expenses are $100.00 or less it is mandatory that the Division of Aid for the Aged make payment of such amount to the proper person entitled thereto on the application, under oath, by such person, but in no case may the same award for burial expenses exceed $100.00.

2. Under the provisions of Section 1359-10, General Code, as amended by House Bill No. 605, enacted in the First Special Session of the 91st General Assembly, effective July 16, 1936, in addition to burial expenses, the Division of Aid for the Aged must pay a reasonable amount, which amount is within their sound discretion, for the grave and the opening and closing of the same, to the proper person entitled thereto.

Respectfully,
JOHN W. BRICKER,
Attorney General.

5654.

APPROVAL—BONDS OF SUGAR CREEK TOWNSHIP, STARK COUNTY, OHIO, $2,830.00.

COLUMBUS, OHIO, May 29, 1936.

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

5655.

WATER RENTALS—BOARD OF EDUCATION FURNISHED WATER BY MUNICIPALITY—LIABILITY OF BOARD OF EDUCATION FOR SUCH WATER DISCUSSED.

SYLLABUS:

Where assessments of water rentals for water consumed have been made against a board of education by a municipality or the waterworks thereof, located in the Fifth Appellate District comprising the counties of Ashland, Coshocton, Delaware, Fairfield, Holmes, Knox, Licking, Morgan, Morrow, Muskingum, Perry, Richland, Stark and Tuscarawas, since January 1, 1931, liability of the board of education to the municipality for the payment of said water rents now exists for the full time the assessments were made.

COLUMBUS, OHIO, June 1, 1936.

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

GENTLEMEN: This will acknowledge your request for my opinion in answer to the following:

> QUESTION: Is the Board of Education of the Mansfield City School District liable for water rentals for water furnished by the waterworks department of the city of Mansfield, Ohio, from January 1, 1931, the date from which the city had a record by meter readings of consumption of water by the Board of Education, or from the 14th day of December 1932, when the Court of Appeals of the Fifth District affirmed the decision of the Common Pleas Court of Perry County, Ohio, in the matter of the Village of New Lexington, Ohio, vs. the Board of Education of the New Lexington Village School District, or from the date the Supreme Court of Ohio decided the case of Board of Education of Willard School District vs. Village of Willard, 130 O. S., 311?"

From the data submitted with your letter, it appears that some time prior to January 1, 1931, water meters were installed by the municipal water department of the city of Mansfield, in the pulic school buildings belonging to the Mansfield City School District, and the municipal authorities notified the board of education of the said school district by letter dated December 19, 1930, that after January 1, 1931, the school board would be charged with water rentals the same as other users of the product of the municipal waterworks.

Since that time, the city water department has regularly read the meters and made a charge against the board of education for water consumed. At the present time the records show that the water rents which have accumulated since January 1, 1931, amount approximately to $13,000, no part of which has been paid.

As you know, there has been for a number of years considerable confusion with respect to the liability of boards of education for water consumed when the water is furnished from municipally owned waterworks. Uniformity throughout the state in the application of a definite rule concerning the matter has been impossible since the changes in certain pertinent provisions of the Constitution of Ohio, that were made in 1912. This confusion has resulted from the decisions of different courts prior to the decision of the Supreme Court in the case of Board of Education v. Village of Willard, 130 O. S., 311, concerning the constitutionality of Section 3963, General Code, which had for a number of years prior to 1912,

provided, and still provides that no charge shall be made by a municipality or a municipally owned waterworks for water consumed in school buildings in the municipality except a proportionate charge which should be made in the ratio which the tax valuation of any property of the school district which may lie outside the territorial limits of the municipality bears to the tax valuation of all the property of the school district. Since the decision of the case of Board of Education v. Village of Willard, 130 O. S., 311, there is no doubt as to the unconstitutionality of the statutory provision referred to above, as it applies to all municipalities and school districts in the state. It follows that since the date of this decision all school boards in the state may be charged for water consumed. Opinion of the Attorney General No. 5147, rendered February 6, 1936.

The Willard Case standing alone, probably does not in all cases solve the problem of liability prior to the date of the decision. In the particular case of Mansfield, however, it may be safely said that the statute requiring municipalities to furnish water free of charge to the school boards in the municipality has not been an effective law since 1912. Without reviewing the several decisions affecting this question generally, it is sufficient for our present purpose to refer to the Columbus Board of Education case, 118 O. S., 295, and the unreported case of New Lexington Village School District v. Village of New Lexington, decided by the Court of Appeals for Perry County, December 14, 1932.

It will be noted that in the case of City of Columbus v. Board of Education of the City of Columbus, 118 O. S., 295, it was said by Chief Justice Marshall, on page 299:

> "In the Second Appellate District, Section 3963 is unconstitutional and void, and must be so treated by all the municipalities of that district. In the Eighth and Ninth Appellate Districts the statute is valid, and must be so administered. In the other six appellate districts municipalities may not know whether that section is valid and applicable to municipalities within their jurisdictions until the question has been submitted to the various Courts of Appeals of those districts, but all municipalities in those districts may be assured that whatever judgments are rendered by their respective Courts of Appeals will be affirmed by this court until such time as either the constitutional provision is abrogated or changes occur in the personnel of this court."

The Columbus case was decided April 4, 1928, and involved a case arising in the Second Appellate District. Prior to that time the Court of Appeals for the Eighth and Ninth Appellate Districts had held the statute to be constitutional. No cases had then been decided by the Appellate Courts affecting the other six Appellate Districts.

The city of Mansfield is in the Fifth Appellate District; so also is Perry County. Sometime in 1932, suit was brought by the Village of New Lexington in Perry County, against the Board of Education of the New Lexington Village School District, in which it was sought to recover from the school district for water consumed by the said board of education for the use of its school buildings, which water was furnished by the municipally owned water works of the Village of New Lexington. Recovery was had in the sum of $203.23. This judgment was affirmed by the Court of Appeals of the Fifth Appellate District, in cause No. 197, on December 14, 1932. The case was not officially reported and so far as I know no written opinion was rendered. In effect, however, the court necessarily held that that part of Section 3963, General Code, which provides that no charge shall be made for water consumed for the use of school buildings, is unconstitutional. The effect of this Perry County decision was, in the light of Chief Justice Marshalls observations in the Columbus case, to render the statute unconstitutional throughout the entire Fifth Appellate District including the city of Mansfield.

It is a general rule of law that a statute which is adjudged to be unconstitutional is as if it had never existed. Contracts which depend upon it for their consideration are void, and that is true of any part of a statute which is found to be unconstitutional, and it consequently is to be regarded as having never at any time been possessed of any legal force. Cooley on Constitutional Limitations, Eighth Edition, Section 382. There are probably some exceptions to this rule, as, for instance, where the principle of estoppel intervenes or where a statute had previously been held to be constitutional and to regard it as having been unconstitutional from the beginning should that holding be reversed, would result in the illegal impairment of contracts.

Tone v. Columbus, 39 O. S., 281;
Mott v. Hubbard, 59 O. S., 199;
Findlay v. Pendleton, et al., 62 O. S., 88-89;
City of Mt. Vernon v. State, 71 O. S., 428;
Thomas v. State, 76 O. S., 341.

No reason exists in the present instance for the application of any exception to the general rule.

I am informed that the contention has been made by the board of education of the Mansfield City School District that recovery for water rents charged against them cannot be had for the reason that no contract existed between the parties, and, in fact, the board of education affirmatively stated in a letter addressed to the municipal authorities under date of January 20, 1931, that it would not be responsible for payment of

water rentals although it at all times thereafter accepted and used the water furnished. Of course, there was no certificate of the fiscal officer of the school district in conformity with Section 5625-33, General Code. This contention has been advanced, I presume on the strength of the case of City of Cincinnati v. Board of Education, 30 O. N. P. (N. S.), 595. This case was decided by the Common Pleas Court of Hamilton County in 1933, and was a suit brought by the city of Cincinnati against the Board of Education of the Cincinnati School District to recover for water consumed. It was held that no recovery could be had for the reason that there was no contract between the parties and that a board of education is not liable upon an implied contract or on an account or upon a *quantum meruit*. The case was not carried higher than the Common Pleas Court, and has never been regarded as authority outside the county of Hamilton. The court in this case evidently mistook the basis upon which charges are made for water furnished by a municipal waterworks, although Sections 3956 and 3958, of the General Code of Ohio, were considered by the court and it was held as stated in the third paragraph of the syllabus:

> "Sections 3956 and 3958, General Code, conferring authority upon the Director of Public Service to assess and collect water rents was not intended to apply to collecting water rents from boards of education."

Ordinarily, the basis of liability of water users for the consumption of water which is the product of municipally owned waterworks is an assessment made in pursuance of Sections 3956 and 3958, General Code, rather than a contract. I would not say that it is not within the power of municipal authorities to make special contracts with water consumers, especially in view of the provisions of Section 4 of Article XVIII of the Constitution of Ohio, but when such contracts do not exist, assessments are made in most cases at least, if not in all cases upon premises owned by boards of education where liability is to be imposed upon such board for payment for water consumed. At any rate, recovery was had in the Columbus case, the Willard case, the New Lexington case, and in many others that might be mentioned, and nothing appears in any of them, to the effect that because valid formal contracts did not exist between the board of education and the municipality, recovery should be denied.

Such assessments are clearly analogous to assessments made for street improvements, which assessments were held to be a proper basis for recovery when made against property owned by a board of education in the case of Jackson v. Board of Education, 115 O. S., 368. In the case of City of Sidney v. Cummings, 93 O. S., 328, it is held that in the assess-

ment of property for a street improvement by the foot front of the property bounding and abutting upon an improvement under Section 3812, General Code, no contractual relation exists between the municipal corporation and the property owner.

On the authority of the New Lexington case, referred to above, and the case of Board of Education v. Willard, supra, I am of the opinion that the Board of Education of the Mansfield City School District is liable to the city of Mansfield for water rents assessed against the board since January 1, 1931. That seems to be the earliest date that assessments were made.

Respectfully,
JOHN W. BRICKER,
Attorney General.

5656.

APPROVAL—BONDS OF CANTON CITY SCHOOL DISTRICT, STARK COUNTY, OHIO, $5,000.00.

COLUMBUS, OHIO, June 1, 1936.

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

5657.

APPROVAL—BONDS OF CITY OF CLEVELAND, CUYAHOGA COUNTY, OHIO, $5,000.00.

COLUMBUS, OHIO, June 1, 1936.

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