

Another opinion to the same effect is found in Opinions of the Attorney General, 1921, at page 829.

Specifically answering your questions, therefore, you are advised that :

First, regardless of the contemplation of a future permanent improvement of a highway, county commissioners are restricted in the use of funds derived from the gasoline excise tax to maintenance and repair of existing highways, whether improved or not, and the extent to which such highways may be widened or the ditches bounding them may be defined, depends upon the reasonable amount of such repair required to restore them to a reasonably proper condition for travel.

Second, county commissioners may not issue notes in anticipation of a bond issue under Section 5654-1, General Code, for the construction of a road by force account, where the preliminary steps for such improvement and the issuance of bonds for the payment thereof are for the construction of said improvement by contract.

Respectfully,

EDWARD C. TURNER,

Attorney General.

3135.

OFFICES—COMPATIBLE AND INCOMPATIBLE—AUTHORITY OF NON-CHARTER VILLAGE CLERK TO SERVE AS SECRETARY TO SINKING FUND TRUSTEES—SAID CLERK MAY NOT ASSIST BOARD OF PUBLIC AFFAIRS OR PLANNING COMMISSION.

SYLLABUS:

The clerk of a non-charter village cannot legally perform the duties of clerk of the board of public affairs and clerk of the planning commission, in addition to his duties as clerk of the village, but may perform the duties of secretary of the board of sinking fund trustees, and is required to do so, unless the village council provides by ordinance for the appointment of a secretary to such board of trustees and fixes the duties, bond and compensation of such secretary, in which case the clerk of the village is ineligible to be appointed to the position.

COLUMBUS, OHIO, January 14, 1929.

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

GENTLEMEN:—This will acknowledge receipt of your communication which reads as follows:

“The rule of incompatibility established by the court in the case of *State, ex rel. vs. Gebert*, 12 C. C. N. S. Page 274, is as follows:

‘Offices are considered incompatible when one is subordinate to, or in any way a check upon the other, or when it is physically impossible for one person to discharge the duties of both.’

QUESTION: When the Council or village, by ordinance, provides that the regularly elected clerk, in addition to his duties as clerk, shall serve as Secretary of the Sinking Fund Trustees, Clerk of the Board of Public Affairs, and Clerk of the Planning Commission, must, or may, such Clerk legally perform such additional duties? No additional compensation is provided for, or paid.”

Sections 4279, 4280 and 4281, General Code, which specifically apply to villages, provide in part as follows:

Sec. 4279. "The clerk shall be elected for a term of two years, * * * "

Sec. 4280. "The clerk shall attend all meetings of council, and keep a record of its proceedings and of all rules, by-laws, resolutions and ordinances passed or adopted, * * * "

Sec. 4281. "The clerk shall keep the books of the village, exhibit accurate statements of all moneys received and expended and of all property owned by the village and the income derived therefrom and of all taxes and assessments."

Section 4283, General Code, which appears under the sub-heading "Cities and Villages", reads as follows:

"In the following provisions of this chapter, the word 'city' shall include 'village', and the word 'auditor' shall include 'clerk.'"

The sections of the Code immediately succeeding Section 4283, General Code, in the same chapter set forth the duties of a city auditor with respect to his auditing the accounts of the several departments and offices of the city. These sections provide in substance that at the end of each fiscal year, or oftener, if required by council, the auditor shall examine and audit the accounts of all officers and departments. He shall prescribe the form of accounts and reports to be rendered to his department, and the form and method of keeping accounts by all other departments, and, subject to the powers and duties of the State Bureau of Inspection and Supervision of Public Offices, shall have the inspection and revision thereof. He shall not allow the amount set aside for any appropriation to be overdrawn, or the amount appropriated for one item of expense to be drawn upon for any other purpose, nor shall any voucher be honored unless sufficient funds shall actually be in the treasury to the credit of the fund upon which such voucher is drawn. When any claim is presented to him, he may require evidence that such amount is due, and for this purpose may summon any agent, clerk or employee of the city, or any other person, and examine him upon oath or affirmation concerning such voucher or claim. On the first Monday of each month he shall receive detailed statements of the receipts and expenditures of the several officers and departments for the preceding month, to be made by the heads of such departments. He shall countersign each receipt given by the treasurer before it is delivered to the person entitled to receive it, and shall charge the treasurer with the amount thereof. If he approves any voucher contrary to the provisions of law herein enumerated, he and his sureties shall be individually liable for the amount thereof. In short, the duties of the auditor of a city, and likewise the clerk of a village, require that he act as a check, by way of auditing the accounts of all city and village departments, and thus he would be in a position of auditing his own accounts if he were clerk of the board of public affairs, sinking fund commissioners or planning commission.

These several positions and the position of village clerk are therefore within the common law rule of incompatibility as stated in the case of *State vs. Gebert*, 12 C. C. N. S., 274, and except as this rule may have been abrogated by statute, a village clerk is rendered ineligible to hold the position of clerk to any of these several boards.

With reference to boards of sinking fund trustees in both cities and villages, it is provided by Section 4509, General Code, as follows:

"The trustees of the sinking fund, immediately after their appointment and qualification, shall elect one of their number as president and another as vice-president, who, in the absence or disability of the president, shall perform his duties and exercise his powers, and such secretary, clerks or employes as council may provide by an ordinance which shall fix their duties, bonds and compensation. Where no clerks or secretary is authorized, the auditor of the city or clerk of the village shall act as secretary of the board."

It is apparent that, so far as the clerk of the sinking fund trustees is concerned, the common law rule of incompatibility is abrogated, and a village clerk, by virtue of his position as such clerk, is made the secretary of the board of sinking fund trustees by statute, in cases where no other secretary is authorized by council. The statute clearly gives council the right to authorize a secretary or to require the village clerk to act as such secretary either by a special ordinance to that effect, or by letting the law take its course. There is no provision of law authorizing additional compensation for a village clerk who is required by law to act as secretary of the board of sinking fund trustees.

It is provided that a planning commission for a village and the board of trustees of public affairs for a village may appoint a clerk or clerks. No provision is made with reference to the city auditor or village clerk acting as clerk or secretary for these boards when the boards fail to elect the clerks or secretaries and therefore, in my opinion, the common law rule of incompatibility as between a village clerk and clerk to either the planning commission or the board of trustees of public affairs would apply, unless by virtue of the Home Rule provisions of the Constitution of Ohio the right is extended to municipalities to abrogate this common law rule of incompatibility, and the municipality takes such steps as are necessary to do so.

In a former opinion of this department reported in Opinions of the Attorney General for 1915, Volume I, page 279, it is held:

"The offices of village clerk and clerk of the board of trustees of public affairs of a village, are incompatible, and may not be held by the same person."

In an opinion reported in Opinions of the Attorney General for 1916, Volume I, page 549, it is held:

"Under the provisions of Section 4509, G. C., it is the duty of the city auditor to act, without additional compensation, as secretary of the trustees of the sinking fund of a city, unless council by ordinance provides for the appointment of a secretary by such trustees, and fixes the compensation, etc., as provided in said section, and in such event the city auditor cannot be appointed as such secretary."

To the same effect is an opinion of the Attorney General reported in the Annual Report of the Attorney General for 1912, Volume II, page 1651, which holds:

"The offices of city auditor and clerk of the sinking fund trustees are in their natures, incompatible for the reason that it is made the duty of the auditor to audit the books of the clerk of the sinking fund trustees, and only in the case where the council has not authorized a clerk or secretary

of the sinking fund trustees does the statute remove the incompatibility and permit the city auditor to serve in that capacity."

In 1918, in an opinion reported in the Opinions of the Attorney General for 1918, Volume I, page 596, the Attorney General held:

"The office of clerk of a village and clerk of the sinking fund trustees, when such sinking fund trustees are authorized by council to have a clerk, are incompatible, and such clerk of a village cannot be employed by such sinking fund trustees or receive the compensation provided for by council in an ordinance authorizing a clerk for said trustees."

In my opinion, the same rule would apply with reference to the clerk of the planning commission, for the same reason as applies to the clerk of a board of public affairs for a village. Inasmuch as the positions of village clerk and clerk of the board of public affairs are incompatible at common law, as are also the positions of village clerk and clerk of the planning commission, a municipality through its council or otherwise may not require the village clerk to do that which under the common law rule of incompatibility is made unlawful, unless, as before stated, a municipality may abrogate the common law rule by authority of the home rule provisions of the constitution. So far as the village clerk performing the duties of the secretary of the board of sinking fund trustees is concerned, he is required to do so by statute, unless council makes provision for a secretary to the board of sinking fund trustees and fixes his duties, bond and compensation.

Mention has been made of the possible influence of the home rule provisions of the Constitution upon the question under consideration. Section 3 of Article XVIII of the Constitution of Ohio reads as follows:

"Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

By force of Section 6 of Article XIII of the Constitution, the General Assembly is authorized and directed to provide for the organization of cities and incorporated villages by general laws, and to restrict their power of taxation, assessment, borrowing money and loaning their credit so as to prevent the abuse of such power.

While it is clear that the distribution of the various administrative functions with relation to village affairs is a matter of local self-government, yet it is equally clear that the authority conferred on the Legislature by Section 6 of Article XIII, supra, to provide for the organization of incorporated villages comprehends the creation of certain offices and the distribution among such offices of the various municipal functions. Manifestly, the power of the General Assembly extends to the creation of the corporate structure and the distribution of the functions among various officials, while, at the same time, similar authority is conferred directly upon municipalities by Section 3 of Article XVIII, supra.

Pursuant to the authority conferred upon the Assembly, the offices concerning which you inquire have been provided by general law and the council of the village which has not adopted a charter owes its existence to the same source, i. e., the general law. To hold that one creature of statute has, in the absence of specific permission, the authority to abrogate statutory provisions made by its own creator regarding other component parts of the municipal structure, would apparently be

illogical, and I am not prepared to say that it may be done in the absence of a specific court ruling to that effect. This does not mean, however, that the people of the municipality are powerless to change the provisions of general law which they find not suited to their convenience, so far as local self-government is concerned. The remedy exists to adopt charter provisions which may, of course, be in contravention of general law provided the subject be not such as is by other constitutional provision specifically within the province of the General Assembly.

In the case of *Berry et al. vs. City of Columbus*, 104 O. S. cited with approval and followed by the Supreme Court in *State ex rel. vs. Williams*, 111 O. S. 400, it is said that Section 6 of Article XIII of the Constitution was not repealed by the adoption of Section 3, Article XVIII, or of any other home rule provision in said article.

In no case has the Supreme Court gone so far as to say that the home rule powers given to municipalities by Article XVIII of the Constitution of Ohio empower such municipalities as have not adopted a charter by authority of Section 7 of the said Article XVIII to exercise any of their municipal powers in any other manner than that provided by general laws, except the power to regulate traffic on their streets, which by force of the case of *Perrysburg vs. Ridgway*, 108 O. S. 245, is said to be one of the powers of local self-government that may be exercised, irrespective of general laws, by a municipality, whether such municipality has or has not adopted a charter.

Until such time as the courts recognize in non-charter municipalities home rule powers in other respects than in the regulation of traffic on their streets, administrative officers should look to the general laws for municipal power and its manner of being exercised.

I am accordingly of the opinion by way of specific answer to your inquiry, that the clerk of a non-charter village cannot legally perform the duties of clerk of the board of public affairs and clerk of the planning commission in addition to his duties as clerk of the village, but may perform the duties of secretary of the board of sinking fund trustees and is required to do so unless the village council provides by ordinance for the appointment of a secretary to such board of trustees and fixes the duties, bond and compensation of such secretary, in which case the clerk of the village is ineligible to be appointed to the position.

Respectfully,
EDWARD C. TURNER,
Attorney General.

3136.

PUBLIC UTILITIES—FREIGHT LINE COMPANIES—VALUATION OF ROLLING STOCK ONLY DETERMINED BY TAX COMMISSION—WHAT CONSIDERED IN FINDING PROPORTION OF CAPITAL STOCK REPRESENTING ROLLING STOCK.

SYLLABUS:

1. Under Section 5465, General Code, the Tax Commission of Ohio determines only the valuation of the rolling stock of a freight line company. Opinion of April 2, 1913, Reports of the Attorney General for 1913, Volume I, page 610, followed.

2. In determining the proportion of the capital stock of the company which represents rolling stock, the Commission should consider only cars owned by a freight line company and operated within the state.