

almost two and one-half years without making any objection, during which time the real estate has been mortgaged to The Union Trust Company of Cleveland to secure an issue of \$380,000.00 of bonds, such creditors, bondholders and stockholders would probably be estopped from setting up any claim to the property in the future.

In view of all the circumstances, while I am not of the opinion that the City of Mansfield has a clear title to the real estate in question, I am of the opinion that there is no serious objection to the conveyance of the real estate in question to the state for armory purposes.

I am returning the abstract of title, together with all other papers submitted in this connection, to you herewith.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1658.

VILLAGE—EMPLOYMENT OF LEGAL COUNSEL—CERTIFICATE OF
FISCAL OFFICER.

SYLLABUS:

1. *A contract entered into by a village for the employment of legal counsel at a definite amount per year for all services, requires a certificate of the fiscal officer that funds are in the treasury or in process of collection and properly appropriated for the purpose.*

2. *Where a contract between a village and an attorney provides for a definite salary for ordinary services and makes further provision for extra allowances in sums to be fixed by council for extraordinary services, no certificate of the fiscal officer is required as to the additional services until, pursuant to said contract, a supplemental agreement is entered into providing for a definite amount for such extra services.*

3. *Paragraphs 1 and 2 of this syllabus do not apply where the position of village solicitor is created by ordinance, and the necessity of a fiscal officer's certificate under such circumstances is not passed upon.*

COLUMBUS, OHIO, February 2, 1928.

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

GENTLEMEN:—Acknowledgment is made of the receipt of your recent communication, as follows:

“Section 4220, General Code, reads:

‘When it deems it necessary, the village council may provide legal counsel for the village, or any department or official thereof, for a period not to exceed two years, and provide compensation therefor.’

The first branch of the syllabus of Opinion No. 2100, page 435, Opinions for 1921, reads:

'Compensation of the village legal counsel should be fixed by ordinance or resolution and may be a salary, or part salary and part for extra or additional services, at the direction of council, paid on itemized statements approved by council.'

Section 33 of House Bill No. 80, Section 5625-33, General Code, 112 O. L. 406, provides in part that no subdivision or taxing unit shall make any contract or give an order involving the expenditure of money unless there is attached thereto a certificate of the fiscal officer, etc. This section further provides that the term contract, as used in this section, shall be construed as exclusive of current payrolls of regular employes and officials.

Section 5625.38, General Code, 112 O. L. 408, reads:

'Each political subdivision shall have authority to make expenditures for the payment of current payrolls upon the authority of a proper appropriation for such purpose provided that the positions of such employes and their compensation have been determined prior thereto by resolution or ordinance or in the manner provided by law. The total expenditures for such purpose during the first half of any fiscal year shall not exceed six-tenths of the appropriation therefor unless the taxing authorities of such subdivision by a three-fourths vote of all members thereof waives such limitation, and in the resolution waiving such limitation there shall be set forth their reason therefor.'

QUESTION 1. When a village enters into a contract with an attorney as provided in Section 4220 and fixes the compensation at a definite amount per annum for all services must the fiscal officer attach thereto a certificate that funds are in the treasury or in process of collection and properly appropriated for the purpose?

QUESTION 2. When a village enters into a contract with an attorney which provides a salary for definite services and extra allowance, to be fixed by council, for additional services when rendered, must the fiscal officer attach thereto a certificate that funds are in the treasury or in process of collection and properly appropriated for the purpose?"

House Bill No. 80 of the 87th General Assembly repealed Section 3809 of the General Code. That section, among other things, specifically rendered unnecessary the fiscal officer's certificate as to money being in the treasury with respect to contracts for the employment of legal counsel by villages, the language, so far as pertinent, being as follows:

"* * * and the requirement of a certificate that the necessary money is in the treasury * * * shall not apply * * * to contracts made by a village for the employment of legal counsel. * * * "

The obvious purpose of the provisions of House Bill No. 80 is to provide a system of procedure of general application to all subdivisions and in the enactment of Section 5625-33 of the General Code therein are found provisions analogous to those theretofore incorporated in Section 5660 of the General Code, which was also repealed by that bill. This latter section was enacted in 111 O. L. and it, like Section 5625-33, was of general application to all subdivisions. At the time of the enactment of Section 5660, Section 3806 of the General Code was repealed, which

had theretofore been the existing section requiring the fiscal officer's certificate to municipal contracts. Section 3809, heretofore referred to, had therefore contained exceptions to the operation of Section 3806 during its life and also to Section 5660.

It is interesting to note that these latter sections formerly had been both included in Bates Revised Statutes, Section 1536-205, and that the particular exemption in favor of contracts for legal counsel for villages did not appear therein until the amendment of that section in 96 O. L., effective May 3, 1903. Under the old section, before this amendment, which was then known as Section 2702 Revised Statutes, the courts on two occasions had opportunity to pass upon the necessity of a certificate in the employment of legal counsel by villages. In the case of *Findlay vs. Pendleton, et al.* 62 O. S. p. 80, the Supreme Court in 1900 passed upon the validity of a contract for the employment of legal counsel, the first branch of the syllabus being as follows:

"A contract made by a municipality with attorneys for legal services is void, unless the auditor or clerk first files and records a certificate, as required by Section 2702, Revised Statutes."

In the earlier case of *Bond vs. Village of Madisonville*, 11 O. C. C. 449, a more exhaustive consideration of this question is found. The headnote of that case is as follows:

"When a contract is entered into between the council of a village of this state, and an attorney at law, by the terms of which the latter was to render his professional services to the village in all prosecutions commenced before the mayor thereof, of persons who might be charged with the violation of a 'Sunday ordinance,' passed by the council of said village; he to receive therefor from such village the reasonable value of said services, and at the time of the making of such contract, the clerk of said village did not first or ever certify that the money required for said contract was in the treasury of said village, to the credit of the fund from which it was to be drawn, and not appropriated for any other purpose, and there was in fact no money in the treasury for such purpose unappropriated at the making of said contract, the contract under the terms of Section 2702, Rev. Stat., is absolutely void, and no recovery can be had for the value of any services rendered under the same. And the fact that the amount contracted to be paid therefor was wholly uncertain, and could not be definitely ascertained at the making of the contract, or that the services were to be rendered for the preservation of peace and good order in the village, did not take it out of the provisions of said section."

In the opinion is found language quite pertinent to the present consideration. The court, on page 451 et seq., states as follows:

" * * * He (the plaintiff in error) concedes, as we understand it, that this case is within the letter of the statute, but argues that it is not within its spirit, for two reasons, viz., 1st, that under the contract as made, or any similar one, it would be impossible for the clerk to know what amount would be payable under it, and therefore he could not, in the proper discharge of his duty, make any such certificate; and that of

necessity it must be held that the statute was intended to apply only to cases where a fixed sum is agreed by the parties; that the object of the law, as stated by the plaintiff, in his written argument, was 'to prevent extravagant contracts, agreements and obligations, with reference to the improvement and repair of streets, pavements, sewers, bridges and other property.'

But is it not equally probable, that the legislature, in passing this statute, intended to prevent extravagant contracts, agreements and obligation as to other matters, as well as those named; to make it apply as well to the contracts for the fees of lawyers and other professional men, and indeed to all the contracts of the municipal corporation with other persons? There is certainly nothing in the language of the statute which makes any distinction, and we see no good reason why contracts of this kind should be taken out of the inhibition of the section. We think it was the manifest intention of the law-makers, that no contract liability should be incurred by a municipal corporation, for an amount greater than the unappropriated funds in the treasury would meet, and as a security to the corporation that such was the case, that the certificate of the clerk to the fact, must be first made and recorded, or the contract or ordinance be invalid. And it is no answer to this to say that the amount of the liability of the corporation, under a contract of this kind, cannot be ascertained. It is essential to the validity of a contract, that it should be ascertained, and doubtless it was the intention of this legislation, to prevent the making of such an indefinite and uncertain contract, in so far as the amount to be paid under it is concerned. And it was probably in the mind of the Legislature that a contract with a municipal corporation could be much more easily procured, when the amount did not clearly and explicitly appear, then when it did. And this provision, which, in our judgment, substantially requires the gross amount that will have to be paid under the contract to be first fixed or determined, or the contract to be so explicit in its terms that the clerk may, by calculation, know and certify that the amount to meet the same is in the treasury unappropriated, will operate as a great safe-guard against extravagant and improvident contracts.

But it is also urged that all contracts and liabilities incurred by the council of a municipal corporation, connected with the administration of justice and the enforcement of the ordinances of the village, and the preservation of peace and other good order therein, stand on a different footing from that of other contracts and agreements, and that this too is so as a matter of necessity; that it could not have been the intention of the Legislature to require a formality of this kind to be gone through with every time an attorney was consulted, as to a point of law, or engaged to conduct a prosecution, or an order is issued to a witness for his fee, or payment made for any like purpose.

We see no exception of this kind in the statute, nor do we think that if followed in its spirit, any such trouble or inconvenience as is suggested by counsel would be likely to result. Would it not be a substantial compliance of the provisions of the section under consideration, for the council of a village, having ascertained the amount that would probably be required during the quarter or year next ensuing, to pay for expenses of this character, by ordinance to set aside and appropriate such sum as in its judgment will be needed for such purpose, to be drawn in the manner pointed out therein, which ordinance can be duly certified by the clerk?

This we suppose would be a substantial compliance with the provisions of this law; but even if there should be doubt as to this, we are satisfied that there was no liability imposed upon the village, by this contract, and that the judgment of the court of common pleas in sustaining a demurrer to the reply and dismissing the petition was right, and should be affirmed."

You will observe that the court did not regard the fact that the amount of compensation was indefinite as ground for the contention that the certificate of the fiscal officer was unnecessary. The conclusion was reached that, in order that liability might be fixed upon the village, even for the reasonable value of services, there must be furnished the certificate then required by Section 2702 of the Revised Statutes. While those decisions were rendered under former statutes, the requirements of Section 5625-33 of the General Code today are in substance the same as those found in the earlier enactments, unless it may be said that certain language of that section, to which you refer, constitutes an exception analogous to the exception heretofore existing by reason of the terms of Section 3809, *supra*. The one sentence of Section 5625-33 pertinent here is as follows:

"The term 'contract' as used in this section shall be construed as exclusive of current payrolls of regular employees and officers."

Unless, therefore, this language is the equivalent of the language of Section 3809, the cases just referred to are applicable today and it necessarily follows that a certificate would be required where a contract requiring the expenditure of money is made. This necessitates an analysis of the character of the employment authorized by Section 4220 of the General Code.

On several occasions this department has been called upon to construe the nature of the employment of legal counsel for villages by authority of the last mentioned section. In Opinions of the Attorney General for 1916, Vol. 2, at page 1651, it was held that one employed as counsel for a village, pursuant to Section 4220 of the General Code, is not a public officer. The opinion goes on to point out that the relationship is contractual only and that none of the ordinary incidents of public office exist. I quote the following language from the opinion on page 1653:

"I believe none of the essential attributes of a public officer, as above indicated, attach to one who pursuant to law stands in the relationship of a legal counsel to a village, its departments of officers. One acting as such counsel exercises no function of government imposed upon him by law. He is required to take no oath of office nor to give an official bond. His duties are such only as the council may choose to impose and he stands in a contractual relationship to the village council. His functions are neither legislative, executive nor judicial.

A partnership may not hold public office; yet I think it would not be seriously contended that under Section 4220, General Code, the council of the village would not be authorized to enter into a contract for the services of a firm of attorneys as counsel for the village, its departments of officers; neither could it be maintained that such services so contracted for would not be wholly subject to the control of the council itself and that there would devolve upon counsel so employed no duty which is imposed by law."

A similar holding is found in the Opinions of the Attorney General for 1915, at page 412, and in that opinion reference is made to an earlier ruling to the same effect. I am in accord with these opinions and believe that they properly state the relationship between the village and its legal counsel to be merely contractual. Obviously, therefore, such legal counsel would not be an officer within the meaning of the sentence in Section 5625-33, hereinabove quoted.

Accordingly the relationship must be that of employer and employee under the terms of the particular contract. It is questionable in my mind whether legal counsel employed under a specific contract such as you suggest would be a regular employe within the meaning of Section 5625-33 of the General Code. I do not consider it necessary, however, to pass specifically upon this question. You will observe that Section 5625-33 only excepts "current payrolls" and does not, in terms at least, refer at all to the contract of employment itself. It is a well recognized principle that exceptions to the otherwise general application of a law are to be strictly construed and I do not feel warranted in extending the words "current payrolls" to include contracts of the character you mention.

I am well aware that the broad provisions of Section 4220 might authorize various types of employment of legal counsel and that the necessity of obtaining the fiscal officer's certificate would be dependent largely upon the terms of the particular ordinance or resolution authorizing the employment. If the ordinance and its acceptance by legal counsel constituted a binding contract upon the village to pay a specific sum, either monthly or on any other basis for specific work, I am of the opinion that, prior to the enactment of the ordinance, it would be necessary to obtain the fiscal officer's certificate as to the monies being in the treasury or in process of collection.

Obviously such is the case in the first instance you cite. In that instance there is a contract fixing the compensation at a definite amount per year for all services and I assume that that contract covers a definite period of time. The aggregate amount due thereunder is readily determinable and it would be essential to the validity of that contract to have the fiscal officer's certificate showing that the money was in the treasury or in process of collection and that there had been a lawful appropriation thereof for the specific purpose. As I have before pointed out, this was the holding of the courts prior to the enactment of the specific exception in Section 3809 of the General Code, and that section having been repealed and no analogous exception now existing, the old rule still applies.

In your second example the contract provides a salary for definite services and extra allowance to be fixed by council for additional services when rendered. The answer to your first question manifestly covers that portion of the contract which provides for a definite salary. At least as to the amount necessary to pay this salary a certificate is required. The provision for an extra allowance apparently is not actually a contract at all. From what you have stated, the village would not be bound to pay any amount whatsoever and this provision of the contract merely constitutes an indication on the part of council that the particular attorney will be permitted to do the additional work and, when the need therefor arises, a subsequent agreement will be entered into fixing the extra allowance. It constitutes no more than a declaration to enter into a binding contract in the future. When, therefore, occasion arises for the rendition of additional services, it would be the duty of the attorney and the village to enter into another contract providing a definite amount for the contemplated additional services and, for that contract, a certificate would likewise be required. The particular contract under consideration should be distinguished from that before the court in the case of *Bond vs. Madisonville*, supra. There was an express agreement to pay a reasonable sum and the

court properly held that contract void for lack of the certificate. As I interpret the facts set forth in your question, there would be no binding obligation upon the village to pay any amount whatsoever, either a reasonable amount or otherwise. If such should, however, be its construction, then the contract would be void in the absence of a certificate showing that the funds are in the treasury and in process of collection and properly appropriated for the purpose. You will observe that the certificate requires in each instance a showing that there has been a proper appropriation. This would necessitate in each instance an appropriation either in the ordinance authorizing the employment or in a separate ordinance prior to the execution of the contract of employment. I might further point out that, a certificate having been attached to the original contract of employment, there would be no necessity for a separate certificate with respect to the individual monthly payment.

This opinion is limited strictly to the inquiry which you have made. In each instance you have stated that an actual contract of employment was entered into between the attorney and the village. As I have before stated, the broad language of Section 4220 of the General Code apparently authorizes the employment of legal counsel by other methods than the execution of a definite contract for a specific sum of money for legal services. For instance, as is indicated in the note to Section 4220 in Ellis' Ohio Municipal Code, the position of the village solicitor might be created and an appointment made. This would, in my opinion, differ essentially from the situation where an express contract is made, and I am not passing upon the necessity of a fiscal officer's certificate under such circumstances.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1659.

AUTOMOBILE—BILL OF SALE—DEVOLUTION OF TITLE TO AS PROPERTY OF DECEASED INTESTATE.

SYLLABUS:

The devolution of the title to an automobile belonging to the estate of a deceased person to a distributee of such estate, can be had only through proceedings in the administration of such estate. Upon such devolution of title the distributee is entitled to receive from the administrator or executor a bill of sale of such automobile, as provided for in Section 6310-8, General Code.

COLUMBUS, OHIO, February 2, 1928.

HON. JOHN P. ROGERS, *Prosecuting Attorney, Hamilton, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your recent communication to this department, as follows:

“Since the law under which license tags are obtained requires the presentation of a Bill of Sale duly registered, the Clerk of Common Pleas Court of Butler County, Ohio, has had several questions come up on which we would like to have a ruling.