142.

WITHDRAWALS — STATE TREASURY — STATE AUDITOR AUTHORIZED TO DRAW WARRANT WHEN—STATE AUDITOR MAY INQUIRE REGARD VOUCHER, WHEN—PAYMENT FOR INDIVIDUAL SERVICES IN DRAFTING LEGISLATIVE BILLS, WHEN—APPROPRIATION LEGISLATIVE REFERENCE BUREAU—PURPOSE.

SYLLABUS:

1. *No money shall be paid out of the state treasury except upon the warrant of the Auditor of State. Section 242, General Code of Ohio.*

2. *The Auditor of State shall draw no warrant on the Treasurer of State for any claim unless he finds it legal and that there is money in the treasury which has been duly appropriated to pay it.*

3. *The Auditor of State is not compelled to draw a warrant on the state treasury upon the presentation of every voucher regular upon its face. As the law requires him to pass upon the legality of the claim before drawing his warrant, the Auditor of State has the right to go behind such voucher and inquire into all the circumstances surrounding the execution of such voucher, and if he finds that the drawing of a warrant thereon would result in an expenditure of public funds for a purpose not within the purpose of the appropriation from which the expenditure is to be made he has no authority to draw a warrant therefor.*

4. *In the absence of a specific appropriation for the purpose of paying for services rendered to the state or any of its departments or instrumentalities in the drafting of legislative bills, public moneys may not be expended for the purpose of compensating individuals for the rendition of such services, provision being made in and by Sections 798-1, et seq., General Code, for a Legislative Reference Bureau for the rendition of such services.*

COLUMBUS, OHIO, February 17, 1937.

HON. JOSEPH T. FERGUSON, *Auditor of State, Columbus, Ohio .*

DEAR MR. FERGUSON: I acknowledge receipt of your communication of recent date, as follows:

> "It has been brought to our attention that substantial amounts of money have been paid in the past to various attorneys for their assistance in drawing up Bills to be presented to the Legislature.

Our records disclose that during the year 1936, the following amounts were so expended:

Clarence Laylin $1,875.00
S. P. Dunkle 800.00

The above amounts were paid from Tax Commission Budget A-3.

An amount of $13,073.00 was also paid during the year 1936, to Bateman & Gibson, for similar work, same being paid out of the Legislative Committee F-9.

We are formulating our policy for the current year, and respectfully seek your opinion as to whether such payments can be legally made should similar vouchers be presented in the future."

It is noted that $2,675.00 was paid from the Tax Commission Appropriation A-3 and $13,073.00 from Legislative Committee Appropriation F-9. I find that this appropriation for the Tax Commission is labeled "Unclassified" and that of the Legislative Committee as "Other Legislative Committees."

You state that these amounts were paid to the parties named for services rendered in the preparation of bills to be presented to the Legislature, more generally referred to as The General Assembly. The legislative branch of government has broad powers. I take the following excerpt of the law relative to the limitations upon legislative enactment from Cooley's Constitutional Limitations, Volume 1, pages 258-264:

"1. Some limitations upon legislative authority other than those contained in constitutions spring from free government. The latter must depend, for their enforcement upon legislative wisdom, discretion and conscience. This legislature is to make laws for the public good and not for the benefit of individuals.

2. The legislature has control of the public moneys, and should provide for disbursing them only for public purposes. Taxes should only be levied for those purposes which constitute a public burden. But what is for the public good, and what are public purposes, and what does properly constitute a public burden, are questions which the legislature must decide upon its own judgment, and in respect to which it is vested with a large discretion which cannot be controlled by the courts, except, perhaps, where its action is clearly evasive, and where under pretense of a lawful authority, it has assumed to exercise one that is unlawful. When the power which is exercised is legislative in its character, the courts can enforce only those limitations

which the constitution imposes; not those implied restrictions which, resting in theory only, the people have been satisfied to leave to the judgment, patriotism and sense of justice of their representatives."

Mr. Cooleys' text has not been accepted in Ohio, in so far as "the limitations that spring from free government" are concerned.

I am content, for the purposes of this opinion, to rely upon Ohio Jurisprudence, Volume 25, Section 195, pages 296 et seq. viz.:

"The principle that the judiciary has nothing to do with the propriety, wisdom, policy or expediency of legislation, is a significant limitation upon the powers of the court in the interpretation of constitutions and the determination of whether or not legislative enactments conform to or violate the provisions of the State or Federal Constitutions. The rule, as commonly expressed, is that the judiciary cannot hold laws invalid merely because they are inexpedient, unwise, unjust, unreasonable, arbitrary, immoral, mischievous or inconvenient in application and enforcement. In determining the constitutionality of an act, the wisdom or beneficent purposes of the legislation under consideration is unimportant. The only duty of the court is to determine whether the general assembly of the state has acted within its constitutional authority. Once the power to legislate on a subject is found to exist in the General Assembly, the wisdom of its exercise is not a judicial question. As is well understood, the remedy for unwise or unjust legislations is not a judicial question. The remedy for unwise or unjust legislation cannot be administered by the courts. The judiciary may intervene only when it is convinced that the legislative act is incompatible with the provisions of the Constitution."

This text is abundantly borne out by the Ohio authorities cited thereunder. Nor can the courts determine the public policy of a statute if it comes within the purview of the Constitution. I quote from *Probasco* vs. *Raine, Auditor,* 50 O. S. 378:

"Of a statute is constitutional, it is valid and cannot be set aside by a court as being against public policy or natural right. There can be no public policy or right in conflict with a constitutional statute."

This case has been followed by the courts of Ohio down to the present moment.

It is obvious under the foregoing authorities that the matter of the amount of the taxpayers' money to be spent for the drawing of legislative bills is not a question of law but one of policy which is to be determined solely by the legislature.

I find at pages 8, et seq., 103 Ohio Laws, that in the year 1913, the General Assembly of Ohio enacted as an emergency measure, House Bill No. 173, which came into the General Code of Ohio, as Sections 798-1 to 798-8, inclusive. Without quoting these sections or going into their history, suffice it to say that a "Legislative Reference Department" was created for the use and information *especially of members of the General Assembly,* the officers of the several state departments and the public. Under virtue of Section 154-54, General Code, the State Librarian is made director of the Legislative Reference Department, with full authority to exercise all power delegated to such department.

Section 798-3, General Code, amongst other things provides that when requested by the Governor or any committee or member of the General Assembly, the director shall collect all available information relating to matters which shall be the subject of proposed legislation by the General Assembly and *he shall prepare and advise in the preparation of any bill or resolution* when requested by the Governor or any member of the General Assembly.

It is assumed that this department has suitable quarters in the Capitol Building as the law so provides. Suitable appropriations have been made each year since the creation of this department for its use. For the biennium, 1935 and 1936 an appropriation in the sum of fifteen thousand dollars was made for the use of the Legislative Reference Bureau.

Under the law it is the duty of the Legislative Reference Bureau to *prepare and advise in the preparation of any* bill when requested by any Member of the General Assembly.

The General Assembly unquestionably had authority to create this Bureau; in fact, there was strong argument for it in 1913. The ship of state was setting sail under a Constitution which was then in many respects new and it followed as a matter of course that existing laws had to be revamped and new ones enacted. That was twenty-four years ago—almost a quarter of century—and it would seem that the added bulk of legislation made necessary by the constitutional amendment of 1912 should be out of the way by this time and the Legislative Reference Bureau be permitted to subserve the primary purpose of its creation, namely, to prepare and assist in the preparation of proposed bills and resolutions.

The essential consideration here is that the General Assembly has

provided by permanent law an instrumentality for the purpose of drawing proposed legislative bills. Under such circumstances, the presumption is that such functions are vested exclusively in the Legislative Reference Bureau, in the absence of an act of the General Assembly to the contrary. The maxim "Expressio unius est exclusio alterius" obtains in Ohio, and while it is not of universal application, it is to be applied when there is a grant of power, or a direction to do a particular thing. *City of Cincinnati, et al.* vs *Roettinger, a taxpayer,* 105 Ohio State, page 145.

There is no question in my judgment but that the General Assembly has full power, notwithstanding the permanent provisions of the law contained in Sections 798-1, et seq., hereinabove referred to, to appropriate moneys to either House or to any department of the state government for special or expert services in the drafting of proposed complex legislation. Such appropriation would constitute a special law to be given full force and effect.

It is sufficient to say that if you are concerned with the question of whether or not you should issue your warrants in payment of charges for services in the drafting of legislation chargeable against such items of appropriation as A-3 "Unclassified" or F-9 "Other legislative committees," moneys appropriated by such items may not be expended for such services. It is my judgment that in view of the express appropriation to the Legislative Reference Bureau, extratordinary services for drafting legislation may not be said to be within the purpose of such appropriations.

There remains to be determined the matter of your authority to refuse to issue your warrant upon a voucher which may be regular on its face.

Section 242, General Code, provides that no money shall be paid out of the state treasury except upon your warrant.

Section 243, General Code, provides that you shall draw no warrant on the Treasurer of the State for any claim unless you find it legal and that there is money in the treasury which has been duly appropriated to pay it.

Your first concern is the validity of the claim. You are charged with the knowledge that a state department has been created by law whose duty it is to advise and prepare proposed bills and resolutions, for which department annual appropriations are made and from which the salaries and wages of its members are paid. A voucher for the identical services presented to you by an individual would necessarily create in your mind a doubt as to its validity.

The duty imposed upon the State Auditor by Section 243, General Code, to find that there is money in the treasury which has been duly appropriated to pay a voucher presented to him necessarily requires that

you give consideration to the purpose for which the pertinent appropriation has been made and that you determine that the voucher is for the payment of a claim within such purpose. It would obviously be impossible for you to find that money in the treasury has been appropriated for the purpose of paying a given voucher without determining that such voucher is within the purpose of the appropriation.

It is accordingly my opinion that when a voucher is presented to you for payment out of a given appropriation, even though regular on its face, it is your duty to refuse to draw a warrant thereon unless you find that the purpose of the expenditure is included within the purpose of the appropriation from which such expenditure is to be made. It follows that in the absence of a specific appropriation for the purpose of paying for services rendered to the state or any of its departments or instrumentalities in the drafting of legislative bills, public moneys may not be expended for the purpose of compensating individuals for the rendition of such services, provision being made in and by Section 798-1, et seq., General Code, for a Legislative Reference Bureau for the rendition of such services.

Respectfully,
HERBERT S. DUFFY,
Attorney General.

143.

APPROVAL— ARTICLES OF INCORPORATION OF WESTERN RESERVE MUTUAL CASUALTY COMPANY.

COLUMBUS, OHIO, February 17, 1937.

HON. WILLIAM J. KENNEDY, *Secretary of State, Columbus, Ohio.*

DEAR SIR: I have examined the articles of incorporation of The Western Reserve Mutual Casualty Company which you have submitted to me for my approval.

Finding the same not to be inconsistent with the Constitution or laws of the United States or of the State of Ohio, I have endorsed my approval and return the same herewith.

Respectfully,
HERBERT S. DUFFY,
Attorney General.