

products to be handled by or through the association. Clearly, under this provision, it is contemplated that the powers which such association may have as to purchasing supplies is, as already pointed out, incidental to the chief purpose of marketing the products of its members.

I am, therefore, of the opinion that the articles of incorporation presented to you cannot be lawfully filed in your office under the provisions of Sections 10186-1 to 10186-30, inclusive, General Code, providing for a co-operative agricultural association.

Sections 10185 and 10186, General Code, provide for co-operative trade associations. Section 10185 is as follows:

“An association incorporated for the purpose of purchasing, in quantity, grain, goods, groceries, fruits, vegetables, provisions, or any other articles of merchandise, and distributing them to consumers at the actual cost and expense of purchasing, holding, and distribution, may employ its capital and means in the purchase of such articles of merchandise as it deems best for itself, and in the purchase or lease of such real and personal estate, subject always to the control of the stockholders, as are necessary or convenient for purposes connected with and pertaining to its business.”

Clearly, the purpose clause submitted contemplates the exercise of no powers in excess of those set forth in this section, and I am therefore of the opinion that such articles may be filed as a corporation not for profit as therein provided.

The articles are returned to you herewith.

Respectfully,
GILBERT BETTMAN,
Attorney General.

287.

PUBLICATION — MUNICIPAL EMERGENCY ORDINANCES — LAWFUL
BUT NOT REQUIRED.

SYLLABUS:

The proper officials of a municipality may cause to be published an emergency measure, although such publication is not required to be made.

COLUMBUS, OHIO, April 10, 1929.

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

GENTLEMEN:—This is to acknowledge receipt of your recent communication, which reads as follows:

“In the case of *Van Such vs. State Ex Rel.*, 112 O. S. 688, at page 689, it is stated:

‘It was held by this court in *Shryock, a Taxpayer, vs. City of Zanesville*, 92 Ohio St. 375, 110 N. E. 937, that the council of a municipality is authorized to pass emergency ordinances necessary for the immediate preservation of the public peace, health, and safety. Such ordinances do not require publication, and are not subject to the referendum, but go into immediate effect.’

Question: Is it the duty of the bureau to find that payments from the

funds of a municipality for advertising emergency ordinances and resolutions in newspapers are illegal disbursements of public funds?"

This office is also in receipt of a communication from the Prosecuting Attorney of Cuyahoga County, requesting an opinion upon the same state of facts. In connection with the prosecutor's request, a copy of Ordinance No. 604 of the village of Independence is enclosed, which reads:

"WHEREAS, the council of the village of Independence is of the opinion that the posting of municipal ordinances, resolutions, statements, orders, proclamations, notices and reports as heretofore made in this village, is not, under the present modern conditions, effective to give to its proceedings the full public notice to which the inhabitants of the village and the public generally are entitled; and

WHEREAS, it is deemed advisable in order that the public be fully informed of its proceedings, to cause the same to be published in a newspaper according to the laws of the State of Ohio providing such publication, and

WHEREAS, 'The Heights Press' is a newspaper of general circulation in Cuyahoga County, Ohio, fully qualified under the law to publish notice of such proceedings. NOW THEREFORE

BE IT ORDAINED by the Council of the village of Independence, State of Ohio—

SECTION 1. That the mayor and clerk be and they are hereby authorized and directed to enter into an agreement with Samuel Slotky, the publisher of and doing business as 'The Heights Press' for the publication of municipal ordinances, resolutions, statements, orders, proclamations, notices, and reports required or authorized by law or ordinance to be published; and that said contract provide that this village shall pay for such publication the statutory rates which such newspaper may charge and receive, and which are more specifically described in Section 6251 of the General Code of the State of Ohio.

SECTION 2. This ordinance being an emergency measure, said emergency having arisen by reason of the need for immediate dissemination of notice regarding the important proceedings of this council, shall take effect and be in force from and after the earliest period allowed by law."

It is believed unnecessary to give extensive consideration to the provisions of Section 3, Article XVIII of the Ohio Constitution, which, relates to the home-rule power of municipalities. However, it may be stated that, in view of recent holdings of the Supreme Court of Ohio to the effect that it is unnecessary for a municipality to adopt a charter in order to exercise the constitutional powers granted to it by Section 3, Article XVIII, some difficulties arise with reference to the determination of the actual powers of the municipality in reference to such matters.

In view of the statutory provisions, I feel that it is unnecessary to depend upon any so-called home-rule power of a municipality in order to justify the expenditure of funds in the manner here under consideration.

Section 4227 of the General Code, provides as follows:

"Ordinances, resolutions and by-laws shall be authenticated by the signature of the presiding officer and clerk of the council. Ordinances of a general nature, or providing for improvements shall be published as hereinafter provided before going into operation. No ordinance shall take effect until the expiration of ten days after the first publication of such notice. As

soon as a by-law, resolution or ordinance is passed and signed, it shall be recorded by the clerk in a book to be furnished by the council for the purpose."

The method of publication is prescribed by Section 4228, General Code, in the following language:

"Unless otherwise specifically directed by statute, all municipal ordinances, resolutions, statements, orders, proclamations, notices and reports, required by law or ordinance to be published, shall be published as follows: In two English newspapers of opposite politics printed and of general circulation in such municipality, if there be such newspapers; if two English newspapers of opposite politics are not printed and of general circulation in such municipality, then in one such political newspaper and one other English newspaper printed and of general circulation therein; if no English newspaper is printed and of general circulation in such municipality, then in any English newspaper of general circulation therein or by posting as provided in Section forty-two hundred thirty-two of the General Code; at the option of council. Proof of the place of printing and required circulation of any newspaper used as a medium of publication hereunder shall be made by affidavit of the proprietor of either of such newspapers, and shall be filed with the clerk of council."

It is true that the Supreme Court in the case of *Shryock vs. Zanesville*, 92 O. S. 375, held that an emergency ordinance does not require publication. This conclusion was based upon the fact that Section 4227-3 of the General Code provides that such ordinances go into immediate effect and apparently the theory of the court was that publication, accordingly, would be useless. I am somewhat in doubt as to the conclusion of the court and am inclined to agree with what was stated by my predecessor in an opinion covering this subject, found in Opinions of the Attorney General for 1927, Vol. III, p. 1768. Commencing on p. 1770, it is as follows:

"Your second question is whether, in the event that ordinances or measures subsequent to the resolution of necessity may be passed as emergency measures, such ordinances and measures need be published.

This question would be of considerable difficulty were it not for the language of the Supreme Court in the case of *Van Such vs. State*, which I have quoted, *supra*. You will observe that the court there says that emergency ordinances do not require publication and are not subject to referendum and go into immediate effect. The reasons for the last two conclusions are obvious, but the court fails to enlighten us as to the process of reasoning by which it arrives at the conclusion that such ordinances do not require publication. We are left to conjecture as to what compelled the conclusion of the court. The fact that Section 4227-3 of the General Code specifically provides that emergency ordinances go into immediate effect is of considerable significance.

Section 4227 of the Code provides as follows:

'Ordinances, resolutions and by-laws shall be authenticated by the signature of the presiding officer and clerk of the council. Ordinances of a general nature, or providing for improvements shall be published as herein-after provided before going into operation. No ordinance shall take effect until the expiration of ten days after the first publication of such notice. As soon as a by-law, resolution or ordinance is passed and signed, it shall be recorded by the clerk in a book to be furnished by the council for the purpose.'

Section 4228 of the Code provides for the manner in which publication shall be made.

You will observe that the effective date of ordinances of a general nature or providing for improvements is postponed until the expiration of ten days after the first publication of the notice. In other words, the requirements of publication and postponement of the effective date may possibly be said to be inseparable. The legislature in Section 4227-3 of the Code provided that the emergency measure shall go into immediate effect, and this being a later enactment than Section 4277, General Code, it may be argued that the implied repeal as to the effective date carries with it also the implied repeal of publication, i. e., the two are not severable.

If it were not for the language of the Supreme Court, I should have considerable doubt as to the logic of this argument. Since, however, the court has categorically stated that emergency ordinances require no publication, and has not announced the grounds on which that conclusion is reached, I feel that the law must be regarded as settled, and consequently ordinances of an emergency character need not be published. I might point out, however, that the matter of the effective date of a measure has not necessarily any direct bearing upon whether or not publication thereof should be had. Nor can it be argued with much force that, because an ordinance is an emergency, it would be futile to publish it since it goes into immediate effect. The history of the pertinent sections of the Code are sufficient to refute such an argument. Statutes relating to publication of ordinances long antedate the constitutional and statutory provisions relative to the initiative and referendum. The object of publication clearly could not have been at that time to advise the public in order that it might take effective action with relation to the legislation. Prior to the initiative and referendum provision, the action of the legislative body was final. Yet there has been for many years provision for publication of ordinances, the obvious purpose of which was to keep the public advised as to what the law was. It is immaterial that people had no recourse from the enactment of the legislative body. They still had a right to be advised as to what action was being taken. It therefore can scarcely be said to follow that because an emergency ordinance is not subject to a referendum, it would be futile to publish the measure. The public still has the right to be advised as to what is going on. My conclusion might be otherwise if the expression of the Supreme Court holding referred to were not in existence. I feel bound by this language, however, and therefore am of the opinion that any emergency measure passed by a municipal council need not be published."

The fact, however, that such an ordinance *need* not be published, does not necessarily preclude such publication. The statutory authority and, in fact, requirement as to publication of all ordinances of a general nature is plain from the provisions of Section 4227, *supra*. The citizens of the municipality are entitled to information as to the proceedings of the legislative body. In view of the specific statutory authority, I have no difficulty in reaching the conclusion that, in spite of the court's decision to which you refer, the expenditure of municipal funds for the publication of an emergency ordinance is not unlawful.

It follows from what has been said that no finding should be made against municipal officers making disbursements for such purpose.

Respectfully,

GILBERT BETTMAN,
Attorney General.