1480.

JUSTICE OF THE PEACE—UNAUTHORIZED TO ACCEPT CASH IN LIEU OF APPEAL BOND—COUNTY COMMISSIONERS MAY BE REQUIRED TO PROVIDE WATER SUPPLY FOR SEWER DISTRICT WHEN—MUNICIPAL WATER PLANT MAY BE REQUIRED TO CONTINUE SUPPLYING WATER TO COUNTY SEWER DISTRICT WHEN—PUBLIC UTILITIES COMMISSIONERS UNAUTHORIZED TO MAKE ORDERS AFFECTING MUNICIPALLY OWNED PUBLIC UTILITIES.

SYLLABUS:

1. *A justice of the peace is not authorized to accept a deposit of cash in lieu of an appeal bond provided for by Section* 10383, *General Code. If he does accept money for such purpose, he is bound to return the money to the person from whom he received it.*

2. *Where a justice of the peace accepts cash in lieu of an undertaking for costs by authority of Section* 10483, *General Code, and he deposits it in a bank which afterwards fails, he is bound to account for the full amount of the money so received.*

3. *Where the public health demands it, and the public health authorities so find and make proper orders, with reference thereto, a board of county commissioners may be required to provide a water supply for any sewer district established by it in pursuance of the authority conferred by Sections* 6602-1 *et seq. of the General Code, of Ohio.*

4. *Where a sewer district has been laid out and established by a board of county commissioners and a water supply provided therefor by contract with a neighboring village for a definite time, the village cannot be required to continue the service after the expiration of its contract unless, where conditions warrant, the health authorities, as agent of the state, in the exercise of its police power in the interests of the public health, order the service continued.*

5. *In a proper case, a municipality which has been furnishing a water supply from its municipally owned water plant for a county sewer district under a contract for a definite time, may be required, by order of the public health authorities, to continue the service after the expiration of its contract, for a reasonable time, until another supply may be furnished for the sewer district by the commissioners of the county. The rate which may be charged for such service must be reasonable under the circumstances.*

6. *The Public Utilities Commission is without jurisdiction to entertain complaints or make orders affecting municipally owned public utilities.*

COLUMBUS, OHIO, August 29, 1933.

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

GENTLEMEN:—This will acknowledge receipt of your request for my opinion, in answer to the following:

> "Where a justice of the peace accepts a cash deposit in lieu of an appeal bond provided for in section 10384 G. C. and deposits the same in a bank closed for liquidation, is he a guarantor for such, or is his liability limited as a bailee? I know of no authority allowing him to

accept a cash deposit in lieu of an appeal bond.

If a justice receives a cash deposit to secure costs, and likewise deposits the same in a bank closed for liquidation, is he a guarantor for such and liable for any loss sustained? The cash deposit in such case is authorized by section 10483 G. C.

County Commissioners established a sanitary sewer district, built and maintained pipes for water supply to the residents of such district, then entered into a contract with the village of Huron for the supply of water to such pipes or mains, which contract is terminated. Under these facts, after the termination of the contract with the village, can the county commissioners abandon the furnishing of water to the residents of the district, or must they either erect a water supply system or make a new contract with the village or some other water supply company to furnish the water? In case the answer to this question is that the board cannot abandon this duty, can the village refuse to supply water or demand a higher rate without the approval of the Public Utilities Commission of Ohio? In other words, can the public users of the properties be inconvenienced by either the action of the officials or the village, so as to render the sewer system useless?"

Your first question involves a consideration of the statutory provisions pertaining to appeals from justices of the peace. Section 10383, General Code, reads as follows:

> "Within ten days from the time a justice renders judgment, the party appealing therefrom must give a bond to the adverse party, though he need not sign it, with at least one sufficient surety to be approved by such justice, in a sum not less than fifty dollars in any case, nor less than double the amount of the judgment and costs; conditioned, that appellant will prosecute his appeal to effect without unnecessary delay, and that, if on the appeal judgment be rendered against him, he will satisfy it and the costs."

Speaking of appeals, generally, the Supreme Court of Ohio, in the case of *Dennison* vs. *Talmadge,* 29 O. S. 433, said:

> "The right of appeal rests solely upon statutory provisions, and unless those provisions are complied with, the right can not be made available."

It was further held in the above case that where an appellant "neglects to give a statutory bond for appeal within the time limited for that purpose, the fact that the court below made an order to the effect that no bond was required, will not authorize him to perfect his appeal by afterwards giving such bond."

In the case of *Allen* vs. *Turnpike Company,* 9 O. D. Rep. 222, 12 Bull. 168, it appeared that an appeal from the judgment of a justice of the peace was attempted. A bank check was deposited with the justice by the appellant payable "to the justice of the peace, appeal or order", and thereupon the ordinary form of an undertaking for appeal was written out by the justice on his docket without being signed by anyone, with a certificate added and signed by the justice, that the check was received "as bond", and was approved. It was held: "That this

did not constitute an undertaking for appeal and that the Court of Common Pleas had no authority, under R. S. 6595 (now §10384, G. C.) to allow the filing of a new undertaking; but was without jurisdiction."

In view of these authorities, it seems clear that a justice of the peace has no authority to accept money in lieu of an appeal bond. His acceptance of cash for that purpose being wholly unauthorized, he is bound to restore the money, regardless of what happens to it or where he deposits it. His obligation to restore the money is personal to him and he cannot plead its loss on account of a bank failure or anything else.

With reference to the second question, it is provided by Section 10483, General Code, that such a sum of money as a justice of the peace may deem sufficient may be deposited in lieu of a bond as security for costs, when an action is brought before the justice by a non-resident of the township. When this is done the justice receives the money in his official capacity and is bound to account for it as other moneys which come into his hands by virtue of his being a justice of the peace.

There are no statutes authorizing or directing a justice of the peace to procure a depository for moneys coming into his hands as such official, as there are for county treasurers, municipal corporations and school boards. He receives the money and is bound to take care of it. No provision of law excuses or exonerates him from accounting for the money in case it is lost. On the other hand, the terms of his bond, which the law directs shall be given (§1721, General Code) provides that "the justice shall well and truly pay over according to law all moneys which may come into his hands by virtue of his commission." The agreement contained in this bond constitutes a contract and fixes an absolute liability on the justice to account for all funds received by him in his official capacity. *State* vs. *Harper,* 6 O. S. 607.

Inasmuch as there is no statute authorizing it, a justice of the peace has no authority in law to deposit money received by him in his official capacity in a bank and if he does so, he does so at his own risk and is chargeable with any loss that may occur. *State ex rel* vs. *Ferris,* 12 O. N. P. (N. S.) 171.

Although the cases are not precisely parallel, the doctrine of the case of *Shaw* vs. *Bauman et al.,* Executors, 34 O. S. 25, would no doubt apply in a case of this kind. It was therein held, as stated in the syllabus:

> "A justice of the peace received money in his official capacity in satisfaction of a judgment on his docket and deposited the same in a bank to his private account. The bank failed before the sum deposited was drawn therefrom. Held, that the justice was liable to the judgment creditor for the amount so received and deposited."

I come now to the consideration of your third question. By the terms of Sections 6602-1 et seq. of the General Code, a board of commissioners of a county is authorized to lay out, establish and maintain sewer districts within the county outside of incorporated municipalities, and to provide sewers and sewer facilities for any such districts. When duly authorized by the council of an incorporated municipality, such sewer district may be within the municipality or may include a part or all of such municipality. See Section 6602-1a, General Code. It is also provided by Sections 6602-17 et seq. of the General Code, that a water supply may be provided by the county commissioners for any sewer district which has been established. Section 6602-17, General Code, provides in part, as follows:

"For the purpose of preserving and promoting the public health and welfare and providing fire protection, the boards of county commissioners of the several counties of this state may by resolution, acquire, construct, maintain and operate any public water supply or water works system within their respective counties, for any established sewer district. * * By contract with any municipal corporation, or any person, firm or private corporation furnishing a public water supply within or without their county, they may provide such supply of water to such sewer district or districts from the water works of such municipality, person, firm or private corporation."

There are no provisions of these statutes authorizing the discontinuance or abandonment of a sewer district after it has been established, or the discontinuance of the furnishing of a water supply for the sewer district after the furnishing of such a supply has been started. Neither do the statutes provide that the sewer district or a water supply therefor must be continually maintained after its original establishment, nor is a statutory method fixed whereby residents of the district or property owners thereof may compel adequate service or any service at all.

Undoubtedly, property owners and residents of a sewer district once established will have acquired expensive and substantial property rights on the strength of sewer and water service in the district, the impairment of which, by the abandonment or discontinuance of the service, would result in irreparable injury to those affected. Ordinarily, courts of equity protect against the invasion of such private rights. Where, however, those rights are dependent upon the performance of governmental functions by public authorities no equitable remedy by way of mandatory injunction exists for their enforcement, nor will an action in mandamus lie, unless the duty imposed on the public authority is by statute made mandatory. In my opinion, the establishment and maintenance of a sewer district by a board of county commissioners and the furnishing of a water supply therefor are purely governmental and residents of a district are without remedy to require a board of commissioners to either establish or maintain a sewer district, or to furnish a water supply for the district, so far as private or property rights are concerned.

It should be noted, however, that the preservation and protection of the public interest as contradistinguished from private rights rest on an entirely different basis.

Sewers, as the term is generally understood, serve a two-fold purpose. A sewer may be installed for drainage purposes or to carry away surface water. This type of sewer is referred to as a storm sewer. Again, a sewer may be for the purpose of sanitation or, in other words, for carrying off what is commonly termed "sewage". Such sewers are commonly referred to as sanitary sewers. In some instances the same sewer serves both purposes. In some municipalities, however, two sets of sewers are maintained, one for storm purposes—the other for sanitary purposes. The law relating to county sewer districts does not definitely state the class of sewers which the commissioners are authorized to establish and maintain. Inasmuch as drainage in a county may be taken care of by county commissioners by the construction of county ditches (§§6442 et seq. G. C.) and for the further reason that the act authorizing county commissioners to establish sewer districts and provide a water supply for such districts (§§6602-1 et seq G. C.) expressly states that the authority so extended is for the purpose of "preserving and promoting the public health

and welfare", and provision is made therein for the employment of a sanitary engineer for the purpose of laying out and supervising sewer districts which may be established by boards of county commissioners I am of the opinion that the primary purpose of sewers and water supplies so established is for sanitary, rather than drainage purposes.

It will be observed upon a reading of the law relating to the establishment of county sewer districts that the providing of a water supply therefor is not couched in mandatory language. Upon consideration, however, that the public welfare and public health of closely built up portions of territory demand the services that sanitary services provide, and such a system of sewers is of no practical use without water to flush the sewers and would in fact be a menace to public health without a water supply by means of which they may be kept sanitary, I am of the opinion that when a sewer district is established by a board of county commissioners and a system of sewers installed the commissioners will be required to provide a water supply for the district at least sufficient to keep the sewer from becoming a menace to public health.

Moreover, it has been held that the word "may" should be construed as meaning "must" when used in a statute investing public authorities with powers to perform duties which the public interest demands. *Columbus, Springfield & Cincinnati R. R. Company* vs. *Mowatt,* 35 O. S. 284, at page 287; Black on Interpretation of Laws, Section 125.

It would seem clear that if ever there would be occasion to apply this rule it would be in the interpretation of this statute, especially since the declared purpose in the statute itself, of providing a water supply for a sewer district is, among other things, "for the purpose of promoting the public health and welfare."

Even though the duty to provide a water supply for a sewer district established by a board of county commissioners were held to be not mandatory, the health authorities might, in the interests of the public health, order a water supply furnished, and such an order would, without a doubt, be mandatory.

By force of Sections 1232 et seq. of the General Code, especially Sections 1239, 1240, 1240-1, 1240-2 and 12403, General Code, the state department of health is vested with plenary power over sewage treatment and disposal within or without municipalities, and its orders with respect thereto, are mandatory. *State Board of Health* vs. *City of Greenville,* 86 O. S. 1; *City of Bucyrus* vs. *State Department of Health et al,* 120 O. S. 426; *The State ex rel Neal, Director of Health* vs. *Williams, Mayor et al,* 120 O. S. 432; *State ex rel* vs. *City of Van Wert,* 126 O. S. 78.

I am of the opinion that in a proper case it is within the power of the public health authorities to require a board of county commissioners to establish and maintain a water supply for an established county sewer district. I am unable to say whether or not in the particular case mentioned this would or could lawfully be done. Circumstances may be such, that on account of the sparse settlement of a sewer district, or otherwise, the health authorities would not be justified in making such a requirement. A water supply may not in all cases be needed to preserve and protect the public health in a given sewer district and the surrounding territory. That may be the situation in the instant case. It is a matter for the health authorities to determine.

A somewhat difficult question arises as to whether or not, if the health authorities should order that a water supply be furnished for this district, under the existing circumstances, the municipality which has been furnishing

water could be required to continue the present supply, at least until another was found and furnished, and if so, what rate could lawfully be charged by the municipality.

It is certain that the Public Utilities Commission has no authority in the premises. The Public Utilities Commission does not have jurisdiction to entertain complaints or to make orders affecting municipally owned utilities, with respect to rates or anything else. By the express terms of Section 614-2a, General Code, municipally owned utilities are exempted from the jurisdiction of the Public Utilities Commission.

It has been held by the Supreme Court of Ohio that the power of municipalities to own and operate public utilities derived directly from a grant of the people by virtue of Sections 4 and 6 of Article XVIII of the Constitution of Ohio, may not be made subject to conditions or restrictions. In the dissenting opinion of Chief Justice Marshall, in the case of *E. Cleveland* vs. *Board of Education,* 112 O. S. 607, at page 618, which opinion was later adopted as the opinion of the court in the case of *Board of Education of the City School District of Columbus* vs. *City of Columbus,* 118 O. S., 295, it is said:

> "It is the spirit of the unanimous decision of this court in the case of *Village of Euclid* vs. *Camp Wise, Assn.,* 102 Ohio St., 207, 131 N. E. 349, that whereas, prior to the amendments of 1912, all authority to a municipality to own and operate public utilities was derived from the Legislature, after those amendments, and by reason of their adoption, the authority came direct from the people, entirely absolved from any conditions or restrictions theretofore imposed or which might thereafter be imposed."

Whatever plenary power may have been granted to municipalities with reference to municipally owned utilities upon the adoption of Article XVIII of the Constitution of Ohio in 1912, it cannot be said, in my opinion, that the sovereignty of the state necessary to a proper exercise of its police power was so far surrendered to municipalities as to prevent the state from imposing upon those municipalities such regulations and conditions in the operation of utilities which they may own and operate as to properly preserve and protect the public health.

In the case of *Williams* vs. *Scudder,* 102 O. S. 305, it is said in the first and second branches of the syllabus:

> "1. The measure of the police power of the state is the measure of the public need, limited only by the state and federal constitution.
> 2. Public health is one of the most vital subjects in the exercise of that power."

It is well settled that a municipal corporation, in the operation of a public utility, acts in a proprietary capacity. *Travelers Insurance Company* vs. *Woodworth,* 109 O. S. 440; Pond on Public Utilities, Section 11.

When the village in question entered the field of public utilities in a proprietary capacity, it, in a sense dedicated itself to the public of the territory which it served, and while so far as any contractual obligation is concerned it is released from its obligations to serve the territory because of the expiration of its contract, it still is amenable to lawful orders of public authorities acting

as agents of the state and by virtue of its police power, to continue the service within reasonable limits, and at reasonable rates, in the interest of the public good.

I am of the opinion that if circumstances warrant, the Village of Huron may be required by the proper authorities, to continue to serve this district until the commissioners can provide a water supply for the district, at a rate that would be regarded in view of all the circumstances, to be reasonable. If the parties can not agree on what is a reasonable rate it would be a question justifiable by the court. In the case of *State ex rel* vs. *Cleveland,* 125 O. S. 230, it is said:

> "A municipality in so far as it acts in a proprietary capacity possesses the same rights and powers and is subject to the same restrictions and regulations as other like proprietors."

I am therefore of the opinion, in answer to the questions submitted:

1. A justice of the peace is not authorized to accept a deposit of cash in lieu of an appeal bond provided for by Section 10383, General Code. If he does accept money for such a purpose, he is bound to return the money to the person from whom he received it, regardless of what becomes of it.
2. Where a justice of the peace accepts cash in lieu of an undertaking for costs by authority of Section 10483, General Code, and he deposits it in a bank which afterwards fails, he is bound to account for the full amount of the money so received.
3. Where the public health demands it, and the public health authorities so find and make proper orders with reference thereto, a board of county commissioners may be required to provide a water supply for any sewer district established by it in pursuance of the authority conferred by Sections 6602-1 et seq. of the General Code of Ohio.
4. Where a sewer district has been laid out and established by a board of county commissioners and a water supply provided therefor by contract with a neighboring village for a definite time, the village cannot be required to continue the service after the expiration of its contract unless, where conditions warrant, the health authorities as agent of the state in the exercise of its police power in the interests of the public health, order the service continued.
5. In a proper case, a municipality which has been furnishing a water supply from its municipally owned plant for a county sewer district under a contract for a definite time, may be required, by order of the public health authorities, to continue the service after the expiration of its contract, for a reasonable time, until another supply may be furnished for the sewer district by the commissioners of the county. The rate which may be charged for such service must be reasonable under the circumstances.
6. The Public Utilities Commission is without jurisdiction to entertain complaints or make orders affecting municipally owned public utilities.

Respectfully,
JOHN W. BRICKER,
Attorney General.