pense with the management and control of a water supply system which they have constructed in a sewer district outside a municipality and transfer such control and management to a city or village until such territory is annexed to such municipality.

Respectfully,
JOHN W. BRICKER,
Attorney General.

1793.

WITNESS—IMMUNITY THEREOF WHEN REQUIRED TO TESTIFY BEFORE DULY AUTHORIZED COMMITTEE OF GENERAL ASSEMBLY —PURPOSE OF SECTION 60, G. C., DISCUSSED.

SYLLABUS:

1. *Witnesses who testify before a duly authorized committee or sub-committee of the General Assembly or either house thereof, or produce evidence documentary or otherwise, for the use of such committee, in obedience to a subpoena therefor, may not be prosecuted or subjected to a penalty or forfeiture on account of a transaction, matter or thing concerning which he so testifies or produces evidence, and the testimony so given or evidence produced may not be used in a criminal proceeding against such witness, providing the testimony so given or evidence produced has a substantial, direct and immediate connection with the offense for which the prosecution is instituted or the penalty or forfeiture provided, but the giving of such testimony or the production of such evidence shall not exempt the witness from the penalties of perjury.*

2. *The obvious purpose of the enactment of Section 60 of the General Code, thereby amending Section 5 of the Act of 1872 relating to the production of testimony and the compelling of attendance of witnesses by committees and sub-committees of the General Assembly or either house thereof, was to broaden the scope of evidence that might be obtained by these committees and to further limit the right of witnesses to object to the giving of testimony on the grounds that they might thereby incriminate themselves. It, therefore, should be construed, so far as possible, as being coterminous with the constitutional privilege of the person concerned exempting him from being a witness against himself in a criminal case, as granted by Section 10 of Article I of the Constitution of Ohio.*

3. *Testimony given, or evidence produced before a committee or sub-committee of the General Assembly, does not make a basis under Section 60 of the General Code of Ohio, for immunity of the witness against prosecution for crime with which the testimony or evidence was only remotely connected.*

4. *For a witness to claim immunity from prosecutions by force of Section 60 of the General Code, it is not necessary that the witness claim such immunity or exact an agreement to that effect before testifying or producing evidence in obedience to a subpoena, before a duly authorized committee or sub-committee of the General Assembly or either house thereof.*

COLUMBUS, OHIO, November 1, 1933.

HON. L. L. MARSHALL, *Chairman, Special Banking Committee, Cleveland, Ohio.*

DEAR SIR:—I am in receipt of your request for my opinion, which reads:

"Section 60 of the Ohio General Code has been called to the atten-

tion of the Special Senate Banking Committee.

In order that the committee may direct its future proceedings in a manner which will not embarrass the local prosecuting authorities, the committee desires an interpretation of this section, as to the extent of the immunity granted those testifying before the committee."

As you do not definitely raise the question as to the powers of your committee, this opinion has been prepared with respect to a duly authorized committee or sub-committee of the General Assembly, or either house thereof, with the power to subpoena and compel attendance of witnesses and the production of evidence, documentary or otherwise.

Section 60 of the General Code reads as follows:

"The testimony of a witness examined before a committee or sub-committee shall not be used as evidence in a criminal proceeding against him. No person shall be prosecuted or subjected to a penalty or forfeiture for or on account of a transaction, matter or thing, concerning which he so testifies, or produces evidence, documentary or otherwise; but nothing herein shall exempt a witness from the penalties of perjury."

This statute was enacted in its present form in 1906 (98 O. L. 268) as amendatory of a previous statute relating to the same subject. The earlier statute was enacted in 1872, as Section 5 of an act "to authorize committees of the General Assembly to compel the attendance of witnesses, and for other purposes." (69 O. L. 61.) The former statute provided in part:

"That the testimony of any witness examined and testifying before any such committee or sub-committee, shall not be used in any criminal proceeding as against him: Provided, however, that no official paper or record shall be included within the privilege of said evidence, so as to protect such witness from any criminal proceeding."

It will be observed that the immunity granted by the original statute was not as broad as the constitutional protection afforded by Section 10 of Article I of the Constitution of Ohio, and therefore there were some things to which a witness could not be compelled to testify. The apparent purpose of amending the statute was to remedy this situation and broaden the immunity by narrowing the witness's right to refuse to testify or produce evidence in pursuance of his constitutional privilege, thus enabling a duly authorized committee or sub-committee of the General Assembly, or of either house thereof, to obtain evidence that otherwise could not be obtained. We may safely say, therefore, in my opinion, that the effect of the amendment is to render the immunity granted coterminous with the constitutional privilege of the witness concerned.

A quite distinct analogy may be noted between the present statute being an amendment of the earlier one, and the present federal statute granting immunity to witnesses before the interstate commerce commission in investigations involving violation of anti-trust laws. (Section 47, Title 40 U. S. C.) This federal statute is almost precisely like Section 60 of the General Code of Ohio in the granting of immunity to witnesses, and it too was amendatory of an earlier statute very similar to Section 5 of the Ohio Act of 1872 referred to above. Of

this Justice Holmes, in the case of *Heike* vs. *United States,* 227 U. S., 131, on page 611, said:

> "The statute was passed because an earlier one, in the language of a late case, 'was not coterminous with the constitutional privilege. *American Lithograph Company* vs. *Werchmeister,* 221 U. S., 603, 611."

This fact led the court to hold in the Heike case, supra, that the statute "is to be construed so far as possible, as coterminous with the privilege of the person concerned."

The federal statute in question, was enacted in 1903, and was codified as Section 47 of Title 49 of the United States Code, which related to immunity from prosecution of witnesses who testified before the interstate commerce commission. Its provisions are as follows:

> "No person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under the preceding chapter or any law amendatory thereof or supplemental thereto; Provided, that no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying."

The similarity between the federal statute and Section 60, General Code, is at once apparent. Its construction was involved in the case of *Heike* vs. *United States, supra,* and the court's conclusion with reference thereto is summarized in the first three paragraphs of the headnotes of that case, as follows:

> "There is a clear distinction between an amnesty for crime committed and the constitutional protection under the Fifth Amendment from being compelled to be a witness against oneself.
>
> The obvious purpose of the act of February 25, 1903, c. 755, 32 Stat. 854, 904, granting to witnesses in investigations of violations of the Sherman Act immunity against prosecution for matters testified to, was to obtain evidence that otherwise could not be obtained; the act was not intended as a gratuity to crime, and is to be construed, as far as possible, as coterminous with the privilege of the person concerned.
>
> Evidence given in an investigation under the Sherman Act does not make a basis under the act of February 25, 1903 for immunity of the witness against prosecutions for crimes with which the matters testified about were only remotely connected."

Section 60, General Code, has never been judicially interpreted or considered by any court in Ohio, to my knowledge. The only Ohio case in which statutory immunity of witnesses was involved, at least so far as officially reported decisions are concerned, is the case of *Nelson* vs. *State,* 41 O. App., 174. This case was a proceeding in error to reverse a judgment of conviction in the lower court for a violation of former Section 13266, General Code, which section defined the offense of fraudulently changing a ballot of an elector and fixed the penalty

therefor. The defendant had been an election judge at a primary election, suspicion having arisen as to the regularity of the conduct of the election in the precinct in which she was a judge. She was called before the board of elections and testified under oath as to what happened in the conduct of the election in her precinct. She was also called to testify, and did testify before the grand jury with reference to these facts. She was indicted by the grand jury, and on trial in the lower court was convicted. Immunity was claimed by a plea in bar and a motion in arrest of judgment on account of the provisions of former Section 13340, General Code, which provided as follows:

> "In a proceeding or prosecution brought under the laws relating to primary elections, if a person is called to testify, he shall be required to testify to all facts of which he has knowledge, and the fact that he has so testified shall forever be a bar to a prosecution brought against him for violating such laws as to such matters to which he may have testified."

The Court of Appeals set aside the conviction which had been obtained by the state in the lower court, and the defendant was discharged. The principal question involved in the error proceeding related to the question of whether or not the testimony given before the board of elections and the grand jury was voluntary on the part of the witness. In the course of the court's opinion, it was said:

> "It is asserted in behalf of the state that the testimony may have been voluntarily given, and, if such was the fact, defendants were not within the terms of the statute.
>
> It is quite enough to say in answer to that contention that the statute contains no word indicative of a purpose to discriminate between persons who testify voluntarily and those whose testimony is given involuntarily. The plain provision is that one who is called to testify in a proceeding or prosecution, and surely no one would claim that a grand jury investigation which resulted in an indictment was not within the words of the statute, shall give evidence of all facts of which he has knowledge, and that thereafter the fact that he has so testified shall forever be a bar to prosecution against him on a subject concerning which he so testified."

The language employed in Section 60, General Code, is quite clear. It needs little, if any interpretation. It no doubt means just what it says. The testimony given by a witness before a committee or sub-committee, which may not be used against him in a criminal proceeding by reason of this statute, must of course have some substantial, direct, and immediate relation to the offense involved in the criminal proceeding else it will not be excluded on that ground. Nor will a witness be immune from prosecution or from being subjected to penalties or forfeitures provided by law unless the testimony or evidence produced by a witness has a substantial, direct, and immediate connection with the offense for which the prosecution is held or the penalty or forfeiture provided. In other words, to quote from the headnotes of the case of *Heike* vs. *United States, supra,* which deals with a federal statute granting immunity to witnesses before the

interstate commerce commission, a statute not substantially dissimilar to the Ohio statute with which we are here concerned:

> "Evidence given in an investigation * * does not make a basis * * for immunity of the witnesses against prosecutions for crimes with which the matters testified about were only remotely connected."

Section 57, General Code, provides that the chairman of a standing or select committee of the General Assembly or of either house thereof, may require the attendance of witnesses from any part of the state before such committee and may require the production of books, papers and reports by such witnesses, and a witness may be prosecuted as for contempt for wilfully failing to appear in obedience to a subpoena by such committee or for refusing to answer questions pertaining to the matter of inquiry or for declining to produce papers or records in his possession or control, which the committee may demand. (See Section 59, General Code.) It is not necessary therefore, in my opinion, that a witness claim immunity before testifying or demand that the committee grant immunity in exchange for such testimony or the production of evidence, in order to have the benefit of the immunity granted by Section 60, General Code. The fact that the law requires him to testify or produce evidence in obedience to subpoena or demand therefor by the committee, precludes the idea that the testimony is voluntary and that he is therefore not entitled to immunity by reason thereof, unless he demands it before testifying or producing evidence.

Inasmuch as your inquiry is broad in scope, and does not set forth a specific state of facts to which this statute may be applied, my conclusions are necessarily very general in character. It is not possible to anticipate and discuss within the limits of an opinion of this kind the many and diverse possible questions that may arise in the application of this statute. I am of the opinion, speaking broadly:

1. Witnesses who testify before a duly authorized committee or sub-committee of the General Assembly or either house thereof or produces evidence documentary or otherwise, for the use of such committee, in obedience to a subpoena therefor, may not be prosecuted or subjected to a penalty or forfeiture on account of a transaction, matter or thing, concerning which they so testify or produce evidence, and the testimony so given or evidence produced, may not be used in a criminal proceeding against such witness, providing the testimony so given or evidence produced has a substantial, direct and immediate connection with the offense for which the prosecution is instituted or the penalty or forfeiture provided, but the giving of such testimony or the production of such evidence shall not exempt the witness from the penalties of perjury.

2. The obvious purpose of the enactment of Section 60 of the General Code, thereby amending Section 5 of the Act of 1872 relating to the production of testimony and the compelling of attendance of witnesses by committees and sub-committees of the General Assembly or either house thereof, was to broaden the scope of evidence that might be obtained by these committees and to further limit the right of witnesses to object to the giving of testimony on the grounds that they might thereby incriminate themselves. It therefore, should be construed, so far as possible, as being coterminous with the constitutional privilege of the person concerned exempting him from being a witness against himself in a criminal case, as granted by Section 10 of Article I of the Constitution of Ohio.

3. Testimony given, or evidence produced before a committee or sub-committee of the General Assembly, does not make a basis under Section 60 of the

General Code of Ohio, for immunity of the witnesses against prosecution for crimes with which the testimony or evidence was only remotely connected.

4. For a witness to claim immunity from prosecutions by force of Section 60 of the General Code, it is not necessary that the witness claim such immunity or exact an agreement to that effect before testifying or producing evidence in obedience to a subpoena, before a duly authorized committee or sub-committee of the General Assembly or either house thereof.

Respectfully,
JOHN W. BRICKER,
Attorney General.

1794.

APPROVAL, NOTES OF CLEARVIEW RURAL SCHOOL DISTRICT, LORAIN COUNTY, OHIO—$2,397.00.

COLUMBUS, OHIO, November 1, 1933.

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

1795.

APPROVAL, NOTES OF FOWLER TOWNSHIP RURAL SCHOOL DISTRICT, TRUMBULL COUNTY, OHIO—$2,225.00.

COLUMBUS, OHIO, November 1, 1933.

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

1796.

APPROVAL, NOTES OF ADDYSTON VILLAGE SCHOOL DISTRICT, HAMILTON COUNTY, OHIO—$2,689.00.

COLUMBUS, OHIO, November 1, 1933.

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

1797.

APPROVAL, NOTES OF AUBURN RURAL SCHOOL DISTRICT, TUSCARAWAS COUNTY, OHIO—$3,223.00.

COLUMBUS, OHIO, November 1, 1933.

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