553.

MUNICIPALITY—POWER TO SELL ITS ELECTRIC CURRENT TO ANOTHER—CONSTITUTIONAL LIMITATIONS—PURCHASE OF VENDEE'S TRANSMISSION LINES, VALID—SPECIFIC CONTRACT APPROVED.

*SYLLABUS:*

1. *A village owning and operating an electric light plant may legally enter into a contract with a neighboring village to supply such neighboring village with electricity, subject to the limitations contained in Section 6 of Article XVIII of the Constitution of Ohio.*

2. *Where a municipality contracts with another municipality to furnish electricity from its municipally owned electric plant to the second municipality and its public, and there exists in the second municipality electric transmission lines owned by the second municipality the said lines may lawfully be purchased by the first municipality from the second municipality.*

3. *Two municipalities may legally enter into an agreement by which the first municipality will furnish electricity to the residents of the second municipality, purchase the distribution lines owned by the second municipality, read the meters and collect from the inhabitants of the second municipality for electricity at such proper rates as may be agreed upon. In so doing the municipality selling the service is burdened with the same duties and is subject to the same restrictions in respect to the public of the territory served, as would apply to and govern a private corporation similarly engaged.*

COLUMBUS, OHIO, June 24, 1929.

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

GENTLEMEN:—Acknowledgment is hereby made of your request for my opinion which reads as follows:

> "Section 6 of Article XVIII of the Constitution provides that any municipality owning or operating a public utility for the purpose of supplying the service or product thereof to the municipality or its inhabitants, may also sell and deliver to others any transportation service of such utility and the surplus product of any other utility in an amount not exceeding in either case fifty per centum of the total service or product supplied by such utility within the municipality.
>
> The pertinent part of Section 3615-1, G. C., reads:
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> 'Two or more municipalities may enter into an agreement for the joint construction or management, or construction and management, of any public work, utility or improvement, benefiting each municipality, or for the joint exercise of any power conferred on municipalities by the constitution or laws of Ohio, in which each of such municipalities is interested. Any such agreement shall be approved by ordinance passed by the legislative body of each municipality party thereto, which ordinance shall set forth the agreement in full, and when so approved, shall be a binding contract between such municipalities.'
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> The syllabus of Opinion No. 597, page 1713, Opinions of the Attorney General for 1913, reads:
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> 'Where the village of Plymouth, Ohio, has installed an electric lighting system and is desirous of furnishing current to the village of Shiloh, the

village of Plymouth is without authority to do this, as Section 3618, General Code, applies only to the establishment, maintenance and operation of the municipal lighting, power and heating plants, and furnishing such power, light or heat by the municipality to the citizens thereof and does not apply to furnishing it to another village.'

The syllabus of Opinion No. 90, page 158, Opinions of the Attorney General for 1919, reads:

'A municipal corporation, which owns an electric lighting plant, has legal authority to furnish service to a person residing outside of the corporate limits of said municipality, provided, however, such service shall not exceed fifty per centum of the total service supplied within the municipality.'

The village of ———— owns and operates a plant for the generation and distribution of electricity and has been selling electric energy to a neighboring village, delivered at the corporation limits of the first village to the transmission line owned by the second village.

QUESTION: 1. May a village owning and operating an electric light plant legally enter into a contract with a neighboring village to supply such neighboring village with electricity subject to the constitutional limitations?

2. May said first village legally purchase such transmission line from the second village?

3. May these two villages legally enter into an agreement by which the first village will furnish electricity to the residents of the second village, purchase the distribution lines owned by said second village, read the meters and collect from the inhabitants of said second village, for electricity at the same rates as paid by the inhabitants of the first village?"

Article XVIII, Section 4 of the Constitution of Ohio adopted September 3, 1912, reads as follows:

"Any municipality may acquire, contract, own, lease and operate within or without its corporate limits, any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. The acquisition of any such public utility may be by condemnation or otherwise, and a municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person supplying to the municipality or its inhabitants the service or product of any such utility.

Prior to the adoption of Article XVIII, Section 4 of the Constitution of Ohio, and subsequent to 1851, utilities could only be owned and operated by municipalities under power specially conferred by legislative enactment, and subject to such restrictions and limitations as were imposed by the authority which conferred the power. Since the adoption of the foregoing section of the Constitution, all authority for a municipality to own and operate public utilities comes direct from the people entirely absolved from any conditions or restrictions theretofore imposed or which might thereafter be imposed. *Village of Euclid* vs. *Camp Wise,* 102 O. S. 207.

Section 3618, General Code, the terms of which were under consideration in the 1913 opinion referred to in your inquiry, and upon which the Attorney General based his conclusions, as quoted in your letter, was enacted in 1908 (99 O. L. 34), before the adoption of Article XVIII, Section 4 of the Ohio Constitution. Said Section 3618, General Code, is now obsolete so far as its conferring any powers on a municipality with respect to establishing, maintaining or operating a municipal lighting, power or heating plant is concerned, and does not serve to impose any limitations on the powers

granted to municipalities, with respect to such plants, by the Constitution of Ohio. The Attorney General gave no consideration whatever to Article XVIII, Section 6, of the Constitution of Ohio in the said opinion, either because of having overlooked it or upon the theory that its provisions were not self-executing. The same Attorney General in a later opinion, Annual Report of the Attorney General for 1914, page 769, at page 772, after quoting Article XVIII, Section 6, of the Constitution of Ohio, says:

> "The provisions of this section of the constitution indicate that it was intended as a present enactment, complete in itself as definitive legislation and that it does not contemplate subsequent legislation to carry it into effect. Construed in the light of these considerations, this section of the constitution is self-executing."

In 1923 the Attorney General in an opinion reported in Opinions of the Attorney General for that year, at page 790, says:

> "Section 6, Article XVIII of the Constitution of Ohio * * * is a self-executing provision."

Although I find no expression of the Supreme Court specificially to the effect that Article XVIII, Section 6, of the Constitution of Ohio is self-executing, it is said with reference to Article XVIII, Section 4, of the said Constitution in the case of *East Cleveland* vs. *Board of Education,* 112 O. S. 607, at page 619:

> "This delegation of power to a municipality directly from the hands of the people is plain, unambiguous and unequivocal, and it is free from conditions; it is apparently self-executing, requiring no enabling legislation to complete the grant of power."

I have no doubt the court would make a similar observation with respect to Section 6 of said article if the occasion should arise.

Aside from, and without consideration of, the home rule power of municipalities as granted by Sections 3 and 4 of Article XVIII of the Constitution of Ohio, the Attorney General, in 1914, held it to be within the power of a municipality by authority of statute, to purchase electric current from another municipality. In his opinion, published in the Annual Report of the Attorney General for 1914, at page 769, it is held as stated in the syllabus:

> "The amendatory provisions of Section 3809, General Code, 103 O. L. 526, granting to a city or village the power to purchase electric current, are to be considered in connection with the other provisions of said section, as amended, and so considered the legislative intent appears to grant to a city or village authority to purchase such electric current from another municipal corporation, as well as from persons, firms, corporations, etc. The authority of a city or village to purchase electric current from another municipality clearly appears from the consideration of the provisions of Section 3809, General Code, authorizing a city or village to purchase electric current, when considered in connection with the provisions of Section 6, Article XVIII of the constitution of the state, which provides that any municipality holding and operating a public utility for the purpose of supplying the service or product thereof to the municipality or its inhabitants may sell and deliver to others the surplus product of such public utility in an amount not exceeding fifty per centum of the service or product supplied by such utility within the municipality.

The opinion holds that such contract between a city or village for the purchase of electric current from another municipality, shuld be governed by the limitations of said section of the state constitution as to the amount of the current to be taken, and by the provisions of Section 3809 as to the term or duration of the contract."

It will be observed from a reading of Sections 4 and 6 of Article XVIII of the Constitution of Ohio, that municipalities are authorized to acquire and operate within their limits any public utility and to contract with others for the product or services of a public utliity. They are also authorized to sell and deliver the product of a municipally owned public utility to others. In my opinion, the word "others" as used in both Sections 4 and 6 of Article XVIII, supra, includes public corporations as well as private corporations and natural persons and that the right to purchase or sell the product of a municipally owned public utility, limited in accordance with the terms of Section 6, supra, exists in municipalities, regardless of whether or not they have adopted a home rule charter, in accordance with Section 7 of Article XVIII of the Constitution of Ohio, provided, if a charter has been adopted in any municipality, it contains no inhibition on the exercise of such power. *State* vs. *Weiler, et al.,* 101 O. S. 123.

When a municipality engages in the operation of a public utility, it acts in a proprietary, as distinguished from a governmental capacity. *Travellers Insurance Company* vs. *Village of Wadsworth,* 109 O. S. 440. It is said to be engaged in the marketing of the commodity which is the product of the utility, and especially is this so where it engages in such enterprise extra territorium.

Clearly, to market electricity, transmission lines are necessary. If a contract were entered into by one village to furnish electricity fom its municipally owned electric plant to another village and its inhabitants, it would be necessary that the first village acquire by some means transmission lines within the second village for the distribution and delivery of the electricity sold. If transmission lines are already in existence in the second village and can be purchased by the first village it may be to the advantage of the first village to do so rather than construct new lines, and in my opinion, the right to purchase already existing transmission lines under those circumstances, exists in the first village whether the lines belong to a private corporation or to the village which has contracted for the purchase of the electricity. I am also of the opinion that the second village would have a right to sell such lines as they may own or to use the lines in any way most advantageous to them in the making of a contract with the first village.

The Constitution, in both Sections 4 and 6 of Article XVIII, supra, where authority is given a municipality to contract with another for the purchase or sale of the product of its municipally owned utilities, makes no provision whatever as to the details of such contracts, and places no limitations or restrictions on the municipalities with respect to making such contracts except that a municipality is not permitted to dispose of, outside its limits, more than fifty percent of the total service or product supplied by such utility within the municipality. Two municipalities in dealing with reference to this subject, deal with one another in a proprietary capacity, subject of course to the same restrictions in respect to the public of the territory served as would apply to and govern a private corporation similarly engaged. The status of each contracting party, where one municipality contracts with another for either the purchase or sale of the product of a utility owned by one or the other, with reference to their respective inhabitants, differs from the status of a private corporation obtaining a franchise to perform the same service, only in the fact that the municipality selling the product has not been declared by statute to be a public utility and probably is not subject to regulation and supervision by the Public Utilities

Commission of Ohio. *Western Reserve Steel Company et al.* vs. *Cuyahoga Heights et al.*, 118 O. S. 544. Subject to the limitations that any contract made between two municipalities with respect to the service of a public utility owned by one or the other must not be unreasonably discriminatory as to the public of either of the contracting parties, the two municipalities deal with each other as would two private corporations or individuals their rights and powers with respect to the making of such contracts not being otherwise limited or restricted by any provision of the Constitution.

In the case of *Western Reserve Steel Company, et al.* vs. *Village of Cuyahoga Heights, et al.*, supra, there was considered a contract between the city of Cleveland and the village of Cuyahoga Heights, whereby it was agreed by the city of Cleveland to furnish to the village of Cuyahoga Heights water from the municipally owned waterworks of the city of Cleveland for the use of the village of Cuyahoga Heights and its public. Under the provisions of the contract the consumers of water in the village of Cuyahoga Heights paid for such water direct to the city of Cleveland. The case did not involve the right of the two municipalities to make such a contract, and the question was not raised, or at least was not discussed in the opinion of the court. The case turned on the question of whether or not under the contract the city of Cleveland acquired or could acquire a lien on property located in Cuyahoga Heights for unpaid water rents. It is very probable, however, had there been any question as to the legality of the contract between the two municipalities or the right of the two municipalities to contract as they did, the question would have been raised either by counsel or by the court, and from the fact that it was not so raised it is fairly inferable that the court took no exception to the contract between the two municipalities on that account.

Section 3615-1, General Code, quoted in your letter authorizes two or more municipalities to enter into an agreement for the joint construction or management, or construction and management, of a public work, utility or improvement.

I understand your inquiry to relate not to the joint construction and management of an electric plant by the two villages in question but to the right of one village to supply electricity by contract, to the other village and its inhabitants, produced from a plant owned and operated by the first village. Under those circumstances the statute in question is not applicable. In my opinion such an arrangement may be effected regardless of Section 3615-1, General Code.

Your third inquiry, among other things, involves the question of whether or not a contract may be made between the two villages whereby one village furnishes electricity to the other village and its inhabitants at the *same* rate as paid by the inhabitants of the first village. Subject to the restricions that the rate must not be unreasonably discriminatory in favor of any consumer in either village or any place else, the two villages have a right to contract for service at any rate they may deem proper. Ordinarily, perhaps, the *same* rate for service in the second village as is paid by the inhabitants of the first village for like service would not amount to unreasonable discrimination, and yet a situation might exist whereby such a rate would be unreasonably discriminatory. I do not wish to be understood as passing on the question of what in any case would be an unreasonably discriminatory rate.

It is my opinion, in specific answer to your questions:

First, a village owning and operating an electric light plant may legally enter into a contract with a neighboring village to supply such neighboring village with electricity, subject to the limitations contained in Section 6, of Article XVIII of the Constitution of Ohio.

Second, where a municipality contracts with another municipality to furnish electricity from its municipally owned electric plant to the second municipality and its public, and there exists in the second municipality electric transmission lines owned by the second municipality, the said lines may lawfully be purchased by the first municipality from the second municipality.

Third, two municipalities may legally enter into an agreement by which the first municipality will furnish electricity to the residents of the second municipality, purchase the distribution lines owned by the second municipality, read the meters and collect from the inhabitants of the second municipality for electricity at such proper rates as may be agreed upon. In so doing the municipality selling the service is burdened with the same duties and is subject to the same restrictions in respect to the public of the territory served, as would apply to and govern a private corporation similarly engaged.

Respectfully,
GILBERT BETTMAN,
*Attorney General.*

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554.

APPROVAL, LEASE OF PREMISES AT 1117 EAST BROAD STREET, COLUMBUS, OHIO, FOR USE OF THE DIVISION OF CHARITIES.

COLUMBUS, OHIO, June 24, 1929.

HON. RICHARD T. WISDA, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—You have submitted for my examination and opinion a lease between the R. B. Campbell Company, of Columbus, Ohio, as lessor, and the State of Ohio, acting by and through Richard T. Wisda, Director of the Department of Public Works, for and on behalf of the Department of Public Welfare, Division of Charities, covering the premises at 1117 East Broad Street (and including garage space for one automobile), in the city of Columbus, Ohio.

The lease covers a period of six months (6) from the first day of July, 1929, to the thirty-first day of December, 1929, inclusive, and provides for the payment, as rent, during said term, of the sum of two thousand, eighty-one and 70/100 dollars ($2,081.70), payable, three hundred forty-six and 95/100 dollars ($346.95) per month.

Accompanying said lease you have submitted encumbrance estimate bearing No. 5271, issued in favor of R. B. Campbell Company, lessor, which bears the certification of the Director of Finance to the effect that there are unencumbered balances legally appropriated sufficient to pay the rent fixed in said lease.

Finding said lease in proper legal form and properly executed, I hereby approve the same and return said lease to you herewith, together with all other data submitted in this connection.

Respectfully,
GILBERT BETTMAN,
*Attorney General.*

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555.

APPROVAL, BONDS FOR THE FAITHFUL PERFORMANCE OF THEIR DUTIES—FORTY-TWO RESIDENT DISTRICT DEPUTY DIRECTORS—ONE FIRST ASSISTANT DIRECTOR AND CHIEF ENGINEER OF HIGHWAY DEPARTMENT—ONE DEPUTY DIRECTOR OF BUREAU OF CONSTRUCTION OF HIGHWAY DEPARTMENT—DISAPPROVAL, BONDS OF THREE RESIDENT DISTRICT DEPUTY DIRECTORS.