

mission under date of May 28, 1936, being Opinion No. 5635.

It is accordingly my opinion that these bonds constitute a valid and legal obligation of said city.

Respectfully,

HERBERT S. DUFFY,
Attorney General.

1212.

MANDAMUS—COUNTY TREASURER'S PAYMENT OF WARRANTS DRAWN FOR SALARIES OF COUNTY OFFICERS—VIOLATION OF SECTION 2989, OHIO GENERAL CODE.

SYLLABUS:

Mandamus will not lie to compel a county treasurer to pay warrants drawn for county officers' salaries in violation of Section 2989, General Code.

COLUMBUS, OHIO, September 22, 1937.

HON. ROBERT C. CARPENTER, *Prosecuting Attorney, Tiffin, Ohio.*

DEAR SIR: This is to acknowledge receipt of your letter of recent date, requesting my opinion upon a matter which you set forth as follows:

“The question involves an interpretation of Ohio General Code, Section 2989, regarding the method of payment of the salaries of county officials. Mr. R.'s (the county treasurer's) specific questions is: Is a county official permitted to draw his salary semi-monthly, or even oftener? Assuming that a county official on the 15th of the month presents the warrant of the county auditor, regular in all respects, purporting to be in payment of the first half-month's salary for said month, is it mandatory upon the treasurer to cash said warrant?

To put the question in another way: Can a county official draw his monthly compensation in as many installments as he cares to? And if the county auditor so issues these warrants in part payment, is it mandatory upon the treasurer to honor and cash them?

It is my opinion, and I have advised Mr. R., that such warrants should not be honored, and that the treasurer is not exceeding his authority in refusing to cash such warrants, even

though they are valid upon their face. He desires an opinion from your department, however, as he does not wish to be made a defendant in a mandamus action."

Section 2989, General Code, provides that the salary of county auditors, county treasurers, probate judges, clerks of courts, sheriffs and recorders shall be paid monthly. The language of this section is as follows:

"Each county officer hereinafter named shall receive out of the general county fund the annual salary hereinafter provided, payable monthly upon the warrant of the county auditor, and such additional compensation or salary as may be provided by law."

The duty of the county treasurer with respect to payment of warrants drawn by the county auditor is prescribed by Section 2675, General Code, as follows:

"When a warrant drawn on him as treasurer by the auditor of the county is presented for payment, if there is money in the treasury or depository to the credit of the fund on which it is drawn, and the warrant is endorsed by the payee thereof, the county treasurer shall redeem it by payment of cash or by check on the depository, and shall stamp on the face of such warrant, 'Redeemed,' and the date of redemption."

A determination of your question of whether or not mandamus will lie to compel the county treasurer to pay warrants drawn for the payment of county officers' salaries in violation of the provisions of Section 2989, *supra*, requires a consideration of whether or not the payment of such warrants constitutes "the performance of an act which the law specially enjoins as a duty resulting from an office" within the meaning of the phrase as used in Section 12283 of the General Code, defining the writ of mandamus. It is, of course, settled that mandamus lies only to enforce the performance of a ministerial act or duty and in my judgment the position appears tenable that the duty imposed upon a county treasurer to pay a warrant drawn on him by the auditor, when the same is presented for payment, is ministerial providing there is money in the treasury to the credit of the fund on which it is drawn and the warrant is endorsed by the payee thereof. See 25 O. Jur. pp. 991 to 993.

In a determination of the question here under consideration, it must be remembered that the issuance of a writ of mandamus is, generally

speaking, discretionary with the courts. It is said in High's Extraordinary Legal Remedies, third edition, page 11, Section 7:

“An important feature of the writ of mandamus, and one which distinguishes it from many other remedial writs, is that it is used merely to compel action and to coerce the performance of a pre-existing duty. In no case does it have the effect of creating any new authority, or of conferring power which did not previously exist, its proper function being to set in motion and to compel action with reference to previously existing and clearly defined duties. It is therefore in no sense a creative remedy, and it is used only to compel persons to act when it is their plain duty to act without its agency. And it follows, necessarily, that the writ will not go to command the performance of an act which would be unauthorized or unlawful in the absence of the writ.”

In the instant case, there is no question but that the issuance of a writ of mandamus to compel the county treasurer to pay the warrants in question for county officers' salaries would serve to command the performance of an act in direct contravention with the provision of Section 2989, *supra*, as to how often such salaries shall be paid. It is also pertinent to refer to the text in 25 O. Jur., pages 1020 and 1021, in support of which numerous Ohio authorities are cited:

“At common law the issuance of a writ of mandamus was not a matter of course. Being in its nature a prerogative writ, its issuance was, to a certain extent, a matter of judicial discretion. And even in Ohio, where the writ has, at lease to a certain extent, lost its prerogative character, it is well settled that the issuance of the writ rests, to a considerable extent—subject always to the well-settled principles that have been established—within the sound discretion of the courts. The writ is not demandable as a matter of right; it only issues when the relator makes a clear case of its application. So, it is apparent that mandamus will not be awarded in all cases, even when a *prima facie* right to relief is shown, but regard will be had to the exigency which calls for the exercise of such discretion, the nature and extent of the wrong or injury which would follow a refusal of the writ, and other facts which have a bearing on the particular case.”

Having in mind the fact that to a certain extent at least the matter

of judicial discretion is always involved in the issuance of a writ of mandamus and also having in mind the fact that regard will be had to the exigency which calls for the exercise of such discretion and in addition to this remembering that as stated in High's Extraordinary Legal Remedies, supra, the writ will not go to command the performance of an act unlawful in its absence, it seems clear and it is accordingly my opinion that mandamus will not lie to compel a county treasurer to pay warrants for county officers' salaries in violation of Section 2989, General Code.

Respectfully,

HERBERT S. DUFFY,
Attorney General.

1213.

APPROVAL — CANAL LAND LEASE EXECUTED BY THE
STATE OF OHIO TO AMERICAN LEGION OF NEWCOMER-
ERSTOWN, OHIO.

COLUMBUS, OHIO, September 22, 1937.

HON. CARL G. WAHL, *Director, Department of Public Works,*
Columbus, Ohio.

DEAR SIR: This is to acknowledge the receipt of your recent communication with which you submit for my examination and approval a canal land lease executed by you as Superintendent of Public Works and as Director of said department to The American Legion, Thomas C. Montgomery Post No. 431, of Newcomerstown, Ohio.

By this lease, which is one for a stated term of fifteen years and which provides for an annual rental of \$50.00, there is leased and demised to the lessee above named the right to occupy and use for club and recreational purposes that portion of the abandoned Ohio canal property, including the full width of the bed and banks thereof, located in the village of Newcomerstown, Tuscarawas County, Ohio, which is described as follows:

Beginning at the point of intersection of said canal property and the westerly line of the alley between Bridge and Cross Streets, and running thence westerly with the lines of said canal property, one hundred ninety-nine and seven-tenths (199.7') feet, more or less, to the east line of Cross Street and contain-