2299.

SEWERS—DONATIONS OF USE OF BY MUNICIPALITIES TO SCHOOLS AND HOSPITALS, ILLEGAL.

SYLLABUS:

The council of a municipal corporation cannot legally provide that public schools, parochial schools, and hospitals giving some free service, be permitted to use the city sewers free of charge, when all other premises must pay therefor.

COLUMBUS, OHIO, June 30, 1928.

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

GENTLEMEN:—This will acknowledge receipt of your request for my opinion in answer to the following question:

"May the council of a municipal corporation legally provide that public schools, parochial schools and hospitals giving some free service, be permitted to use the city sewers free of charge when all other premises must pay therefor?"

Sections 3891-1 and 3891-2, General Code, read as follows:

Sec. 3891-1. "The council of any city or village which has installed or is installing sewerage, a system of sewerage, sewage pumping works or sewage treatment or disposal works for public use, may by ordinance establish just and equitable rates or charges of rents to be paid to such city or village for the use of such sewerage, a system of sewerage, sewage pumping works or sewage treatment or disposal works by every person, firm or corporation whose premises are served by a connection to such sewerage, system of sewerage, sewage pumping works or sewage treatment or disposal works. Such charges shall constitute a lien upon the property served by such connection and if not paid when due shall be collected in the same manner as other city and village taxes. The council may change such rates or charges from time to time as may be deemed advisable. Provided, however, that in a municipality operating under a municipal charter the council or other legislative body may establish the schedule of rates herein authorized and provide for its administration by designating the department or officer of the municipality to be charged with the enforcement of the provisions of this act."

Sec. 3891-2. "In a city the director of public service shall manage, conduct and control the sewerage system and sewage pumping, treatment and disposal works and when the council has established a schedule of rates or charges of rents for their use shall collect sewer rentals, and he shall appoint the necessary officers and agents for such purposes."

Prior to the enactment of Section 3891-1, supra, municipal corporations were not authorized by statute to establish a system of rates or charges of rents, for the use of its system of sewerage, sewage pumping works, or sewage treatment or disposal works. The cost of the construction of such plants, and the maintenance of the service afforded by them were to be provided for by general taxation. Whether or not under the so-called home rule provisions contained in Article XVIII of the Constitution of Ohio, as amended in 1912, municipalities would now have the right to

establish and collect such rentals even though there was no specific statutory authority therefor is not here material since the right now clearly exists, by virtue of the statute, if not by force of the constitution.

On the other hand, municipalities in the operation of such public utilities as waterworks, gas works, electric light plants and street railways are not now authorized by statute, nor have they ever been so authorized in this state, to provide for the cost of operation by any other means than by the sale to consumers of the commodity, which is the product of the utility and which is distributed or furnished to persons desiring the same. With respect to these utilities the municipality is said to act in its proprietary capacity, rather than in its public or governmental capacity. *Rogers* vs. *Cincinnati,* 14 O. N. P. (N. S.) 193.

Whether municipalities may now provide for the furnishing of the product of such municipality owned utilities as waterworks and the like by general taxation, by virtue of the inherent power granted to municipalities in Article XVIII of the Constitution of Ohio is problematical. The power to tax having always been considered an attribute of sovereignity, our Supreme Court in construing the home rule provisions contained in Article XVIII of the Constitution, has held in a line of decisions beginning with *State ex rel. Toledo* vs. *Cooper,* 97 O. S. 86 that municipalities have not absolute and unrestricted power to levy taxes for local purposes, but that this power may be limited or restricted by general law. Although the Legislature has not specifically restricted municipalities by general laws in the levying of taxes in such a manner as to preclude their raising revenues for the operation of their waterworks plants by direct taxation, it may well be questioned whether or not this restriction may not be implied, from the fact that it has provided for the raising of these revenues by directing that such revenues be raised by means of rental, or charges for water consumed.

It is a familiar principle of law in its application to municipalities, that where a statute prescribes the mode of exercise of the power therein conferred upon a municipal body, the mode specified is likewise the measure of the power granted. The *Frisbie Company* vs. *The City of East Cleveland,* 96 O. S. 266. It may be contended that this principle has no application to a municipality exercising the powers of local self-government. However, when the object to be attained involves encroachment upon the sovereign power of the State, as does the raising of revenues for waterworks purposes by general taxation, that object may well be said to cease to be wholly a matter of local self-government and to be controlled by general laws to the extent of the municipality having the power to tax for that purpose. For that reason, it is questionable whether or not municipalities until authorized to do so by general laws, may provide either in whole or in part for the raising of revenue or the operation of its waterworks by general taxation, or whether such municipalities are limited to providing these revenues by making charges for water consumed as for the sale of a commodity.

Chief Justice Marshall in his dissenting opinion, in the case of *East Cleveland* vs. *Board of Education,* 112 O. S., 607, 620, which opinion was later adopted by reference as the opinion of the majority of the court in the case of *Board of Education of Columbus City School District* vs. *City of Columbus,* 118 O. S., 295, Ohio Law Bulletin and Reporter, May 21, 1928, uses this language:

> "We have read Sections 4, 5 and 6 of Article XVIII of the Ohio Constitution in vain to find any provision of the Constitution which prevents the taxing authorities of the city from raising part or even all of the revenue to pay for water by direct taxation."

The language of Chief Justice Marshall, above quoted, was dicta and not a positive assertion of his construction of the section of the Constitution there referred to.

However, a fair inference from this language would be that in the opinion of the Chief Justice, municipalities have the right to raise part, or even all, of the revenues to pay for water by direct taxation, at least that there is no inhibition in the Constitution against such a course of action. There is some question whether he meant to say that municipalities possessed the right to raise revenues, as stated, because of their inherent home rule powers, or whether or not the right might be granted by the Legislature and nothing in the Constitution inhibited the granting of such right.

Be that as it may, however, the situation now with reference to the furnishing of water and the furnishing of service afforded by a system of sewerage, sewage pumping works, or sewage treatment or disposal works is the same so far as the right of the municipality to establish a system of rates and charges of rents is concerned. If the language of Chief Justice Marshall quoted above, is to be considered as meaning that municipalities have the inherent power by virtue of their powers of local self-government to raise part, or even all, of the revenues to pay for water, by direct taxation, the situation with reference to the power of municipalities to furnish water and to furnish the service afforded by its system of sewerage, sewage pumping works, or sewage treatment and disposal works is likewise the same in that respect.

Again, the law with reference to the use of the funds received from the collection of sewerage rentals, as stated in Section 3891-5, General Code, is similar to the provisions with reference to the use to which water rents may be put as provided by Section 3959, General Code. Section 3959, General Code, was held to be constitutional and a valid limitation upon the uses and purposes for which revenues derived from municipally owned waterworks may be applied by the Supreme Court in the case of *Cincinnati* vs. *Roettinger,* 105 O. S. 145.

There is no statutory authority for municipalities to furnish free of charge for any purpose, the services afforded by its system of sewerage, sewage pumping works or sewage treatment or disposal works. The right does exist, however, in a municipality to furnish free of charge the product of its waterworks plant for certain purposes, by virtue of Section 3902-1, General Code, which reads as follows:

> "The council of any municipality owning and operating municipal water, gas, or electric light plants, may provide by ordinance to furnish free of charge the products of such plants when used for municipal or public purposes."

By the plain terms of the foregoing statute, if it be constitutional, municipalities may furnish water free of charge if they see fit to do so, for the use of the public schools, as the maintenance of the public schools has universally been recognized as a public purpose. Cooley on Taxation, Section 200.

On April 4, 1928, the Supreme Court of Ohio decided the case of the *Board of Education of the City School District of Columbus, Ohio,* vs. *The City of Columbus,* 118 O. S. 295, Ohio Law Bulletin and Reporter, May 21, 1928. This was a suit instituted in the Common Pleas Court of Franklin County by the *City of Columbus* vs. *The Board of Education of the City School District of the City of Columbus,* seeking to recover for water rentals charged against the said board of education for water furnished by the municipal waterworks of the city of Columbus for use in the school buildings maintained by the said board of education.

It was contended by the board of education, in defense to this claim, that no liability existed for the payment of these rentals, for the reason that Section 3963, General Code, provided that:

> "No charge shall be made by a city or village or by the waterworks department thereof for supplying water * * * for the use of the public school buildings in such city or village. * * *"

The suit was not between a water user and the city of Columbus. The question of how the free water which the board of education contended it was entitled to receive by virtue of the statute was to be paid for was not involved. Whether the city of Columbus, if required to furnish this water as the statute provided, must provide for the cost of furnishing the water by direct taxation, or whether it might spread this cost out among the other water users and add the cost thereof to their normal water rents was not raised in any stage of the case. It was not mentioned in any of the pleadings or briefs of counsel, and was not an issue in the case. The court held, as stated in paragraphs one and two of the syllabus of the opinion, as follows:

> "1. That portion of Section 3963, General Code, which prohibits a city or village or the waterworks department thereof from making a charge for supplying water for the use of the public school buildings or other public buildings in such city or village, is a violation of the rights conferred upon municipalities by Section 4 of Article 18 of the Ohio Constitution, and is unconstitutional and void. (*East Cleveland* vs. *Board of Education,* 112 Ohio St., 607 overruled.)
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> 2. That portion of Section 3963, General Code, above referred to is unconstitutional and void for the further reason that it results in taking private property for public use without compensation therefor, in violation of Section 19, Article I, of the Ohio Constitution."

Clearly, if the requirement to furnish water free of charge for public school purposes, *"results"* in taking private property for public use, without compensation, the furnishing of it voluntarily, would also *"result"* in taking private property for public use, without compensation, and would therefore be illegal. If the furnishing of water for public school purposes free of charge would bring about the result stated by the Supreme Court and would, therefore, be illegal, the furnishing of this water for hospitals and similar institutions would surely bring about the same result, and if furnishing water would bring about this result, manifestly the furnishing of the use of a system of sewerage, sewage pumping works and sewage treatment or disposal works would bring about a like result and would therefore be illegal.

I am therefore led to the conclusion, in the light of the decision so lately enunciated by the Supreme Court in the Columbus School case above referred to, that the council of a municipal corporation cannot legally provide that public schools, parochial schools and hospitals giving some free service, be permitted to use the city sewers free of charge, when all other premises must pay therefor.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2300.

GASOLINE TAX—"GAS-O-LITE" NOT SUBJECT TO TAX.

SYLLABUS:

In order to be taxable under Sections 5527 *and* 5541-1, *General Code, respectively, imposing an excise tax of two cents and one cent on the sale and use of each gallon of*