Note from the Attorney General's Office:

1929 Op. Att'y Gen. No. 29-0242 was overruled in part by 1981 Op. Att'y Gen. No. 81-098.

M. O. Enterline, principal, Division No. 1, upon which the Massachusetts Bonding and Insurance Company appears as surety.

Harry D. Metcalf, principal, Division No. 6, upon which the Indemnity Insurance Company of North America appears as surety.

Walter V. Scott, principal, Division No. 7, upon which The Ohio Casualty Insurance Company of Hamilton, Ohio, appears as surety.

Frayne L. Combs, principal, Auglaize County, upon which The Ohio Casualty Insurance Company appears as surety.

The above bonds are given in pursuance to the provisions of Section 1162 of the General Code, which section specifically requires that resident district deputy directors give bond in the amount above indicated, with sureties to your approval. The bonds have been properly executed and bear your approval thereon.

It is further noted that in the official roster of the Division of Insurance the sureties heretofore mentioned have been duly authorized to transact business in Ohio.

In view of the foregoing, I have approved said bonds as to form and return the same herewith.

Respectfully,
GILBERT BETTMAN,
Attorney General.

241.

APPROVAL, NOTES OF BOKESCREEK RURAL SCHOOL DISTRICT, LOGAN COUNTY—$75,000.00.

COLUMBUS, OHIO, March 25, 1929.

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

242.

MUNICIPALITY—MAY FURNISH WITHOUT CHARGE PRODUCTS OF ITS WATERWORKS, GAS OR ELECTRIC PLANT FOR MUNICIPAL AND PUBLIC PURPOSES—CONDITIONS.

SYLLABUS:

A municipality which owns its own waterworks, gas or electric plant, may lawfully provide by ordinance of its council or other legislative authority to furnish free of charge the product of such plant for municipal or public purposes, if the cost of furnishing the same is met from the general revenue fund of the corporation and not prorated among the other patrons of the waterworks, gas or electric plant who are charged service rates based on the cost of the management and operation of the plant.

COLUMBUS, OHIO, March 26, 1929.

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

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

"The second branch of the Syllabus of the Opinion of May 18, 1928, being Opinion No. 2126, reads:

'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 unconstitutional for the reason that it is a violation of the right conferred upon municipalities by Section 4 of Article XVIII of the Constitution, and 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 (*Board of Education of the City School District of Columbus, Ohio* vs. *City of Columbus, Ohio,* 118 O. S.)'

Section 3982-1, General Code, reads:

'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.' (110 O. L. 126.)

Question 1. In view of the opinion above referred to, may the council of a municipal corporation legally provide by ordinance that the products of municipal water, gas and electric plants be furnished to public school buildings free of charge?

Question 2. May water be legally furnished free of charge to the State Fish Hatchery located near Defiance, Ohio, when provided for by ordinance of council?"

By the terms of Section 3963, General Code, it is made the mandatory duty of a municipal corporation which owns and operates its own waterworks to supply water free of charge for the use of the public school buildings in such municipality, and for extinguishing fire, cleaning fire apparatus, or for furnishing or supplying connections with fire hydrants, and keeping them in repair for fire department purposes, for the cleaning of market houses, for the use of any public building belonging to the corporation, or any hospital, asylum or other charitable institution devoted to the relief of the poor, aged, infirm or destitute persons, or orphan or delinquent children.

The Supreme Court of Ohio, in the case of *Board of Education of the Columbus School District* vs. *City of Columbus,* 118 O. S. 295, having under consideration the provisions of said Section 3963, General Code, as they apply to the furnishing of water free of charge for the use of the school buildings in the city of Columbus, held the said provisions to be unconstitutional. The second branch of the syllabus of the case reads as follows:

"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."

It would seem logical to conclude that if to require a municipality to furnish water free of charge for any purpose would *result* in the taking of private property for public use, without compensation therefor, the voluntary furnishing of the water by the municipality would lead to a like *result,* and that therefore to do so would be a violation of the constitutional provisions preserving inviolate the right of private property.

However, I cannot believe that the Supreme Court meant by its holding in the Columbus School case, supra, to overthrow the well settled principle of law so thor-

oughly grounded in the law since the advent of organized government, that private property may be subjected to taxation for public purposes. The question of the right to tax, for public purposes, was not before the Supreme Court in the Columbus case, and the holding of the court in that case cannot, and should not, in my opinion, be extended to cases involving the right to provide moneys for public uses by taxation.

The questions involved in the Columbus case grew out of the right of the city of Columbus to operate its waterworks plant and provide for the cost of maintaining it by the assessment and collection of water rents, free from any interference or regulation by the Legislature, in the light of the plenary powers conferred on municipalities to acquire, construct, own, lease and operate any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants, by Article XVIII, Section 4 of the Constitution of Ohio. The facts before the court were that by a provision of the charter of the city of Columbus (Section 120) it was directed that the cost of conducting, managing and operating the waterworks of the city of Columbus should be met by charging a so-called water rent against all water consumers. The charter provision which is not quoted in the opinion of the court, but which was embodied in the bill of exceptions before the court, read as follows:

> "For the purpose of paying the expenses of conducting, managing and operating the city waterworks the Director of Public Service shall, as a condition of supply, charge against and collect from all consumers both public and private, including the various and several city departments and institutions, a charge for water service rendered. Such rate of charge shall be fixed by ordinance of council. It shall be made in an equitable manner and in such amount as will *fully* cover the *cost* of *service.*" (Italics the writer's.)

It has been repeatedly held by the courts that a municipality in the operation of a public utility acts in a proprietary capacity, and in furnishing the product or service of the utility it acts in the capacity of a merchant selling the product or service, or as stated by the Supreme Court in the case of *Cincinnati* vs. *Roettinger,* 105 O. S. 145, at page 153:

> "A water rate exacted for actual consumption is merely the price of a commodity, and when in an amount which fairly compensates the cost can have no proper relation to the revenues which are expended for the equal benefit of the public at large, and it should not be placed in the same classification with burdens or charges imposed by the legislative power upon persons or property for the purpose of raising money for general governmental purposes."

In other words, it is not a general property tax or an excise tax, but merely the selling price of a commodity. Clearly if that selling price is to be fixed "in an equitable manner and in such an amount as to fully cover the cost of service," as must have been done under the Columbus charter provision, and some consumers, whose use of water was for a public purpose, were to be given free service and were not considered when the equitable apportionment of the cost of the service was computed and the rates fixed on that equitable basis, it would in effect automatically increase the price of the water to all other consumers over and above the actual cost of the water consumed by them and compel them proportionately to participate in the payment of the cost of the water consumed by the free consumers. This obviously would result in the taking of private property for public uses without compensation by means other than taxation.

The situation above outlined comprised substantially the facts before the court in the Columbus water case and constituted the basis for the court's holding in that case. The question of the right to expend moneys derived from taxes for public uses was not before the court and was not considered or passed upon by the court.

The right to levy taxes for public purposes has never been questioned. It is a principle so well embedded in the law as to need no citation of authority. What is a public purpose or a municipal purpose has frequently been the subject of controversy. Without discussing here what constitutes a public purpose or a municipal purpose, it is sufficient for the purposes of this opinion to state that courts are agreed that public education is a public purpose for which moneys raised by taxation may lawfully be expended. The use of public money for school purposes is universally recognized as a public use. In New York it has been held to be included within *"city purposes"* although public education is there a State function. *Board of Education* vs. *Van Zandt,* 195 N. Y. S. 297. See Gray on Limitations of Taxing Power, pages 169, 187; Cooley on Taxation, 4th Edition, Sections 200 and 201. So also are public park purposes held to be public purposes and moneys expended for public parks are held to have been expended for a public use. Cooley on Taxation, 4th Edition, Section 203.

Article XVIII, Section 4 of the Constitution of Ohio confers plenary powers on municipalities to acquire, construct, own, lease and operate any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants. This plenary power, as well as all other so-called home rule powers of a municipality conferred by Article XVIII of the Constitution of Ohio, is qualified by the terms of Section 13 of said Article XVIII, which empowers the Legislature to limit the power of municipalities to levy taxes and incur debts for local purposes.

A pertinent exercise of the power thus conferred on the Legislature by Article XVIII, Section 13 of the Constitution to limit the power of municipalities in the levying of taxes, in its application to municipally owned waterworks, is contained in Sections 3958 and 3959 of the General Code. Section 3958, General Code, fixes a method by which the cost of the operation and management of waterworks may be met by the assessment and collection of water rents. Section 3959, General Code, contains limitations upon the uses and purposes for which revenues derived from municipally owned waterworks may be applied, so that surplus revenues derived from water rents may be applied only to repairs, enlargements or extensions of the works, or of the reservoirs, and to the payment of the interest on any loan made for their construction or for the creation of a sinking fund for the liquidation of the debt. This statute, Section 3959, General Code, was held in the case of *Cincinnati* vs. *Roettinger, supra,* to be constitutional.

There are no provisions with reference to gas and electric plants similar to those contained in Sections 3958 and 3959, General Code, with reference to waterworks. In fact there is no specific statutory authority for the assessment and collection of gas and electric rentals for the purpose of providing revenues for the management and operation of municipally owned gas and electric plants except in villages. Section 4361, General Code. The principle applies, however, that a municipality owning and operating any public utility acts in a proprietary capacity and the furnishing of the product or service of the utility is like unto the selling of a commodity. The most expedient and equitable method of doing this is by making a charge therefor in proportion to the product or service furnished. It is said, however, by Chief Justice Marshall in his dissenting opinion in the case of *East Cleveland* vs. *Board of Education,* 112 O. S. 607, at page 620, which dissenting opinion was adopted, by specific reference, as the opinion of the court in the Columbus School case, supra:

"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 revenues to pay for water by direct taxation."

Whether the Constitution permits the cost of the management and operation of public utilities by municipal corporations to be met by general taxation or not, the Legislature within its constitutional authority to limit the powers of taxation of municipalities has provided as to waterworks in Section 3958, General Code, that the expenses of conducting and operating the waterworks should be provided for by the collection and assessment of water rents. While the language of the statute is permissive, the word "may" as used in the statute should in my opinion be read as "shall" in order to give effect to other language in the statute and to carry out the purpose of the Legislature as it appears from a general view of said Section 3958 and cognate sections of the General Code. *State ex rel, Myers* vs. *Board of Education,* 95 O. S. 367.

Similar provisions are not made for municipally owned gas and electric plants, but, regardless of how such cost is met, no method or requirement with respect to providing for the cost of maintaining the utility would serve to abrogate or have any relation whatever to the right of the municipality to provide money for public uses independently of revenues derived from the operation of the utility.

Inasmuch as the charging of a rate for the service of a public utility greater than the actual proportionate cost of the service and the diverting of the excess to a public use results in the taking of private property for public use without compensation in violation of Article I, Section 19 of the Constitution of Ohio, care should be observed in computing and fixing the rate to be charged, so as to take into consideration all of the parties to whom service is furnished, whether it is intended to collect from all those parties or whether it will be provided by ordinance that some part of the service used for municipal or public purposes shall be furnished free of charge by authority of Section 3982-1, General Code, the provisions of which are quoted in your letter.

If the council of a municipality determines by ordinance to furnish free of charge the product of its municipally owned waterworks or gas or electric plant for a municipal or public purpose, the regular charge in accordance with the previous equitably determined rate should be made as against the purpose, and moneys equal to the amount of such charge should be appropriated from the general revenues of the municipality and paid to or credited to the waterworks, gas or electric plant fund, as the case may be.

With reference to your second question involving the right of the city of Defiance to provide by ordinance for the furnishing of water free of charge for the use of the State Fish Hatchery located near the city, I am advised that the fish hatchery and the grounds surrounding the buildings are a part of a public park used by the inhabitants of the city and that the furnishing of the water or at least a part of the same will be used to aid in beautifying the park.

As the city of Defiance and its inhabitants use the park and the grounds surrounding the fish hatchery buildings for park purposes, and as park purposes, under those circumstances, would be not only a public purpose but a municipal purpose as well, I am of the opinion that the city may lawfully furnish water free of charge for the use of the park and the fish hatcheries.

In view of what has been said, I am of the opinion that both your questions should be answered in the affirmative, if the cost of furnishing the water is not prorated among the other patrons of the waterworks who are charged a rate for the use of

water consumed by them based on the proportionate cost of the management and operation of the plant.

Respectfully,
GILBERT BETTMAN,
Attorney General.

243.

DISAPPROVAL, ABSTRACT OF TITLE TO LAND OF ROBERT A. AND OLIVE L. HUTCHINSON, IN THE VILLAGE OF OXFORD, BUTLER COUNTY, OHIO.

COLUMBUS, OHIO, March 26, 1929.

HON. W. P. ROUDEBUSH, *Secretary of the Board of Trustees, Miami University, Oxford, Ohio.*

DEAR SIR:—You have submitted for my examination and approval abstract of title, warranty deed and encumbrance estimate No. 2697 relating to the south half of the south half of Outlot No. 29, as the same is known and designated upon the recorded plat of the village of Oxford, Butler County, Ohio.

An examination of the abstract of title submitted shows that Robert A. Hutchinson and Olive L. Hutchinson, the present owners of record of the above described tract of land, obtained their title thereto by a deed executed and delivered to them by Evert E. Williams, executor of the last will and testament of Eliza A. Page, deceased, the said deed being executed pursuant to express authority contained in the said last will and testament of the said Eliza A. Page. It appears further that the said Eliza A. Page obtained title to the property here in question by descent from her deceased husband, Philip Page. However, there is nothing in the abstract to show how Philip Page ever obtained title to this property. In other words, there is a complete break in the chain of title from the time that Joshua A. Davis obtained title to Outlot No. 29 on March 31, 1865, until, as shown by the affidavit of inheritance, Eliza A. Page obtained title to this property by descent on the death of Philip Page on December 25, 1891. The abstract should be corrected so as to show how said Philip Page obtained title to the property.

It is further shown by the abstract that under date of September 12, 1912, said Eliza A. Page executed and delivered to one H. H. Smith a mortgage on the premises here in question to secure the payment of a note in the sum of $172.00, which was due and payable in one year after the date of said note and mortgage. It does not appear that said mortgage has been cancelled or otherwise released of record, and the same is a lien upon this property.

The taxes for the year 1928 are unpaid and a lien upon the above described tract of land. It is stated in the abstract that the taxes for the first half of the year 1928 which are due and payable December 20, 1928, amount to the sum of $29.10. I take it, therefore, that the total amount of taxes that are a lien on said premises is the sum of $58.20.

In addition to the exceptions above noted, it appears that the original conveyance of Outlot No. 29 by the president and trustees of Miami University to Meriken Bond under date of September 7, 1810, was by a ninety-nine year lease, renewable forever. Inasmuch as there does not appear to have been any renewal of said lease in 1909 it may be questioned whether Robert A. Hutchinson and Olive L. Hutchinson have anything more than an equitable estate in interest to convey at this time. However,