3354

VILLAGE — WHERE POPULATION INCREASED TO BECOME CITY THIRTY DAYS AFTER PROCLAMATION, SECRETARY OF STATE, SECTION 3498 G.C. — VILLAGE CONTINUES, PART GENERAL HEALTH DISTRICT, UNTIL ELECTION AND QUALIFICATION OF MAYOR AND COUNCIL AS CITY OFFICERS, MUNICIPAL CORPORATION.

SYLLABUS:

A village, the population of which has increased so as to make it a city thirty days after proclamation of the Secretary of State pursuant to Section 3498, *General Code, continues to be part of the general health district until the election and qualification of a mayor and council of such municipal corporation as city officers. Opinions of the Attorney General,* 1922, *Vol.* I, *page* 167, *and Opinions of the Attorney General,* 1931, *Vol.* I, *page* 85, *overruled.*

Columbus, Ohio, January 21, 1941.

Dr. H. R. Markwith, Director, Department of Health,
Columbus, Ohio,

Dear Sir:

Your recent request for my opinion reads as follows:

"As a result of each federal census one or more municipal corporations heretofore classified as villages are, by proclamation of the Secretary of State, declared to be in the constitutional classification of cities.

In an opinion of the Attorney General (O.A.G. 1922, Vol. I, page 167), rendered March 9, 1922, it is held:

'Under the provisions of section 1261-16 of the General Code, a municipality becoming a city by the proclamation of the Secretary of State, becomes a city health district thirty days after the issuance of such proclamation.'

In an opinion on the same subject, rendered by the Attorney General January 26, 1931 (O.A.G. 1931, Vol. I, page 85) it is held:

'Villages becoming cities on December 31, 1930, were automatically removed from county general health districts.'

In conformance with these opinions, the Department of Health has advised the councils, mayors or managing officers of these municipalities that it was necessary, immediately, to establish a board of health by the enactment of a suitable ordinance as required by Section 4404 of the General Code, or to contract for public health service with a general health district or city health district as authorized by Section 1261-20, General Code.

On March 23, 1932, the Ohio Supreme Court decided the case of The State, ex rel. Heffernan et al., v. Serp et al. (125 O.S., page 87). This case was based on the action of a mayor, elected as a village officer, appointing the members of a civil service commission for a newly declared city. The syllabus applicable to this inquiry is as follows:

'3. It is the true intent and meaning of Section 3499, General Code, that village officers shall continue in office, with the powers and duties only of village officers, until the first regular election after the proclamation of the secretary of state has been filed with the mayor of the municipality as provided by Section 3498, General Code.'

Does this decision of the Supreme Court make void the opinions of the Attorneys General herein quoted, or is there a distinction to be made between the appointment of a civil service commission by a mayor, elected as a village officer, and the establishment of a board of health, both of which are prohibited to a municipality of village status? In other words, will a municipality becoming a city, thirty days after proclamation by

the Secretary of State, continue as a component part of the general health district for the balance of the calendar year, when the city officers elected at the general election assume office, or will the municipal officers in office at the effective date of the proclamation proceed with the establishment of a board of health as required for a city health district?"

Section 1261-16, General Code, provides:

"For the purposes of local health administration the state shall be divided into health districts. Each city shall constitute a health district and for the purposes of this act shall be known as and hereinafter referred to as a city health district. The townships and villages in each county shall be combined into a health district and for the purposes of this act shall be known as and hereinafter referred to as a general health district. As hereinafter provided for, there may be a union of two general health districts or a union of a general health district and a city health district located within such district."

Section 1261-20, General Code, to which you refer in your letter, provides the mechanics and procedure for uniting a city health district with a general health district.

Sections 4404 and 4405, General Code, respectively provide:

Section 4404.

"The council of each city constituting a city health district, shall establish a board of health, composed of five members to be appointed by the mayor and confirmed by the council, to serve without compensation, and a majority of whom shall be a quorum. The mayor shall be president by virtue of his office. Provided that nothing in this act contained shall be construed as interfering with the authority of a municipality constituting a municipal health district, making provision by charter for health administration other than as in this section provided."

Section 4405.

"If any such city fails or refuses to establish a board of health the state conmissioner of health, with the approval of the public health council, may appoint a health commissioner therefor, and fix his salary and term of office. Such health commissioner shall have the same powers and perform the duties granted to or imposed upon boards of health, except that rules, regulations or orders of a general character and required to be published made by such health commissioners shall be approved by the state commissioner of health. The salary of the health commissioner so appointed, and all necessary expenses incurred by him in performing the duties of the board of health shall be paid by and be a valid claim against such municipality."

You will note that each city is constituted a health district and that the council of each city constituting a city health district is required to establish a board of health composed of five members to be appointed by the mayor and confirmed by council. If any such city fails or refuses to establish a board of health, Section 4405, General Code, provides that the state commissioner of health, with the approval of the public health council, may appoint a health commissioner for such city health district, and fix his salary and term of office, and such health commissioner so appointed shall have the same powers and perform the duties granted to or imposed upon boards of health with certain exceptions as in the statute set forth.

In passing, it should be noted that the function of appointing a health commissioner where the city fails or refuses to establish a board of health which Section 4405, General Code, delegated to the state commissioner of health, has been by Section 154-43, General Code, transferred to the Department of Health and should be exercised by such department with the approval of the public health council. The office of state commissioner of health was abolished by Section 154-26, General Code.

In Opinion No. 2922 of the Opinions of the Attorney General for 1922, found at page 167 of Volume I of the Opinions for that year, to which opinion you refer in your letter, the then Attorney General advised that a municipal corporation which had formerly been a village and the population of which increased to five thousand or more, automatically became a city thirty days after the proclamation of the Secretary of State and at the same time automatically became a city health district. The conclusion reached in this opinion was followed in Opinion No. 2861 of the Opinions of the Attorney General for 1931, found at page 85 of Volume I of the Opinions for such year, and while the Attorney General in the 1931 opinion did not specifically approve the conclusion reached in the 1922 opinion, nevertheless he based his conclusion upon the reasoning therein contained and I think it may safely be said that he approved and followed it.

The reasoning of the 1922 opinion was in a large measure based upon the decision of the Circuit Court of Summit County in the case of Wise v. City of Barberton, 20 C. C. (N. S.), 390, 31 C. D., 373, affirmed without opinion in 88 O.S., 595.

Sections 3498 and 3499, General Code, respectively provide:

Section 3498.

> "When the result of any future federal census is officially made known to the secretary of state, he forthwith shall issue a proclamation, stating the names of all municipal corporations having a population of five thousand or more, and the names of all municipal corporations having a population of less than five thousand, together with the population of all such corporations. A copy of the proclamation shall forthwith be sent to the mayor of each municipal corporation, which copy shall be forthwith transmitted to council, read therein and made a part of the records thereof. From and after thirty days after the issuance of such proclamation each municipal corporation shall be a city or village, in accordance with the provisions of this title."

Section 3499.

> "Officers of a village advanced to a city, or of a city reduced to a village, shall continue in office until succeeded by the proper officers of the new corporation at the next regular election, and the ordinances thereof not inconsistent with the laws relating to the new corporation shall continue in force until changed or repealed."

These were the sections of the General Code which were under consideration in the case of Wise v. Barberton, supra, and if they were wrongly interpreted in that decision, the conclusions reached in the 1922 and 1931 opinions above referred to must be regarded as unsound.

Section 1 of Article XVIII of the Constitution of Ohio provides:

> "Municipal corporations are hereby classified into cities and villages. All such corporations having a population of five thousand or over shall be cities; all others shall be villages. The method of transition from one class to the other shall be regulated by law."

In the opinion of Marshall, C. J., in the case of State, ex rel. Heffernan, v. Serp, 125 O.S., 87, at pages 90 and 91, it was said concerning Sections 3498 and 3499, General Code, and Section 1 of Article XVIII of the Constitution:

> "Manifestly the General Assembly has nothing to do with establishing distinctions between cities and villages, and the only test of whether a municipality is the one or the other is whether it has a population of more or less than 5,000. Upon the population of any municipality advancing beyond or receding below the 5,000 limitation of population, it automatically

changes from the one status to the other. The only political difference which can exist between a city and a village is that the form of government be made different. The distinctions of form are matters of legislative cognizance and have in fact been provided. If nothing further appeared in the constitutional provision, it would follow that immediately upon the necessary increase or decrease in population the changed forms would become effective. The constitutional framers, however, did place a limitation by providing: 'The method of transition from one class to the other shall be regulated by law.' Without resorting to technical definitions as given by lexicographers, transition may be declared to be a change from one status to another, and in this particular instance means change from a village status to a city status, or vice versa. Method means mode of procedure. The constitutional provisions are not self-executing, because the method of transition has been expressly delegated to the General Assembly."

Further, on pages 92 and 93 it was said by the then Chief Justice:

"It is indisputable that public officers have only such authority as the law confers upon them, and that they must proceed in the exercise of that authority in the manner prescribed by law. It has been so held in numerous cases. True, an officer in the exercise of express powers has such implied powers as are necessary for the due and efficient exercise of powers expressly granted. But power will not be implied beyond the necessities of the case. While not parallel in their facts, this is the spirit of the cases of Buchanan Bridge Co. v. Campbell et al., Commrs., 60 Ohio St., 406, 54 N.E., 372, and City of Wellston v. Morgan, 65 Ohio St., 219, 62 N.E., 127.

We have examined the case of Wise v. City of Barberton, 88 Ohio St., 595, 106 N.E., 1086. That case merely affirmed without opinion a decision of the Circuit Court reported in 20 C.C. (N.S.), 390, 31 C.D., 373. While that case merely decided the question of the veto power of a mayor of a municipality which had been advanced from the village to a city, the reasoning of the opinion in that case in the court of appeals would lead to a denial of the writ in the instant case. The mere affirmance of the Circuit Court, by this court, did not make authoritative the Circuit Court opinion. The inconveniences, not to say the impossible situations which would necessarily arise in following that authority, are well described by counsel for relator, and they are so concisely stated that they are adopted in toto."

The opinion of the Chief Justice concludes with the following statament which is found at pages 95 and 96:

"The Legislature clearly had the right to provide for the method of transition; that is to say, the code of procedure by which the village government should end and the city government begin. It could have expressly provided that, from the time

of the filing of the proclamation of the secretary of state in the office of the mayor, the village officers then in office might immediately begin to exercise powers of corresponding city officers. What the Legislature in fact did was to continue the village officers in office until succeeded by the proper officers of the new corporation at the next regular election. The village officers were elected because of their presumed qualifications to discharge the duties devolving upon those officers respectively. Applying the rule of strict construction, they should not be held to be empowered to discharge other duties essentially different, without specific legislative authority therefor, on the sole theory that such powers are implied because of the failure of the Legislature to make them express. The analysis of the implications made necessary by immediately regarding the city government to be in effect, with the village officers exercising undefined powers, could only be justified upon the maxim that 'necessity knows no law.' If, on the other hand, the mandate of the Legislature be followed only to the extent that the officers continue in office until the next regular election, without giving them any implied powers whatever, but limiting them strictly to those expressly conferred, the transition from one form of government to the other is made without difficulty and without inconvenience. It must therefore be presumed that such was the legislative intent."

The language contained in the third paragraph of the syllabus in that case is quite broad and leaves no doubt as to the limits of the authority of the village officers who continue in office after the proclamation of the Secretary of State until the next election. It reads as follows:

"It is the true intent and meaning of Section 3499, General Code, that village officers shall continue in office, with the powers and duties only of village officers until the first regular election after the proclamation of the secretary of state has been filed with the mayor of the municipality as provided by Section 3498, General Code."

This decision in effect overrules the case of Wise v. City of Barberton and the principles of law announced in the Barberton case must be regarded as unsound in so far as they are in conflict with the decision of the Supreme Court.

It is true that Section 3498, General Code, provides that a village whose population has increased to five thousand shall become a city thirty days after proclamation by the Secretary of State, but this change does not increase the powers of the officers of such corporation nor change its form of government until new officers are elected.

The Circuit Court of Appeals for the Sixth Circuit in the case of City of Oakwood v. Hartford Accident Company, 81 Fed. (2d), 717, had

this to say concerning the transition of an Ohio village into a city pursuant to these statutes:

> "While change of status had been initiated, it had not yet been completed and there was therefore no immediate change in the form of government."

Since the mayor and council elected while the municipal corporation was a village cannot exercise the powers granted by law to the mayor and council of a city, a board of health could not be established by such officers pursuant to the provisions of Section 4404, General Code, and no other authority of the city would have such power. The city therefore should not be regarded as having "failed or refused" to establish a board of health within the meaning of such terms as used in Section 4405, General Code. The General Assembly has divided the entire state into health districts and if the officers of a municipal corporation during the period of transition from village into city do not have the power or authority necessary to establish the machinery for a city health district, such municipal corporation should not be regarded as separated from the general health district until after the next ensuing election.

You are therefore advised, in specific answer to your question, that a village, the population of which has increased so as to make it a city thirty days after proclamation of the Secretary of State pursuant to Section 3498, General Code, continues to be part of the general health district until the election and qualification of a mayor and council of such municipal corporation as city officers. Opinions of the Attorney General, 1922, Vol. I, page 167, and Opinions of the Attorney General, 1931, Vol. I, page 85, overruled.

Respectfully,

THOMAS J. HERBERT,

Attorney General.