Section 1536-213, Revised Statutes (now Section 3821, General Code), or under Section 2835, Revised Statutes, (now Section 3939, General Code), issue bonds to pay its part of the cost of specific improvements. (Matter in parentheses the writer's.)

5. The bonds authorized by Section 53 of the Municipal Code of 1902 can not be provided for by resolutions or ordinance until after the passage of an ordinance providing for the improvement."

Although Section 3939, General Code, which authorized the issuance of bonds by municipalities for specific improvements, was amended so as to eliminate from that section the authority to issue bonds, and although Sections 3914 and 3821, General Code, authorizing the issuance of bonds by municipalities in anticipation of the collection of special assessments and to pay the municipalities' portion of the cost of improvements paid for in part by special assessments, were repealed, and municipalities are now authorized under Section 2293-2, General Code, to issue bonds for the purpose of acquiring or constructing any permanent improvement which a municipality is authorized to acquire or construct, I am unable to reach the conclusion that this change in the statutes has in any way affected the conclusions reached in the 1918 opinion, supra, and announced in the case of *Heffner* vs. *The City of Toledo*, supra. In other words, I am of the opinion that when a municipality desires to issue bonds for the purpose of acquiring or constructing a permanent improvement, the legislation providing for such bonds must designate a specific improvement or improvements for which such bonds are to be issued, and such municipality may not issue bonds to pay its share of the cost of a class of improvements, the specific improvements to be selected later.

In view of the foregoing, and answering your question specifically, it is my opinion that a municipal corporation may not legally issue bonds for the purpose of creating a fund from which to pay the city's portion of the cost of paving and improving streets, the streets and the amount of the municipality's portion for each to be determined thereafter.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2385.

SINKING FUND TRUSTEES—SALE OF SECURITIES—FUNDS PROHIBITED FOR BOND REINVESTMENT PURPOSES.

SYLLABUS:

Sinking fund trustees of a municipality are without power to sell securities in their hands for the purpose of raising funds to purchase municipal bonds offered for sale by the municipality.

COLUMBUS, OHIO, July 23, 1928.

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

GENTLEMEN:—This will acknowledge receipt of your recent communication, as follows:

"May a board of sinking fund trustees of a municipal corporation legally sell investments for the purpose of providing funds with which to purchase bonds for investment which bear a higher rate of interest?

We are enclosing a letter from Mr. John D. Ellis, City Solicitor, Cincinnati, Ohio, in relation to the matter."

The enclosed letter gives in detail the facts which, in the opinion of Mr. Ellis, constitute a justification for the proposed action of the sinking fund trustees of Cincinnati. These facts are disclosed in the first two paragraphs of the letter, which are as follows:

"The Sinking Fund Trustees have on hand bonds bearing 3½% and 3.65% interest and also 4% bonds issued prior to 1912 and therefore non-taxable, in which they have invested a portion of their surplus funds. They now have no surplus funds for investment. The City of Cincinnati purposes to issue certain improvement bonds bearing 4% interest and to offer them to the Sinking Fund. It has been proposed that the Sinking Fund Trustees shall agree to accept these 4% bonds when offered, thus creating an obligation under the terms of General Code 4517, and then, to satisfy this obligation, sell the 3½% and 3.65% and 4% bonds and invest the proceeds in the new 4% bonds.

All of the bonds sold will be sold at par or above and the purpose of the transaction is to allow the trustees of the sinking fund to increase the return to the sinking fund on the money so reinvested and, if legal, the result would be desirable."

Thereafter reference is made to the case of *Cleveland* vs. *Baker*, 4 Ohio App. 68, and to a prior opinion of this office, found in Volume 1 of Opinions of the Attorney General for 1921, at page 678, the syllabus of which is as follows:

"The sale of securities in the hands of the sinking fund trustees, for the purpose of raising funds to purchase municipal bonds offered for sale by the municipality, is unauthorized by law and illegal, and such an act is a breach of official duty, rendering such trustees liable to the municipality for any loss or damage occasioned by reason of such illegal transactions."

Mr. Ellis points out that, under the facts then before the Attorney General, the conclusion as to the illegality of the action of the sinking fund trustees was correct, but he suggests the statement contained in the syllabus, heretofore pointed out, is too broad, especially in view of the decision in the case of *Cincinnati* vs. *Baker*, which decision was not noticed in the opinion. The specific questions then under consideration were whether or not the sinking fund trustees could sell below par securities in which they had theretofore invested for the purpose of purchasing bonds to be offered by the municipality and also whether they might take bonds offered for sale and thereafter sell them at private sale below par, deferring payment to the municipality for such bonds until the subsequent resale. I think it quite obvious that the second procedure under consideration was clearly illegal. It constituted a subterfuge by which bonds of a municipality were to be sold below par and the sinking fund was used as a mere convenience in accomplishing this end without even a colorable attempt to make an actual investment in the bonds. The answer to the first question was not so clear, but the conclusion of my predecessor was based upon a consideration of the statutes applicable to the powers of the sinking fund trustees. Reference was made to Section 4514 of the General Code, which provides as follows:

"The trustees of the sinking fund shall invest all moneys received by them in bonds of the United States, the State of Ohio, or of any municipal

corporation, school, township or county bonds, in such state, and hold in reserve only such sums as may be needed for effecting the terms of this title. All interest received by them shall be reinvested in like manner."

It is to be noted that it is the mandatory duty of the trustees to invest moneys received by them in the specified classes of securities and they are permitted to hold in reserve only such sums as may be needed for retirement and interest purposes. It is also to be observed that no specific right of reinvestment is given, although I have no doubt that where a security held by the sinking fund matures and is paid, it is not only within the power but also the duty of the trustees to reinvest the proceeds.

With respect to the disposal of the securities in which the funds of the sinking fund have been invested, the provisions of Section 4517 of the General Code are applicable, which section is as follows:

"The trustees of the sinking fund shall have charge of and provide for the payment of all bonds issued by the corporation and the interest maturing thereon. They shall receive from the auditor of the city or clerk of the village all taxes, assessments and moneys collected for such purposes and invest and disburse them in the manner provided by law. For the satisfaction of any obligation under their supervision, the trustees of the sinking fund may sell or use any of the securities or moneys in their possession."

Here is specific authority to sell securities when necessary to satisfy any obligation under the supervision of the trustees. This, of course, means when necessary to provide for the retirement of bonds of the municipality or to meet interest charges thereon. The question, accordingly, occurs whether this is the sole occasion on which investments may be sold or whether, the statutes being silent, there exists implied authority of readjusting investments by sale and reinvestment. My predecessor apparently reached the conclusion that the extension of the authority to sell the securities under certain contingencies effectively negatived the right of disposal in other cases. This conclusion is stated in the opinion, as follows:

"This section (G. C. 4514) clearly indicates that the trustees of the sinking fund 'shall invest all moneys received by them in bonds of the United States,' etc. The section does not authorize such trustees to sell the securities already within their possession as investments in order to raise funds for the purpose of other investments, but definitely authorizes the investment of moneys in their possession not already invested.

It would seem, therefore, that the selling of the securities representing the invested funds of the sinking fund trustees, in order to obtain funds for the purchase of municipal bonds by such trustees, as well as the selling of both the securities in their hands and also those purchased from the municipality below par, is an act clearly unauthorized by law, and beyond the powers conferred upon the sinking fund trustees to consummate, and for which such trustees would be liable to the municipality for any loss or damage occasioned by reason of the illegal transaction."

If this question were before me as a matter of first instance, I might be inclined to reach a conclusion other than that which I feel forced to reach. The situation suggested by the letter of Mr. Ellis is one in which I feel the trustees would not be violating any express statutory prohibition or any of the ordinary rules applicable to the functions of trustees in case they adopted the suggested course. That is to say, they propose to sell comparatively low interest-bearing investments and, with the proceeds, purchase bonds of the city bearing a higher rate of interest. I assume

that this course is not to be adopted as a subterfuge to obtain a disposition of the bonds of the municipality which might not otherwise be disposed of at par and accrued interest. It cannot be presumed that the investment of these funds in the bonds of the City of Cincinnati would be an abuse of the ordinary discretion of trustees, since bonds of municipalities in Ohio generally are made proper investments for such funds and the statute specifically requires the offering of bonds of the municipality to the sinking fund trustees prior to their disposal at public sale. Manifestly it would be to the interest of the fund to secure a higher interest rate and if, within the specified class of securities an investment may be made which will net the municipality a higher return upon its funds and at the same time no sacrifice of principal is entailed by reason of the sale of lower interest-bearing securities below par, clearly the interesf of the municipality would be furthered by such a course and the trustees would be merely giving to the municipality the benefit of their skill in the management of such funds.

In Mr. Ellis's letter it is suggested that all of the bonds will be sold at par or above. Let us assume that these bonds are held until maturity. Those that can now be sold at above par can only be retired at par upon maturity. Hence it would be manifestly to the interest of the sinking fund to take the profit on these securities if the proceeds derived therefrom may be immediately reinvested in safe and authorized securities bearing a higher interest rate. It is for these reasons that I say that if I were to be governed entirely by my present judgment, my conclusion might be that a board of sinking fund trustees may properly, in the exercise of good faith and for the best interest of the sinking fund, dispose of securities in which it has heretofore invested and use the proceeds to purchase other securities within the classes in which it is authorized to invest. Whether such disposition could be made where the securities to be disposed of could not be sold for par, need not be discussed, but I should be inclined to the view that no hard and fast rule could be laid down, but the test of good faith and sound business judgment should be applied.

The conclusion of my predecessor, however, is entitled to some weight. It was his view that the doctrine of *expressio unius exclusio alterius est* is here applicable. The Legislature having indicated one contingency on which securities may be disposed of, clearly negatives such disposition under any other circumstances. If this were the only expression upon the question before me, I might be inclined to reach a different conclusion, but the case of *Cleveland* vs. *Baker*, supra, which Mr. Ellis cites in support of the right of the trustees in this instance, in my opinion clearly negatives that right. In that case the board of sinking fund trustees of the City of Cleveland had offered for sale certain bonds of the City of Cleveland which were held in the sinking fund. An action was brought to enjoin the sale on the ground that the sinking fund trustees were attempting to sell the bonds at less than par and that, although the resolution for such sale recited that it was necessary to meet the obligation of the sinking fund, such allegation was in fact untrue and that the trustees proposed to sell them for the purpose also of paying for such bonds of the City of Cleveland as the sinking fund commission should in the future decide to purchase. The case was decided on a motion for judgment on the pleadings and hence, for the purpose of the decision, the allegations were conceded to be true. Relief was denied, but the court in the course of the opinion, at page 78, states as follows:

> "The limitations that the bonds when held for the benefit of the sinking fund or debts shall not be sold except when necessary to meet the requirements of the fund or debts, seems to be distinct and apart from that which provides that the bonds shall not be sold for less than their par value. The only limitation imposed when the bonds are held for the benefit of the sinking fund is that they shall not be sold except when necessary to meet the requirements of such fund or debt."

Apparently the court recognized the right to sell below par where necessary to meet the requirements of the fund, but also the court was clearly of the opinion, from the language used, that the disposal of such securities was limited to those times when such disposal should become necessary to meet the requirements of the fund.

The position of the court is substantiated by the language found in the final paragraph of the opinion:

> "It is alleged and argued that the recitation in the resolution adopted by the sinking fund commission on October 22, that for the purpose of accumulating funds to meet the obligations of the sinking fund there be offered for sale bonds owned by the sinking fund commission, does not state the real purpose of the commission in offering the bonds for sale. It is futher alleged that when the bonds are sold the sinking fund commission will use the funds, at least in part, for a different purpose. We scarcely need cite authorities to the effect that if the act proposed to be done is legal, the motive which prompts the act is not material. We find that the sinking fund commission is empowered to sell its assets, to-wit, the bonds in question, for the purpose of meeting the obligations of the sinking fund as proposed. If, after obtaining the proceeds of this sale, it should attempt to make an unlawful use of the funds, it would then be the proper time to proceed to restrain a wrongful disposition of such funds."

You will observe that the court again limits the authority of the sinking fund commission in the sale of assets to occasions where the obligations of the sinking fund require. It may be said that the conclusion of the court in this case is rather strange in view of the fact that there is apparent recognition of the illegality of selling securities for the specific purpose of investing in the future bond issues of the city. The language last quoted would indicate that an action would lie to prevent a subsequent investment but this would apparently be a case of locking the door after the horse was stolen. Manifestly, if the bonds were once sold it would become the mandatory duty of the sinking fund trustees thereafter to invest the proceeds and if bonds of the City of Cleveland were offered, the statutory right to invest therein exists. However, that may be, the court in the course of the opinion has clearly recognized the limitation upon the right to sell securities and, in so doing, has adopted the same view of Section 4517 as was adopted by my predecessor.

Accordingly, in view of the previous opinion of this office and the language used in the case of *Cleveland* vs. *Baker*, supra, I am impelled to the conclusion that there exists no authority in a board of sinking fund trustees of a municipality to sell securities in which they have once invested funds under their control, except when necessary to meet the requirements of such fund or debt. It follows that the course suggested in the letter of Mr. Ellis cannot be pursued.

While it is not material to your present inquiry, I call attention to Section 4519 of the Code, which is as follows:

> "The trustees of the sinking fund may investigate all transactions involving or affecting the sinking fund of any branch or department of the municipal goverment, and they shall have such other powers and perform such other duties not inconsistent with the nature of the duties prescribed for them by law, as may be conferred or required by council."

Authority is here given to council to prescribe other powers and duties for the trustees not inconsistent with the nature of the duties prescribed for them by law. Accordingly there may exist in council the right by general ordinance to give to the trustees the power of sale and reinvestment where such a course would be clearly ben-

eficial to the fund, but as no such action appears to have been taken in this instance, I am not specifically passing upon this question.

By way of specific answer to your inquiry, therefore, I am of the opinion that the sinking fund trustees of a municipality are without power to sell securities in their hands for the purpose of raising funds to purchase municipal bonds offered for sale by the municipality.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2386.

APPROVAL, BONDS OF THE VILLAGE OF WEST LIBERTY, LOGAN COUNTY, OHIO—$23,460.06.

COLUMBUS, OHIO, July 23, 1928.

Industrial Commission of Ohio, Columbus, Ohio

2387.

INSURANCE—CONTRACT TO PAY ATTORNEY TO DEFEND ONLY IS NOT CONTRACT OF INSURANCE—PROPRIETY OF CONTRACT DISCUSSED.

SYLLABUS:

1. *An association or league, that undertakes and agrees to employ competent attorneys without charge to the member of such league to defend such member in all legal proceedings against him arising out of alleged wrongful death or other claims for damages arising from the use of his automobile by himself, a member of his family, his agent or employe, said league not assuming or agreeing to pay any judgment or other claim for damages, is not engaged in the insurance business and its contract is not one substantially amounting to insurance.*

2. *Form and substance of contract criticized and disapproved.*

COLUMBUS, OHIO, July 23, 1928.

HON. WILLIAM C. SAFFORD, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication requesting my opinion as follows:

> "Herewith I hand you a specimen contract of National Motorists League of Columbus, Ohio.