benefit of the item shall go to any institution operated for profit. In other words, it is quite clear by the word "school" he had in mind an institution public in the sense that it is not maintained for private gain and is open to all on equal terms. The restrictions concerning the reading of the Bible, the attendance at public worship, etc., are not of such character as to destroy the publicly charitable nature of the undertaking.

While the commission does not request the opinion of this department upon the specific point, it seems not inappropriate to remark that this department is of the opinion that the succession is not taxable.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1755.

APPROVAL, FINAL RESOLUTION FOR ROAD IMPROVEMENT IN PUTNAM COUNTY, OHIO.

COLUMBUS, OHIO, December 31, 1920.

HON. A. R. TAYLOR, *State Highway Commissioner, Columbus, Ohio.*

1756.

DISCUSSIONS OF RIGHTS OF BOARD OF EDUCATION AND CITY COMMISSION TO ENTER INTO AGREEMENT TO EXTEND WATER MAINS IN CITY STREET ON NAKED PROMISE OF COMMISSION TO REPAY TO BOARD INITIAL COST OF SUCH EXTENSION WHEN SIX PER CENT PROFIT FROM WATER USERS THEREON IS MADE BY CITY.

For a board of education, in order to be furnished city water, to enter into an agreement, to extend the water mains in the city street on a naked promise of the city commission to repay the initial cost of such extension, at a time when, under city control and management, a six per cent profit from water takers thereon is made by the city, is an arrangement of such indefinite and doubtful character for the board, that it should be avoided. The right of a consumer to enforce a demand for water service is, in general, conceded, but to enforce a demand for the extension of a water main depends upon all the facts and circumstances of the case.

COLUMBUS, OHIO, December 31, 1920.

HON. VERNON M. RIEGEL, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your communication, which is as follows:

"1. Springfield is a chartered city and has a commission-manager

form of government. Enclosed find with this statement a copy of the city charter.

2. Springfield owns its own water system and has supplied the various needs for water, the schools being no exception, at a profit to the city. The board of education has never in the past been called upon to lay a water main in the street or streets.

3. The board of education on the 14th of October, 1920, made request as per resolution attached to have water main on either Maiden Lane or Broadway or on any other more convenient point, extended so as to supply the new school building now being erected on Zischler street with water. See copy of resolution attached, also see plat giving location of streets, school house, water mains, hydrants, etc.

4. The city commission made reply through its manager as per letter attached.

5. On Broadway there is now only one house without city water. This might be supplied if the main was extended. On Maiden Lane three houses, now without city water, could be supplied from the present main and one more could be supplied if main was extended.

6. The requested extension would be about two hundred seventy-five feet in length, on either street, leading to the property line of the school site.

Can the Springfield city commission rightfully expect the Springfield board of education to lay a water main extension to the present water main of the city waterworks department, under the terms of its letter, or can the Springfield board of education demand that the water main be extended by the city of Springfield to its property line on Zischler street so that water may be supplied to a public school located on this street between Maiden Lane and Broadway?"

The board of education has formally applied for water. Omitting the formality of the resolution, the city board of education has, after reciting the purchase of land for a site upon which to erect a new school house, the letting of a contract to build the same and the need of water for the use of the contractor, requested that the water main be extended in a way most convenient to the city water department to the new site by said department and to thus furnish the water needed.

To this formal application for the needed service, the city commission through its manager replied as follows:

"At the commission meeting on Monday, October 18, 1920, it was decided by the members of the commission that the school board furnish the material, labor, and install the water line on Zischler street, under the supervision of the water department, and when the returns from the consumers were sufficient to net the city six per cent interest on the investment, the city would take over the line at the cost of installation."

A plat of the streets showing the ends of the water mains now in the streets and the required extension, approximately two hundred seventy-five feet, of the main to reach the new school house site is furnished with a request for an opinion.

From the several conversations we have had with you and interested persons it has been learned that the board of education is reluctant, to say the least, to accept the proposition to extend the water mains for the city water department.

The law applicable to the furnishing of water to schools in cities and villages

for all purposes is found in section 3963 G. C. (108 O. L., Part II, p. 1160), and is as follows:

> "Sec. 3963. No charge shall be made by a city or village, or by the waterworks department thereof, for supplying water for extinguishing fire, cleaning fire apparatus, or for furnishing or supplying connections with fire hydrants, and keeping them in repair for fire department purposes, the cleaning of market houses, the use of any public building belonging to the corporation, or any hospital, asylum, or other charitable institutions, devoted to the relief of the poor, aged, infirm, or destitute persons, or orphan or delinquent children, or for the use of the public school buildings in such city or village.
>
> But in any case where the school district, or districts, include territory not within the boundaries of the city or village, a proportionate charge for water service shall be made in the ratio which such tax valuation of the property outside the city or village bears to the tax valuation of all property within such school district, subject to the rules and regulations of the waterworks department of the municipality governing, controlling, and regulating the use of water consumed."

This amended section is mandatory in form, and differs from the repealed section only in the manner prescribed for payment for water used by school districts whose areas are more extensive than the areas of the villages or cities wherein they are situate.

In cities and villages where the school district is more extensive in area than that of the municipality a charge for the use of water furnished may be made against the board of education by the water department of said municipality. Prior to the amendment in 1911 (102 O. L., 94) no pay for water service could by law be asked of any board of education. And no charge may now be made by any municipality for water used to extinguish fire. This statute as enacted in 1897 is still a living law and is section 14769 G. C. A former attorney general has said:

> "For the sake of accuracy I may add that not every waterworks activity of a municipal corporation is, strictly speaking, of a business character. *The furnishing of water for fire protection is held to be governmental.*"
>
> Opinions of Attorney-General, 1915, Vol. I, p. 975.

The city commission by its proposal does not refuse to supply water, but presents a counter-proposition. The board of education is asked to extend the water main, under the supervision of the water department, for a distance of some two hundred seventy-five feet, to the new site. Coupled with this request is a promise that the initial expenditure made by the board of education will be paid back at some future time, indeterminate in duration, when, under the management of the water department, the rents received from the water takers on said extension show a six per cent profit to the city upon the initial cost thereof.

It is implied, of course, in the proposal that the extended main shall be of such size and material as will take care of all future needs as estimated by the water department on such line for the water required by the takers along the line and beyond, and shall be laid in such workmanlike manner as other mains are laid. The cost may thus be so expensive as to require the board of education to proceed under the law as found in section 7623 in laying said extension.

It is, of course, implied that the use of the street to lay such main shall be granted to the board of education. Thereafter the board may not again re-enter said street except on further permission, since repairs that may at any time become needed are not provided for in the proposal and the board thus loses control over the materials it has bought and laid in making such extension.

Under the terms of the proposal the board becomes, perhaps, a part owner of the water system or perhaps it makes a loan of its funds to the water department of the city, or again, perhaps, it makes a gift to the city. Legal permission to receive gifts is accorded the board, but it is quite doubtful whether it may become a doner of the funds it holds in trust for the education of the youth of the district. If the hour ever strikes when the water department shall receive a six per cent return on the initial expenditure and said expenditure is repaid, then the use of these funds has become a loan. While it is permissible for the board, under certain conditions, to borrow, it is still quite doubtful if it may ever make a loan of its funds for any such purpose as herein proposed.

In Alter vs. Cincinnati, 56 O. S., at page 64 of the opinion, speaking of section 6, Article VIII of the constitution, the court says:

> "This section of the constitution not only prohibits a business partnership, which carries the idea of a joint or undivided interest, but it goes further and prohibits a municipality from being the owner of part of a property which is owned and controlled in part by a corporation or individual. The municipality must be the sole owner and controller of the property in which it invests its public funds."

If the board of education were a private corporation, not a public one, it is evident it may not become a joint owner of the water system. If such extension of the water mains as is proposed operates to make it a joint owner, which proposition is not free from doubt as to joint ownership, since, as we have seen, the board loses, after leaving its property in the street, all control or dominion over it. The board of education has no interest or authority in managing the property and it has no beneficial interest except a supply of water, for which it pays a fixed and profit making rate to the city.

Under section 7620 G. C. as amended, 108 O. L., Part I, p. 187, the law is:

> "* * * It (the board of education) also, shall provide * * * and make all other provisions necessary for the convenience and prosperity of the schools within the sub-districts."

Here the law, doubtless, permits and empowers the board of education to make a temporary tap of the water main where it now is in the streets near the new site, if it can secure the right to do so, and to lay a private line over the property of others at a reasonable expense, thus carrying the water where it may be used, subject of course to the city's consent; or it may drive a well on its own property and construct a water system for use in its new building if no sanitary or other regulation forbids or may forbid should the water supply become bad or unfit for use.

If the board should adopt either of the above suggestions, the property bought and used is and remains its property over which it exercises control and authority at all times.

The result of compliance with the city commission's proposal is so impalpably involved in the hazy confines of doubtful legal implication that consent to the board's acceptance of it as a sure or safe proposition of law cannot after diligent search be clearly discovered.

In view of the foregoing discussion of the city commission's right to expect the board of education to extend the water main, and the board's disinclination to do so, it is believed it will be more profitable to turn to and to discuss the other part of the question asked.

> "In modern days it is not only considered a governmental function but also, and especially in the United States, an imperative governmental duty to provide for and maintain a system of public education."
> Abbott Municipal Corp., p. 2378.

The light in which public education and the support of the schools for all people has been held from the earliest times and the trend of legislation in Ohio under all our constitutions indicate that such functions are not municipal, but belong peculiarly and primarily to the state and have been sedulously fostered and jealously guarded by it at all times. The ordinances of 1787 recites that "schools and the means of education shall forever be fostered." Section 25 of the Bill of Rights in the constitution of 1802 provides for the use of the revenues received from lands given the state by congress for the use of the schools, and opens the doors of all state schools to all the people of the state. Section 2 of Article VI of the constitution of Ohio remains as found in the constitution of 1852 and is as follows:

> "The general assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund will secure a thorough and efficient system of common schools throughout the state; * * *."

The general assembly has passed many laws for the establishment of a public school system in Ohio and recently, in 1914, it enacted a very elaborate and extensive school code for Ohio, which code is now in operation throughout the state. Many other laws for raising, by taxation, great sums of money for school purposes are provided. Colleges and normal schools are supported by the state. Everything seemingly possible is carefully attempted by the state looking to and earnestly desiring the thorough preparation of the youth of the state for the many and complex duties that will be theirs when they come to exercise the duties of citizens. Obviously the educational system is a serious business, one of the peculiar functions of the state, and has always been so regarded in Ohio.

Anything impeding the progress of education in the common schools of the state or hindering the acquiring by the public thereof of an educational training is frowned upon and swept aside as against public policy and the welfare, peace, and perpetuity of our institutions. In short, the public school system is a governmental function of the state.

The charter of the city of Springfield reads thus:

> "Sec. 83. Nothing in this charter contained shall operate in any way, except as herein specifically stated, to limit the city commission in the exercise of any of its lawful powers respecting public utilities, or to prohibit the city commission from imposing in any such grant such further restrictions and provisions as it may deem to be in the public interest, provided only that the same are not inconsistent with the provisions of this charter or the constitution of the state."
>
> "Sec. 84. All general laws of the state applicable to municipal corporations, now or hereafter enacted, and which are not in conflict with the

provisions of this chapter, or with ordinances or resolutions hereafter enacted by the city commission, shall be applicable to this city provided, however, that nothing contained in this charter shall be construed as limiting the power of the city commission to enact any ordinance or resolution not in conflict with the constitution of the state or with the express provisions of this charter."

Here the city declares its intention to avoid conflict with the inhibited powers found in the general laws and the constitution. There is to be no abuse of corporate power, no unlawful exercise of power possessed, no assumption of power not conferred. See Elyria G. & W. Co. vs. Elyria, 57 O. S. 347.

"Municipal waterworks constitute a municipal utility, managed and conducted by the municipality in its proprietary capacity as distinguished from its *governmental* capacity. It is clear that the local regulations which are under section 3 of Article XVIII of the constitution to be subordinate to the general laws are those of a *governmental* character only. It follows, therefore, that the provisions of a municipal charter pertaining to the exercise by the municipality of its corporate or business functions are in no way subordinate to or controlled by the provisions of the general laws enacted for the government of municipalities generally. On the contrary, it seems reasonably clear that such general laws would not be applicable at all in a municipality operating under a charter unless the municipality had as a part of its charter, either expressly or by necessary implication, adopted such general laws. * * *."

Opinions of Attorney-General, 1915, Vol. I, p. 975.

Sections 3955 G. C. et seq. provide for the creation, support, regulation, etc., of waterworks systems in cities. Discussing some of these sections in deciding that water rent is a lien upon the property supplied, in Young vs. Hamilton, 10 O. N. P. (n. s.) 369, the court says:

"Under the statutes above quoted, the director of public service is compelled to furnish water, on application, and to prepare the necessary by-laws and regulations for the government of his department * * *."

In C. H. & D. R. R. Co. vs. Bowling Green, 57 O. S. 336, the syllabus is:

"An electric light company, owning an electric plant, and engaged in furnishing light to the inhabitants of a city or village, and in lighting the streets thereof, has so far devoted its property to a public use, that it is bound to furnish light within such city or village impartially to all applicants at a reasonable price."

In Dillon-Municipal Corporations, Vol. III, 5th edition, sec. 1317, under "Consumers," it is held:

"* * * The organization supplying water or light, whether it be a municipal or a private corporation, is under *a duty to consumers to supply* the water or light *impartially to all reasonably within the reach of its pipes,* mains, and wires. The public character of the service, the obligation of the municipality to perform its duty towards all the inhabitants without discrimination, and the acceptance of a charter to perform a public service

by a private corporation create this duty, which *must be exercised without discrimination* between persons similarly situated and under circumstances substantially the same. The organization furnishing a supply cannot act capriciously or discriminate against any one who is able to pay for the service furnished. The law will not permit any undue advantage to be given to a consumer by doing for him what is not done for others under circumstances substantially the same. Therefore, whether the supply be furnished by a municipal or by a private corporation, the water or the light *must be furnished to all who apply* therefor, and *offer to pay* the rates and *abide by such reasonable rules* and regulations as may be made as a condition of rendering the service. * * *"

In the present instance the board of education as a consumer is required to observe the regulations provided in the last part of section 3963 G. C., which reads:

"Subject to the rules and regulations of the waterworks department of the municipality governing, controlling, and regulating the use of water consumed."

This refers, of course, to the manner of the consumption of the water furnished.

To be in a position to demand the extension of the water mains, it must appear that under all the circumstances of the case that such extension may be made without discrimination between persons similarly situated under substantially the same circumstances. Facts that might be discriminative where private persons are concerned might not be such where a board of education is the applicant for water service, because of the fact that the board represents a governmental functions of greater importance than the convenience of a private individual.

In the very nature of the case this is a question of fact to be discovered from all circumstances. It cannot be decided as a matter of law in the absence of the evidential facts required to be established. It is a question of such importance that it ought to be determined by having the law judicially applied under the circumstances here particularly pertinent. While such determination would be conclusive here, in other charter cities it might not be effective nor applicable.

The right of the board of education to demand an extension of the water main is generally conceded and is more urgent, immediate and serious than that of an individual, but is to be determined in this case by all the facts and circumstances under which the municipality labors in its business or proprietary character as a public utility holding out its services to the citizens of the city under a charter form of government.

Respectfully,
JOHN G. PRICE,
Attorney-General.