5297.

PUBLIC UTILITY—MUNICIPALITY MAY NOT LEVY TAX ON SUCH FOR PRIVILEGE OF USING STREETS UNDER FRANCHISE ISSUED BY CITY.

*SYLLABUS:*

*A municipal corporation in this state has no power or authority to levy a tax as such upon a natural gas company, waterworks company or telephone company for the exercise of the privilege which such company may have under a franchise granted by the municipality or under statutory authority, to use the streets and public places of the municipality for its mains, pipes, poles and wires in the conduct of its business as a public utility.*

COLUMBUS, OHIO, March 27, 1936.

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

GENTLEMEN: Some time ago, acting at the instance and suggestion of the City Solicitor of the city of M., Ohio, you requested my opinion, with respect to the power and authority of the said city to impose a tax upon The Ohio Fuel Gas Company for the privilege of using the streets of the city in the conduct of its business as a public utility. My opinion is further requested with respect to the power and authority of the city to impose a like tax upon The M. Water Company and upon the associated telephone company, both of which companies, I assume, use the streets of the city in the conduct of their respective businesses as public utilities.

With respect to gas companies and water companies, it is to be noted that such public utilities are not authorized to occupy and use the streets of a municipal corporation otherwise than by and with the consent of such municipality. See sections 9320 and 10129, General Code. In this situation, it has been held that a municipal corporation may, by contract embodied in the ordinance granting to a gas company the right to occupy and use its streets, provide for the payment by such gas company to the municipal corporation of a designated sum of money annually to compensate the municipality for its necessary supervision of the work done by the gas company in laying its pipes and other appliances in the streets and other public places within the corporation, and that upon the acceptance of such franchise ordinance by the gas company, it will be bound by such contract. City of Columbus v. Columbus Gas Company, 76 O. S., 309. For like reason, I assume that a similar contract may be made by a municipal corporation with a water company in the ordinance granting such company the right to use the streets for its mains and other appli-

ances, which contract would become a binding obligation on the company upon its acceptance of the terms of the ordinance.

A telephone company desiring to occupy and use the streets of a municipal corporation for the construction therein of conduits for the purpose of carrying its wires and other appliances, could do so only with the consent of the municipality evidenced by the ordinance of the council or other legislative body of such municipality. See section 9197, General Code; Queen City Telephone Company v. City of Cincinnati, 73 O. S., 64. And in consideration of the grant of such consent, the municipal corporation and the telephone company may in the ordinance granting to the telephone company the right to use the streets of the municipality for said purpose, contract for the payment by the telephone company to the municipal corporation of an ascertained or ascertainable sum of money as compensation for the privilege of laying and maintaining conduits in the streets. The Columbus Citizens Telephone Company v. The City of Columbus, 88 O. S., 466. A different question may be presented with respect to a telephone company which does not desire to use the streets for the purpose of laying therein subsurface conduits, but desires to use such streets only for the purpose of erecting therein poles, wires and other appliances for its use in carrying on its business as a telephone company. In such case the telephone company takes its rights in the use of the streets of the municipality for such purposes directly from legislative enactments which have been carried into the General Code as sections 9170, 9180 and 9191. Zanesville v. Telephone Company, 64 O. S., 67; Farmer v. Columbiana County Telephone Company, 72 O. S., 526. In this situation, it may be questioned on the authority of the decisions of the Supreme Court of this State in the cases just cited, whether there would be any consideration supporting a contract of the kind above referred to, which would be sustained with respect to gas and water companies and with respect to a telephone company using the streets for conduit purposes.

However this may be, the question here presented is not one with respect to the power of the city to enter into contracts of this kind with the companies above named in consideration of the use of the city streets by these companies, but the question is as to the power and authority of the city to impose taxes on these companies for the privilege of occupying and using the streets for their mains, pipes, wires and other appliances which, I assume, have heretofore been constructed and put in place in the streets and public places of the city. As to this, it is to be noted that although the moneys paid by the public utilities under the franchise ordinances under consideration in the cases of City of Columbus v. Columbus Gas Company and The Columbus Citizens Telephone Company v. City of Columbus, supra, became a part of the general revenues of the city of

Columbus, there was no suggestion in the decision of the Supreme Court in either of these cases that the exactions made by the city under the ordinance in question were in any sense a tax imposed by the city upon the company for the privilege of occupying and using the streets. On the contrary, the court in its opinion in the case of The Columbus Citizens Telephone Company v. City of Columbus, supra, the later of the two cases above noted, in answer to the contention of the telephone company that the exaction there in question was a tax imposed upon it by this ordinance, said:

> "The other proposition underlying the second defense is that the payments of a percentage of the gross receipts of the telephone company is a tax for a general revenue, which is unauthorized. This proposition is based upon a clause in the ordinance, and in the contract pursuant thereto, that the company shall 'pay into the city treasury for the use of the general expense fund of the city, a percentage on its gross receipts', etc. This court has held in the case of City of Columbus v. Columbus Gas Co., supra, that such a clause does not render the ordinance invalid, and of course it should not nullify the contract . In that case the annual stipend was by ordinance transferred to the 'general expense fund'.
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> The debtor company accepted the grant and acquiesced in its terms during three years, and has enjoyed all its privileges and emoluments. The company was free to promise the annual payment or refuse the grant. Certainly the demand for a debt thus voluntarily incurred as a recompense for a grant can with no propriety be called a tax in any sense. A tax is imposed by sovereign power; it creates an involuntary obligation."

Although a municipal corporation in this State holds the fee in its streets, it owns and holds such streets in trust for travel and for other authorized public purposes, and it has no private proprietary right or interest in the streets which authorizes it to demand and receive compensation for the privilege of using such streets otherwise than by contractual grant or franchise made and entered into in the manner provided by law. City of Cincinnati, ex rel., v. The Union Gas and Electric Company, 49 O. App., 166.

Moreover, it is to be observed that each and all of the above named companies are required by the provisions of section 5483, General Code, to pay to the State an excise tax for the purpose of carrying on their respective businesses in this State. And although this city, under the

provisions of section 3 of article XVIII of the State Constitution, may have a limited authority to levy taxes in the exercise of its powers of local self-government, it cannot impose taxes of the kind here in question which are in a field now occupied by the State in the imposition of the excise or privilege tax provided for by section 5483, General Code. City of Cincinnati v. American Telephone and Telegraph Company, 112 O. S., 493.

By way of specific answer to your question, I am of the opinion that the city of M. has no power or authority to levy the taxes here in question.

Respectfully,
JOHN W. BRICKER,
*Attorney General.*

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5298.

APPROVAL—BONDS OF CITY OF SHAKER HEIGHTS, CUYAHOGA COUNTY, OHIO, $32,000.00.

COLUMBUS, OHIO, March 27, 1936.

*Retirement Board, State Teachers Retirement System, Columbus, Ohio.*

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5299.

APPROVAL—BONDS OF VILLAGE OF JOHNSTOWN, LICKING COUNTY, OHIO, $22,500.00.

COLUMBUS, OHIO, March 27, 1936.

*Retirement Board, State Teachers Retirement System, Columbus, Ohio.*

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5300.

APPROVAL—BONDS OF PERRY TOWNSHIP RURAL SCHOOL DISTRICT, LOGAN COUNTY, OHIO, $8,000.00.

COLUMBUS, OHIO, March 27, 1936.

*Retirement Board, State Teachers Retirement System, Columbus, Ohio.*