

to believe the accused guilty, order the accused to enter into a recognizance to appear before the proper court of the county, viz., the common pleas court or the probate court.

In either of the above cases, if the accused, in a writing, subscribed by him and filed before or during the examination, waive a jury and submit to be tried by the magistrate, the justice of the peace may render final judgment. While the filing of such a waiver in this class of cases may seem unnecessary because the accused would in no event be entitled to a jury trial inasmuch as the penalty therein provided is only a fine, by the express terms of the statute above cited, unless such waiver be filed, the justice of the peace is without jurisdiction to hear and finally determine the cause.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

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512.

APPROVAL, NOTE OF FALLS TOWNSHIP RURAL SCHOOL DISTRICT,  
HOCKING COUNTY, \$6,720.00.

COLUMBUS, OHIO, May 19, 1927.

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

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513.

MUNICIPALITY—ALTERATION OF CERTIFICATE—SECTIONS 13105,  
13088 AND 5660, GENERAL CODE, DISCUSSED—"FALSE" AND  
"FRAUDULENT" DISCUSSED—OBLIGATION ENTERED INTO WITH-  
OUT CERTIFICATE NULL AND VOID—CRIMINAL LIABILITY DIS-  
CUSSED.

**SYLLABUS:**

1. *Under Section 13088, General Code, an offense is committed when one maliciously alters, defaces or mutilates the whole or part of a record authorized to be made by law pertaining to a municipal office or officer, or an other public record authorized by law, or a paper or writing duly filed under authority of law with, in or by a municipal office or officer.*

2. *Whether or not the changing of the date on an invoice for supplies sold to a municipal corporation would constitute a violation of Section 13088, General Code, would depend upon the facts in each particular case, including facts showing whether or not such alteration was done maliciously, whether or not the bill was a paper or writing duly filed under authority of law with, in or by a municipal office or officer, et cetera.*

3. The word "false" as used in Section 13105, General Code, means "unfounded" or "unjust", and the word "fraudulent" means "wrong" or "deceitful". However, there is little distinction between a claim that is false and one that is fraudulent, and in so far as the practical operation of the statute is concerned, it will be generally found that when a claim is fraudulent it is also false, and when one is false it is also fraudulent.

4. In view of the requirements of Sections 5660 and 5661, General Code, that before an obligation of a municipality can be legally incurred, a certificate must be made by the proper fiscal officer to the effect that money required to meet such obligation has been appropriated and is in the municipal treasury and the provisions of such sections making an obligation entered into without such a certificate null and void and preventing recovery thereon, bill or claim for supplies or services sold and furnished without the required certificate and, therefore, by the terms of said sections, a claim that is null and void and one upon which recovery can not be had, which is post dated so as to make such claim valid on its face, is as a matter of law a false or fraudulent claim within the meaning of Section 13105, General Code.

5. Whether or not a conviction could be had under Section 13105, General Code, where one actually sells or furnishes supplies or services to a municipality, without the certificate prescribed by Section 5660, General Code, having been filed and then post dates an invoice for such supplies or services in order that pay may be collected for such supplies or services which have been furnished is a practical question which must be left primarily to the judgment of the proper prosecuting attorney and grand jury in the first instance, and then to the determination of a petit jury, under proper instructions from the court.

COLUMBUS, OHIO, May 20, 1927.

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

GENTLEMEN:—I acknowledge receipt of your letter of recent date requesting my opinion, which letter reads as follows:

"In the city of ——— officers and employes incur obligations for labor and supplies without obtaining a certificate from the city auditor before such obligations are incurred as provided by Section 5660, G. C. Subsequent to the incurring of the obligation and at a much later date a certificate is obtained, the auditor being under the impression that the labor and supplies are to be procured.

When invoices for such purchases are received the dates thereof are altered by city officers and employes to make it appear that said labor or supplies were purchased on or after the date of the auditor's certificate.

Question 1. Does such alteration of dates constitute a criminal offense in view of the provisions of Section 13088, G. C.?

Question 2. In view of the provisions of Section 5661, G. C., does the procedure described result in a fraudulent voucher when signed and submitted to the auditor for payment? Section 13105, G. C."

You state in substance that the officers and employes of a certain city have been incurring obligations for labor and supplies without a certificate from the city auditor that the money required to meet such obligations has been lawfully appropriated or authorized or directed for such purpose and is in the treasury or in process of collection; that subsequent to the incurring of such obligations and at much later dates a certificate is obtained from the auditor who

is under the impression that the obligations for the labor and supplies have not yet been incurred; and that when invoices covering such purchases are received the dates of such invoices are altered by city officers and employes for the purpose of making it appear that such obligations were incurred after the date of the auditor's certificate. You refer to Section 5660 and 5661 of the General Code, and ask:

1. Does such alteration of dates on the invoices described constitute an offense under Section 13088; and

2. In view of the provisions of Section 5661, is such invoice a fraudulent claim, bill or account when submitted to the auditor, within the meaning of Section 13105, General Code?

Upon inquiry, your Bureau was unable to furnish any facts in addition to those above set forth.

In the absence of concrete facts upon which to base an opinion, it is difficult, if not impossible, definitely to determine whether or not a crime is committed upon a certain general statement of fact, and in so far as your first question is concerned little else can be done in this opinion than to quote and analyze the penal section of the code first above referred to and state what acts will constitute a crime under such section.

1. Section 13088 of the General Code, reads as follows:

"Whoever maliciously alters, defaces, mutilates, destroys, abstracts or conceals the whole or part of a record, authorized to be made by law, of or pertaining to a court, justice of the peace or a state, county, township or municipal office or officer, or other public record authorized by law or a paper or writing duly filed with, in or by such court, office or officer, shall be fined not more than three hundred dollars or imprisoned not more than three months, or both."

In so far as the facts stated in your letter are concerned, before a conviction could be had under this section it would be incumbent upon the state to prove beyond a reasonable doubt that the accused (1) either altered, defaced or mutilated (2) the whole or part of a record authorized to be made by law pertaining to a municipal office or officer, or an other public record authorized by law, or a paper or writing duly filed under authority of law with, in or by a municipal office or officer, and (3) that such alteration, defacement or mutilation was done *maliciously*.

It is my opinion that one who changes a date on such an invoice as the one under consideration would undoubtedly alter such invoice. Whether or not it can be found that such alteration was done *maliciously* would depend upon the facts in each case, and in the absence of such facts it is utterly impossible to determine whether or not in the cases to which you refer there would be a violation of this section. It would also be a question of fact to be determined in each particular case as to whether or not the invoice in question would be a paper or writing duly filed under authority of law with or by a municipal officer, or in a municipal office. I can conceive of cases where such an invoice might be changed prior to the time it was duly filed under authority of law, in which event, clearly a violation of this statute would not take place. On the other hand, after the legally authorized filing of such a paper with or by a duly authorized officer, it might become a paper writing within the terms of the statute. As above stated, no specific facts are given, and in the absence of such facts it is impossible definitely to say that an offense would or would not be committed under the section above set forth.

2. As to your second question, Sections 5660 and 5661, General Code, to which you refer in your letter, provide in part as follows:

"Sec. 5660. No expenditure, excepting from the proceeds of bonds, shall be made unless authorized by appropriation both as regards purpose and amount, nor shall any expenditure be made from the proceeds of bonds unless duly authorized or directed.

No contract, agreement or other obligation calling for or requiring for its performance the expenditure of public funds from whatsoever source derived, shall be made or assumed by any authority, officer, or employee of any county or political subdivision or taxing district, nor shall any order for the payment or expenditure of money be approved by the county commissioners, council or by any body, board, officer or employee of any such subdivision or taxing district, unless the auditor or chief fiscal officer thereof first certifies that the money required to meet such contract, agreement or other obligation, or to make such payment or expenditure has been lawfully appropriated or authorized or directed for such purpose and is in the treasury or in process of collection to the credit of the appropriate fund free from any previous and then outstanding obligation or certification, which certificate shall be filed with such authority, officer, employee, commissioners, council, body or board, or the chief clerk thereof. \* \* \*

"Sec. 5661. Every contract, agreement or other obligation and every order entered into or issued contrary to the provisions of the preceding section shall be null and void, and no claim or demand thereon shall be recoverable from any county or other political subdivision or taxing district or from any public funds.

Any officer, employe or other person who issues any order contrary to the provisions of the preceding section or who expends or authorizes the expenditure of any public funds for or on account of any such void contract, agreement, obligation, or other, shall be liable to the county or other political subdivision or taxing district for the full amount paid from the funds of such county, subdivision or district on or on account of any such void contract, agreement, obligation or order.

Any auditor or clerk of any county or other political subdivision or taxing district who furnishes a certificate under Section 7 of this act (G. C. 5660) which contains any false statement shall be liable to the county or other political subdivision or taxing district for the full amount paid by or recovered from such county, subdivision or district on or on account of any contract, appropriation or expenditure based upon such false certificate. The prosecuting attorney of the county or the city solicitor or other chief law officer of the subdivision or district shall enforce this liability by civil action brought in any court of appropriate jurisdiction in the name of and on behalf of the county, municipality, subdivision or district.

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Section 13105 in so far as pertinent to your inquiry, provides:

"Whoever, knowing it to be false or fraudulent in whole or in part, makes, presents for payment or certifies as correct to \* \* \* the auditor or other accounting officer of a municipal corporation a claim, bill, \* \* \* account, \* \* \* or other evidence of indebtedness for procuring its allowance or an order for the payment thereof out of the treasury \* \* \* of such \* \* \* municipal corporation, or whoever, knowing it to be false

and fraudulent in whole or in part, receives payment thereon from the treasurer of the \* \* \* municipal corporation, if it is *false or fraudulent* to the amount of thirty-five dollars or more, shall be imprisoned in the penitentiary not less than one year nor more than ten years, or, if it is *fraudulent* to a sum less than that amount, shall be fined not more than two hundred dollars or imprisoned not more than thirty days, or both." (Italics the writer's.)

It will be observed that in so far as the making, presenting or certification as correct of a claim is concerned, the statute makes it an offense to make, present or certify a claim if it be "*false or fraudulent*" in the amount of thirty-five dollars or more, while if the amount be less than thirty-five dollars the statute reads "*if it is fraudulent* to a sum less than that amount", the word "*false*" being omitted from the latter clause. It will also be noted that in so far as receiving payment on such a claim is concerned, before an offense is committed, payment must be received with knowledge that the claim is "*false and fraudulent*."

There is little distinction between a claim that is false and one that is fraudulent, and no significance is attached to the use of the disjunctive "or." In so far as the practical operation of the statute is concerned, it will generally be found that where a claim is fraudulent it is also false, and where one is false it is also fraudulent.

In your letter you ask: "In view of the provisions of Section 5661, G. C. does the procedure described result in a fraudulent voucher," and the question to be answered therefore is: In view of the requirements of Sections 5660 and 5661, supra, that before *an obligation can be legally incurred* a certificate must be made by the proper fiscal officer that money required to meet such obligation has been appropriated and is in the treasury, and the provisions of such sections making any obligation entered into without such a certificate null and void and preventing recovery thereon, is a claim a false or fraudulent one within the meaning of Section 13105, supra, where the date on the invoice representing such claim is changed so as to make it appear that an obligation actually incurred *without such a certificate* was incurred after the required certificate was obtained from the auditor.

In the case of *United States vs. Bittinger*, 24 Fed. Cases, 1150, under a similar statute of the federal government, with reference to the words "false" and "fraudulent", the Federal District Court said as follows:

"Section 5438 of the United States Statutes under which the indictment is drawn, provides: '**Every person who makes or causes to be made or presents or causes to be presented for payment or approval \* \* \* any claim upon or against the government of the United States, or any department thereof, knowing such claim to be false, fictitious or fraudulent, shall be imprisoned**', etc. By making a claim, as defined in this statute, is meant the asking or demanding on part of the defendant of the government payment for services. *The term 'false,' used, means 'unfounded' or 'unjust' by 'fictitious' is meant 'not real'; by 'fraudulent,' 'wrong' or 'deceitful.'* *These terms have no special legal signification in their use in this statute, but are to be taken by you in their ordinary and well-understood sense.* The language of the statute and indictment is, 'knowing such claim to be false, fictitious, and fraudulent.' By the word 'knowing', as here used, is meant the having a certain and clear perception of the falsity of the claim made. The object of the statute is to prohibit and punish the drawing of money from the treasury of the United States *without having rendered legal and recognized equivalents.*" (Italics the writer's.)

In the opinion in the case of *United States vs. Shapleigh*, 54 Fed., 126, in construing the same federal statute, a false claim was defined as follows:

"A claim against the government is a false one, within the meaning of the statute, if it is an untrue claim, for example, if a claim is made for labor or supplies said to have been furnished to the government, and the claim is made for *more services* than have been actually rendered, or *more supplies* than have been furnished, such a claim is a false one within the meaning of the statute."

In the case of *Bridgeman vs. United States*, 140 Fed., Rep., 577, 594, in defining a false and fraudulent claim, the following language was used by District Judge Hunt in charging the jury:

*"A false claim means a statement or a claim which is not true. I think that the law did not intend to make a mere mistake, made through error or inadvertence, to be brought within the definition of a false claim as used in the law, if it was believed by the agent to be true. An error, for instance, might occur in the amount of figures, or in the name, or there might even be an inadvertent statement of a claim which might be technically in fact false. And if it were not known to the agent, and if he did not mean to make a false claim, a mistake thus honestly made would not expose him to punishment under the statute. Neither is a mere lack of business capacity or prudence what the statute would punish for. But if the entry was an untrue one, and was known to the agent to be untrue and false, and was by him certified to while so knowing its false and untrue nature, then a jury should find that such a person, if on trial, did, within the meaning of the statute, make a false claim. A fictitious claim against the government is one preferred against it for supplies said to have been furnished to the government, or for services said to have been rendered to it, no part of which said supplies or services were in fact rendered or supplied. A fraudulent claim against the government is a false or fictitious claim, gotten up or contrived by some person or persons with the design or purpose to deceive or defraud the government or its departments or officers in Washington, or to present it for approval or payment." (Italics the writer's.)*

By the express terms of Section 5661, unless there be a certificate by the auditor that funds have been appropriated and are in the treasury sufficient to take care of an obligation to be incurred by a municipal officer, no such obligation can be legally incurred; nor can one who sells goods or services to the municipality without such a certificate having been made, maintain an action to recover for the goods sold or services furnished. If the date on a bill or invoice covering such supplies or services is changed so as to make it appear that goods were sold or services were furnished after the making of the required certificate, when as a matter of fact they had been sold or furnished without such certificate, undoubtedly such bill or invoice would be false and fraudulent as would the claim which such bill or invoice represents. To give a concrete example: If without the required certificate an officer of a municipality should purchase certain supplies on the first of the month, and if such official should procure the auditor on the tenth of the month to make a certificate that funds had been appropriated and were in the treasury to pay for such supplies, and if after the tenth a bill for such supplies should be presented to the proper officer, drawn so as to make it appear that the supplies were actually sold on the eleventh of the month, that is, after the required certificate was made, the bill undoubtedly would be a false and fraudulent one as would the claim evidenced by such bill. On its face

it would appear that the goods was sold after the required certificate had been made, and that, therefore, the claim was a valid one upon which recovery could be had, when as a matter of fact no supplies had been furnished on the date shown on the invoice, but upon another date, and at a time which, because of the provisions of Section 5661, recovery could not be had. In the language of the court in the case of *United States vs. Shapleigh*, supra, the claim would be a false one within the meaning of Section 13105, supra, because it was an untrue one. It would be a fraudulent claim, within the language of Judge Hunt in the case of *Bridgeman vs. United States*, supra, because it would be "a false or fictitious claim gotten up or contrived by some person or persons with the design or purpose to *deceive* or defraud" the municipality, and to draw money from the municipal treasury "without having rendered *legal* and recognized equivalents."

It should be borne in mind that the above discussion is from a moot or academic viewpoint. Whether or not a conviction could be had, where one actually furnishes supplies to a municipality without the prescribed certificate having been filed, and then post dates an invoice in order that pay may be collected for supplies actually furnished, is a practical question which must be left primarily to the judgment of the proper prosecuting attorney and grand jury in the first instance, and then to the determination of a petit jury, under proper instructions from the court. As heretofore pointed out, specific facts upon which an opinion of an equivocal character can be rendered are not furnished. Probably the most that can be said is that should one be indicted in a case such as you present, evidence that an invoice had been post dated in order to make a *void* claim valid on its face would be admissible, and if a jury upon such evidence should find the defendant guilty, under the law of Ohio, the court would not be justified in disturbing the verdict of the jury.

Because of the nature of your inquiry it is impossible specifically to answer your questions. I therefore summarize the following conclusions with reference to the two sections about which you inquire:

1. Under Section 13088, General Code, an offense is committed when one *maliciously* alters, defaces or mutilates the whole or part of a record authorized to be made by law pertaining to a municipal office or officer, or an other public record authorized by law, or a paper or writing duly filed under authority of law with, in or by a municipal office or officer.

2. Whether or not the changing of the date on an invoice for supplies sold to a municipal corporation would constitute a violation of Section 15088, General Code, would depend upon the facts in each particular case, including facts showing whether or not such alteration was done maliciously, whether or not the bill was a paper or writing duly filed under authority of law with, in or by a municipal office or officer, *et cetera*.

3. The word "false" as used in Section 13105, General Code, means "unfounded" or "unjust", and the word "fraudulent" means "wrong" or "deceitful". However, there is little distinction between a claim that is false and one that is fraudulent, and in so far as the practical operation of the statute is concerned, it will be generally found that when a claim is fraudulent it is also false, and when one is false it is also fraudulent.

4. In view of the requirements of Sections 5660 and 5661, General Code, that before an obligation of a municipality can be legally incurred, a certificate must be made by the proper fiscal officer to the effect that money required to meet such obligation has been appropriated and is in the municipal treasury and the provisions of such sections making any obligation entered into without such a certificate null and void and preventing recovery thereon, a bill or claim for supplies or services sold and furnished without the required certificate and, therefore, by the terms of said sections, a claim that is null and void and one upon which recovery can not be had,

which is post dated so as to make such claim valid on its face, is as a matter of law a false or fraudulent claim within the meaning of Section 13105, General Code.

5. Whether or not a conviction could be had under Section 13105, General Code, where one actually sells or furnishes supplies or services to a municipality, without the certificate prescribed by Section 5660, General Code, having been filed, and then post dates an invoice for such supplies or services in order that pay may be collected for such supplies or services which have been furnished is a practical question which must be left primarily to the judgment of the proper prosecuting attorney and grand jury in the first instance, and then to the determination of a petit jury, under proper instructions from the court.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

514.

COMMON PLEAS COURT—AUTHORITY TO APPOINT SALARIED  
PROBATION OFFICERS—AUTHORITY OF MUNICIPAL JUDGES—  
SECTIONS 1554-1 AND 1662, GENERAL CODE, DISCUSSED.

*SYLLABUS:*

1. *A judge of the common pleas court has no authority to appoint a salaried probation officer except as provided in Section 1554-1, General Code.*

2. *Municipal judges, when authorized by statute, may appoint probation officers, which officers may receive such salary as the proper officers of the municipality prescribe, even though a county department of probation has been established by the common pleas court, as authorized by Section 1554-1, General Code.*

3. *When a juvenile judge of the county has appointed a salaried probation officer, as authorized by Section 1662, General Code, it is not lawful to unite such probation department with the county department of probation authorized by Section 1554-1, General Code.*

COLUMBUS, OHIO, May 20, 1927.

HON. JOHN E. HARPER, *Director, Department of Public Welfare, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of your recent communication reading as follows:

“House Bill 197, 86th General Assembly, provides for a system of local administration of probation, parole and conditional pardon, and places certain duties in respect thereto upon the State Department of Public Welfare. In this connection we respectfully ask your opinion on the following questions:

1. Has a common pleas judge the authority to appoint a salaried probation officer without the establishment of a county department as provided for by Section 1554-1?

2. If a county department of probation has been established, may a municipal judge appoint a probation officer, salaried, who is not a member of the county department?

3. If a county juvenile court has already a salaried probation officer regularly employed, is it possible to unite the probation work of that court or to merge it with the work of a county department of probation later established under Section 1554-1?