In this connection it might be pointed out that ordinarily the ballots cast at an election for councilmen are counted by the judges and clerks in the various precinct election booths. It is clear from the sections of the General Code above quoted that the compensation paid these judges and clerks in the various voting precincts should be charged against the municipality or other proper subdivision. The assistants referred to in your communication, due to the method of voting in Cincinnati, perform the work ordinarily performed by the precinct judges and clerks, and it would seem to follow that their compensation, therefore, should be a charge against the city just as the compensation of the precinct judges and clerks is a charge against the city.

In the communication to the Auditor of State, above quoted, the election board states as follows:

> "We understand that Mr. Blau contends that if our minutes read 'assistants' instead of 'assistant clerks' this charge could stand as a direct City of Cincinnati charge."

There is of course no magic in the name by which the election board designated the employes necessary to count the ballots cast in the election for councilmen. What the status of these employes was is to be determined by the law under which they were hired and the nature and character of the services performed by them rather than the designation which the election board used in its minutes when authorizing the employment.

For the above reasons, in specific answer to your question it is my opinion that the compensation of the assistants to the director of the count, employed by the Board of State Supervisors and Inspectors of Election of Hamilton County for the sole purpose of counting the ballots cast at the election for members of the council of the City of Cincinnati, should be charged against and paid solely by such city.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2057.

COUNCIL OF MUNICIPALITY—AUTHORITY TO ENTER INTO AN AGREEMENT WITH HOSPITAL ASSOCIATION TO PURCHASE HOSPITAL SITE—HOW MONEY IS TO BE OBTAINED.

SYLLABUS:

By virtue of the provisions of Sections 4021, 4022 *and* 4022-1 *of the General Code, the council of a municipality may enter into an agreement with a hospital association organized not for profit, wherein the municipality agrees to furnish the sum of* $10,000 *for the purpose of purchasing a hospital site and to provide a one mill levy for a period of not less than five years for the maintenance of the hospital, if, in return therefor, the association agrees to furnish permanent free hospital service to such inhabitants of the municipality as in the opinion of the majority of the trustees of such hospital are unable to pay. The execution of such a contract must, by virtue of the provisions*

of Section 4022-1 of the General Code, receive the approval of the electors and, in the event the issuance of bonds is necessary, such issuance must also be so approved.

COLUMBUS, OHIO, May 4, 1928.

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

GENTLEMEN:—This will acknowledge receipt of your recent communication, as follows:

> "Section 4022, G. C., provides that the council of a city may agree with a corporation for hospital services. Section 4022-1, G. C., provides for the ratification of the agreement by the electors.
>
> Byron D. Beacon offered to donate fifty thousand dollars to the city of Wellsville for the purpose of building a hospital, provided the city should furnish a site for the hospital and guarantee its maintenance for a period of at least five years. The donor also wished to keep the hospital out of politics and did not care to erect a hospital to be managed by city officials. In pursuance of the wishes of the donor, the Byron D. Beacon Memorial Hospital Association, a charitable corporation not for profit, was organized. It was planned that Mr. Beacon should donate his money to the hospital association and that the trustees of the association should enter into a contract with the council of the city of Wellsville, whereby the city should agree to furnish the sum of ten thousand dollars to the association for the purpose of purchasing a hospital site and to provide a one mill levy for a period of not less than five years for the maintenance of the hospital; and whereby the hospital association should agree to furnish free hospital service to such inhabitants of the city of Wellsviile, as in the opinion of a majority of the trustees of such hospital were unable to pay. This contract is to be submitted to a vote of the people.
>
> May the council of the city of Wellsville legally enter into such a contract or agreement with the Beacon Memorial Hospital Association?"

The answer to your question involves the consideration of Section 4021 of the General Code, as well as Sections 4022 and 4022-1, which you mention. These sections are as follows:

> *Sec.* 4021. "The council of each municipality, annually, may levy and collect a tax not to exceed one mill on each dollar of the taxable property of the municipality and pay the amount to a private corporation or association which maintains and furnishes a free public hospital for the benefit of the inhabitants of the municipality, or not free except to such inhabitants of the municipality as in the opinion of a majority of the trustees of such hospital are unable to pay. Such payment shall be as and for compensation for the use and maintenance of such hospital. Without change or interference in the organization of such corporation or association, the council shall require the treasurer thereof, annually, to make a financial report setting forth all of the money and property which has come into its hands during the preceding year and the disposition thereof, together with any recommendation as to its future necessities."
>
> *Sec.* 4022. "Such council may agree with a corporation organized for charitable purposes and not for profit, for the erection and management of a hospital suitably located for the treatment of the sick and disabled of such

municipality, or for an addition to such hospital, and for a permanent interest therein to such extent and upon such terms and conditions as may be agreed upon between them, and the council shall provide for the payment of the amount agreed upon for such interest either in one payment or in annual installments as may be agreed upon. Provided, that such agreement shall not become operative until approved by a vote of the electors of such municipality as provided for in the next section."

Sec. 4022-1. "Upon the execution of the agreement provided for in Section 4022 the council of the municipality shall submit to the electors of the municipality, at the next general election occurring more than sixty days after the passage of the resolution providing for such submission, the question of the ratification of such agreement, and if the sum or sums to be paid by the municipality under the terms of such agreement are not available from current general revenues of the municipality, the council shall also submit to the electors, at the same election, the question of the issue of bonds of the municipality in the amount specified in such agreement for the purpose of providing funds for the payment thereof. The proceedings in the matter of such election and in the issuance and sale of such bonds, if authorized, shall be as otherwise provided by law for municipal bonds. Provided, that such agreement shall not be effective, and no bonds shall be issued, unless the electors approve of both the agreement and the bond issue, if the question of the issue of bonds is so submitted."

Section 4022, supra, was under consideration by the Circuit Court in the case of *Zanesville* vs. *Crossland,* 8 O. C. C. 652, and was therein held to be constitutional, but the effect of that decision is not clear in view of the reversal of that case by the Supreme Court, without report, in 56 O. S. p. 735.

In Opinions of the Attorney General for 1915, at page 332, a question with respect to Section 4021 was under consideration, and the syllabus of that opinion is as follows:

"The arrangement authorized by Section 4021, G. C., whereby a municipal corporation may levy taxes and pay the proceeds thereof to a hospital for charity work, may be made with more than one hospital, but not with a hospital organized for profit."

In the course of the opinion is found the following with respect to the Circuit Court case referred to above:

"In *Zanesville* vs. *Crossland,* 8 C. C. 652, it was held that what is now Section 4022, General Code, is constitutional. That section provides, and then provided, as follows:

'Such council may agree with a corporation or association organized in the municipality for charitable purposes, for the erection and management of a hospital for the sick and disabled, and a permanent interest therein to such extent and upon such terms and conditions as may be agreed upon between them. The council shall provide for the payment of the amount agreed upon for such interest, either in one payment or installments or so much each year as the parties may stipulate.'

The Circuit Court, per Jenner, J., on the authority of *Walker* vs. *Cincinnati,* 21 O. S. 15, limited the words 'any joint stock company, corporation or association whatever,' as used in Article 8, Section 6 of the Constitution, to 'projects originated by individuals, * * * with a view to gain.'

There was another question in the case cited, arising under the peculiar language of Section 4022. It appeared that the municipality in that case had not acquired 'a permanent interest' in the hospital with which it was proposed to enter into a contract, nor did the contract provide for such an interest. The Circuit Court held that this alleged defect was immaterial.

Now the case of *Zanesville* vs. *Crossland* was reversed, without report, in *Crossland* vs. *Zanesville,* 56 O. S. 735. Such reversal may have been upon constitutional grounds or upon grounds arising out of the interpretation of the statute. Inasmuch as the concurrence of a majority of the court was necessary for a reversal, and it is not to be supposed that the constitutional question would have been decided without an opinion, it seems that it must be assumed that the case was reversed upon the second ground above suggested, and that the Supreme Court did not intend to disapprove the opinion of the Circuit Court on the constitutional question.

I feel that it would be improper for me to hold that a given statute is unconstitutional where such a holding is not plainly required by the circumstances of the case; and where, as in this case, there is a decision interpreting the Constitution in a given way, I feel that I ought to follow such a decision.

Accordingly, I am of the opinion that Article 8, Section 6, of the Constitution should be so interpreted as to prohibit a municipality from in any way contributing to the support of a corporation or association of individuals organized with a view to gain; but that said section does not prohibit a reasonable arrangement under statutory authority between a municipality and a corporation or association not organized with a view to gain, whereby the municipality may be relieved of some of the burdens otherwise cast upon it."

In the present instance the precise question involved in the prior opinion is not involved in view of the fact that the section now is specifically limited to corporations not for profit and the corporation in this instance is of that character. However that may be, it is to be observed that in Opinions of the Attorney General for 1926, at page 129, the former opinion was modified in so far as it held that the municipality could not, under the provisions of Section 4021 of the Code, levy and collect the tax and turn the proceeds thereof over to a private corporation organized for profit. The conclusion was reached that so long as the corporation furnished free services in the manner prescribed by that section, and such services were reasonably commensurate with the amount of funds received, the fact that the corporation was organized for profit was immaterial.

In the light of the foregoing, the facts which you present should be considered. As I understand it, council proposes to enter into a contract with the hospital whereby the city agrees to furnish the sum of $10,000 for the purpose of purchasing a site for the hospital and, in addition thereto, the city will agree to provide a one mill levy for a period of not less than five years for the maintenance of the hospital. In return therefor the hospital association agrees to furnish free hospital services to such inhabitants of the city of Wellsville as, in the opinion of the majority of the trustees of such hospital, are unable to pay. Your statement of facts is silent as to whether or not the agreement to furnish this free hospital service is limited to the five years or such additional years as the city makes the one mill levy, or extends during the life of the association. In other words, it is not clear whether the association proposes to bind itself to maintain free hospital service permanently. In view of what is said in the 1915 opinion, supra, with respect to the Circuit Court case, I feel that it is important to note whether or not, by virtue of the proposed contract, the city obtains any permanent interest. The statute leaves us in the dark as to a definition of

the term "permanent interest." I am inclined to the belief, however, that the term should not be too narrowly interpreted. That is to say, I do not feel it to be necessary that a conveyable interest in the real estate remain in order to come within the purview of Section 4022 of the Code. In my opinion the requirement of the statute would be satisfied if, by virtue of a contract, the city acquires a permanent free hospital service to such inhabitants of the municipality as in the opinion of the majority of the trustees of the hospital are unable to pay.

You will observe that the proposed agreement is not definitely authorized by either Section 4021 or Section 4022, but constitutes rather a combination of the two. If we were to leave the one mill levy stipulation out of consideration, we would then have an agreement specifically within the terms of Section 4022. The city would be giving a specific sum and, in return therefor, it would secure a permanent interest in the hospital to the extent that free service to the inhabitants of the municipality would be furnished. This is, of course, stated on the assumption that the agreement to furnish free service is not limited to the years in which the one mill levy is to be made.

The provisions of Section 4021, on the other hand, are separate and apart and apparently authorize the one mill levy and the payment thereof to a private hospital association "as and for compensation for the use and maintenance of such hospital" in furnishing free treatment to such of the inhabitants as in the opinion of the majority of the trustees are unable to pay. It may, therefore, be questioned whether these sections are not in the alternative so that the municipality would be precluded from securing free hospital service by furnishing the consideration therefor authorized by both sections. In my opinion, however, this would be too narrow a view. If in the opinion of the council the free service furnished is reasonably commensurate with both the lump sum payment and the levy, I incline to the belief that its judgment should not be disturbed in the absence of fraud or gross abuse of discretion. While Section 4021 of the Code does not in terms authorize a contract between the municipality and the hospital association, I believe that, taking its language as a whole, the section authorizes the execution of such contract so as to place the relative rights and obligations of the parties upon a definite basis. This is specially substantiated by the statement in the section that "such payment shall be as and for compensation for the use and maintenance of such hospital." Clearly, the only way in which the rights could be definitely determined would be by agreement.

I believe, furthermore, that the provisions of Section 4022 are broad enough to include within the contract an agreement on the part of the municipality to make a levy for the benefit of the hospital. You will note the agreement for a permanent interest therein is to be made "to such extent and upon such terms and conditions as may be agreed upon between" the parties. This apparently would authorize any legitimate term or condition and I am of the opinion that the agreement to make the one mill levy in addition to the lump sum for the purchase of a site would be proper, if commensurate with the services received.

I note that you say the contract is to be submitted to a vote of the people. This is, of course, necessary in view of the provisions of Section 4022-1 of the Code. I call your attention to the fact that this section requires a separate vote upon the question of the issuance of bonds, in case the city has not available from current general revenues sufficient money to pay the lump sum of $10,000 agreed upon. The proceedings relative to submitting the question to a vote are, according to the provisions of the statute, to be "as otherwise provided by law for municipal bonds." Accordingly, the procedure would be governed by the provisions relative to the issuance of bonds in House Bill No. 1, passed by the 87th General Assembly, found in 112 O. L., commencing at page 364. By the terms of Section 2293-23 of the Code, fifty-five per cent of those voting upon the proposition is required.

It may perhaps be well to point out that the municipality may encounter some embarrassment in complying with its agreement to make a one mill levy and to pay it to the hospital association. For this reason, care should be observed in applying to the situation the provisions of House Bill No. 80, passed by the 87th General Assembly and found in 112 O. L. p. 391, et seq. This act provides for the levying of taxes by local subdivisions and their method of budget procedure. It may be well to examine certain of the provisions of this act pertinent to the situation.

Section 5625-6, General Code, provides as follows:

"The following special levies are hereby authorized without vote of the people:

a. For any specific permanent improvement which the subdivision is authorized by law to acquire, construct or improve, or any class of such improvements which could be included in a single bond issue.

b. For the library purposes of the subdivision, in accordance with the provisions of the General Code authorizing a levy or levies for such purposes but only to the extent so authorized.

c. In the case of a municipality for a municipal university under Section 7908 of the General Code, but only to the extent authorized therein.

d. In the case of a school district for the purposes of Section 7575 of the General Code, or for any school equalization levy which may be authorized.

e. In the case of a county, for the construction, reconstruction, resurfacing and repair of roads and bridges, other than state roads and bridges thereon.

f. In the case of a county, for paying the county's proportion of the cost and expense of the construction, improvement and maintenance of state highways.

g. In the case of a township, for the construction, reconstruction, resurfacing and repair of roads and bridges (except state roads and bridges on such roads), including the township's proportion of the cost and expense of the construction, improvement, maintenance and repair of county roads and bridges.

Each such special levy shall be within the fifteen mill limitation and shall be subject to the control of the county budget commission as provided by this act.

Excepting the special levies authorized in this section any authority granted by provision of the General Code to levy a special tax within the fifteen mill limitation for a current expense shall be construed as authority to provide for such expense by the general levy for current expenses."

You will observe that a special levy for the purpose authorized in Section 4021 of the General Code is not mentioned herein. Consequently the one mill levy in this instance would be governed by the terms of the last sentence of the section and the levy would be comprehended within the general levy for current expenses and consequently subject to the fifteen mill limitation.

The succeeding section details the levies authorized outside of the fifteen mill limitation, but no mention is made of the levy here under consideration. Consequently the levy in this instance would be subject to the paring process of the budget commission and there would be no definite assurance that the one mill levy would be available for the purpose of fulfilling the obligation of the contract without sacrificing other current expenses of the municipality.

In view of this, it would be perhaps advisable to submit to the electors at the same time the other matters are submitted the question of the levying of a tax in excess of the fifteen mill limitations for current expenses of the municipality. Such procedure is authorized by Section 5625-15 of the General Code. In the event of approval by the electorate the levy could then be made irrespective of the fifteen mill limitation and funds would always be available for the purposes of fulfilling the contract, since Section 5625-23 of the Code directs the budget commission to approve without modification all levies outside of the fifteen mill limitation. By this procedure financial embarrassment resultant from action of the budget commission may be avoided.

Summarizing my conclusion, I am of the opinion that, by virtue of the provisions of Sections 4021, 4022 and 4022-1 of the General Code, the council of a municipality may enter into an agreement with a hospital association organized not for profit, wherein the municipality agrees to furnish the sum of $10,000 for the purpose of purchasing a hospital site and to provide a one mill levy for a period of not less than five years for the maintenance of the hospital, if, in return therefor, the association agrees to furnish permanent free hospital service to such inhabitants of the municipality as in the opinion of the majority of the trustees of such hospital are unable to pay. The execution of such a contract must, by virtue of the provisions of Section 4022-1 of the General Code, receive the approval of the electors and, in the event the issuance of bonds is necessary, such issuance must also be so approved.

Respectfully,
EDWARD C. TURNER,
Attorney General

2058.

MARRIAGE FEES—JUDGE OF MUNICIPAL COURT OF PAINESVILLE MAY NOT LEGALLY RETAIN SAME.

SYLLABUS:

1. *The judge of the municipal court of Painesville, Ohio, under the provisions of Sections* 1579-1040, 1579-1043 *and* 1579-1047, *General Code, may legally solemnize marriages and charge the same fee that a justice of the peace may charge, which is three dollars.*

2. *Such fee so charged by the municipal judge may not be lawfully retained by him, but is required to be paid into the city treasury, the same as other moneys received by him in his official capacity.*

COLUMBUS, OHIO, May 4, 1928.

HON. SETH PAULIN, *Prosecuting Attorney, Painesville, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication requesting my opinion as follows:

> "Section 1579-1040 of the General Code of Ohio, confers upon the judge of the Municipal Court of the city of Painesville, authority to perform marriages, said section reads as follows:
>
> 'The judge of the municipal court shall have authority and jurisdiction: To administer an oath authorized or required by law to be administered; to take the acknowledgment of deeds, mortgages or other instruments of writing; and to solemnize marriages.'