Section 1261-27 of the General Code provides for the establishment of district laboratories under the supervision of the State Department of Health and Section 1261-28, General Code, provides for the free treatment of certain venereal diseases by district boards of health. The question here considered is not whether the laboratory of the State Department of Health is justified in considering who took the sample of blood, but whether or not a chiropractor and electrotherapist is authorized to take such sample himself by making an incision or puncture. In view of these provisions for the treatment of such diseases; in view of the fact that the rules governing chiropractors and electrotherapists established by the State Medical Board limits such practitioners exclusively to external treatments; in view of the fact that limited practitioners are expressly prohibited from treatment of venereal diseases; and in view of the opinion of this department referred to above, holding that a limited practitioner may not diagnose a disease that he is prohibited from treating, I am of the opinion that chiropractors and electrotherapists are not authorized to take a sample of blood for a Wasserman test.

Respectfully,
GILBERT BETTMAN,
Attorney General.

115.

MUNICIPALITIES—NOT CHARTERED—NO AUTHORITY TO PROVIDE INSURANCE AGAINST FORGERY OF WARRANTS.

SYLLABUS:

Municipalities operating under the general laws relating to municipal corporations in Ohio are not authorized to provide against loss occasioned by forgeries and "raised" municipal warrants by effecting insurance against the same.

COLUMBUS, OHIO, February 23, 1929.

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 question:

> "May a city legally pay from public funds premiums for insurance against forgery and raised warrants?"

Aside from the Home Rule powers of a municipal corporation in Ohio, it is generally recognized that it is within the powers of such a corporation to provide for protection against loss caused by fire by contracting for fire insurance on its public buildings. This power is said to be incident to or implied from the power to own and maintain such buildings. McQuillan on Municipal Corporations, Second Edition, Section 1228; Davidson vs. Baltimore, 96 Md. 509; French vs. Melville, 66 N. J. L. 392.

After citing with approval the case of French vs. Melville, supra, and reasoning by analogy therefrom, the Supreme Court of Ohio in the case of Traveler's Insurance Company vs. Village of Wadsworth, 109 O. S. 440, held that a municipal corporation is empowered to provide by means of liability insurance against liability for judgments for personal injuries which might grow out of the operation of its municipally owned electric light and power plant. In this connection Judge Allen, speaking for the court, after noting the holding in the case of French vs. Melville, supra, said:

"There being no practical distinction in protecting a business from loss by fire and from loss by liability, we consider this case an authority in favor of the power of the village to make the contract."

The conclusion of the court in the Traveler's Insurance Company case, supra, was based to a great extent upon the fact that a municipality in the operation of a public utility acts in a proprietary, as distinguished from a governmental capacity and is therefore liable in tort for any damages that may accrue by reason of negligence in the operation of the said utility, and the further fact, as stated in the opinion:

"Under the Ohio statutes a municipality is nowhere prohibited from taking out liability insurance, so that any prohibition against making such a contract through its properly authorized officers must be inferred from the statutes above given, or from the nature of the power exercised. With regard to the exercise of proprietary powers the rule is that when exercising those powers the municipality may act as would an individual or private corporation. This is the general rule upon the subject. * *

Would a private business man take out liability insurance upon such a business as this Wadsworth utility? Such insurance is often written upon business operated by individuals and by private corporations, and making contracts therefor is generally considered to be the act of a prudent business man."

Of course if, in the exercise of its functions, a municipal corporation is engaged in the performance of a governmental duty as distinguished from a proprietary duty, and in the performance of such duty, damages are caused to be incurred to its employees or third persons, no liability rests on the corporation for such damages. Under such circumstances, inasmuch as the corporation has no risk to insure, it obviously would be a wholly unauthorized and wasteful use of public money to effect insurance against a liability growing out of the performance of these governmental duties.

A municipality and its officers acting within the scope of their authority in transactions pertaining to the finances of the corporation act in a business capacity.

The interpretation of municipal contracts, the rights and liabilities growing out of the uses of commercial paper by a municipality, and the business transactions generally of a municipality and its officers duly authorized in the premises, if shown to be within the scope of municipal authority, are measured by the same rules and are subject to the same restrictions and limitations as are like contracts and transactions of private corporations and individuals.

Although I find no direct authority authorizing a municipality to protect itself by insurance against possible losses on account of forgeries, either of its own employees or third persons, it is probable that the courts would uphold the power of a municipal corporation to do so in a case where there is a risk to protect, irrespective of the Home Rule powers of municipalities in Ohio, if it were shown to be sound business practice. It is probable that the courts would hold that the right of a municipality to protect itself in business transactions in the same manner that is sanctioned by good business practice, is an incident to the authority to transact the business. However, by reason of the view I take of your immediate question, it is not necessary to pass upon this question.

The moneys belonging to a municipal corporation, either a city or village, which operates under the general laws of Ohio relating to the organization of municipal corporations, are received by, held in the custody of, and disbursed by an officer known as the treasurer of the municipality. The office is an elective one and carries with it the duties of receiving, holding and disbursing, on proper warrants, the moneys of the corporation. Sections 4294, 4297, 4298 and 4300, General Code.

By the terms of Sections 6, 4214, 4294 and 9573-1, General Code, the treasurer of a municipal corporation is required to give a bond. These sections read in part as follows:

> Sec. 6. "A bond payable to the state of Ohio, or other payee as may be directed by law, reciting the election or appointment of a person to an office or public trust under or in pursuance of the constitution or laws, and conditioned for the faithful performance, by such person, of the duties of the office or trust, shall be sufficient, notwithstanding any special provision made by law for the condition of such bond. * * *"
>
> Sec. 4212. "Except as otherwise provided in this title, council, by ordinance or resolution, shall determine the number of officers, clerks and employes in each department, * * * and the amount of bond to be given for each officer, clerk or employe in each department of the government, if any be required. Such bond shall be made by such officer, clerk or employe, with surety subject to the approval of the mayor."
>
> Sec. 4294. "Upon giving bond as required by council, the treasurer may, by and with the consent of his bondsmen, deposit all funds. * * *"
>
> Sec. 9573-1. "The premium of any duly licensed surety company on the bond of any public officer, deputy or employe shall be allowed and paid by the state, county, township, municipality or other subdivision or board of education of which such person so giving such bond is such officer, deputy or employe."

It will be observed from the terms of Section 6 and 9573-1, supra, that the bond to be given by the treasurer of a municipality is conditioned upon the faithful performance of his duties as such treasurer, and that, if a surety company be given as surety on such bond, the municipality shall pay the premium upon the bond. The amount of the bond is fixed by council.

It is conceivable that forgeries may occur by which municipal authorities may be defrauded, and a distinct loss suffered either by the corporation itself or the officer who had advanced money or extended credit in reliance on a forged instrument. This could occur by reason of honoring forged warrants and paying out money thereon or the acceptance of forged checks in payment for an issue of bonds which later passed into the hands of bona fide holders for value and perhaps in other instances. Forgery includes not only the making of a written instrument with intent to defraud, but the material alteration of such an instrument with intent to defraud. A "raised" warrant is a forged instrument, as much so as a check or note with a false signature purporting to be that of the maker, endorser or guarantor.

A municipal warrant or order is an instrument generally in the form of a bill of exchange or order drawn by an officer of the municipality upon its treasurer, directing him to pay an amount of money specified, to a person named, or his order or bearer. It is in the ordinary form of commercial paper, but does not possess the qualities of commercial paper. It is sometimes characterized as a promissory note, as it is said to be such in effect, but more properly a non-negotiable promissory note, but it is not strictly a promissory note or a bill of exchange. Generally, it is held to possess none of the attributes or qualities of commercial paper save of the capacity of being transferred by delivery or assignment. Some decisions hold that such a warrant possesses all of the qualities of negotiable paper save one, namely it is open to any defense which might have been made to the claim upon which it is founded. McQuillen on Municipal Corporations, Second Edition, Section 2400.

Such warrants are not negotiable instruments, in the sense of the law merchant, so as to preclude evidence of invalidity or defenses available against the original payee, even where they are sought to be enforced by a bona fide purchaser, and this is so

without regard to any recitals in the warrant itself. Morrison vs. Austin City Bank, 213 Ill. 472; Field vs. Highland Park, 141 Mich. 69; Nashville vs. Roy, 19 Wallace 468; Watson vs. Huron, 97 Fed. 449.

Clearly no loss could occur on account of a forged or "raised" municipal warrant unless it had been passed and honored by the municipal treasurer, because it is an order on the treasurer to pay money, and no money could be paid out on such a warrant unless it were paid by the treasurer, and no liability would attach to a forged warrant until it had finally been presented to the treasurer, for the reason that it is not a negotiable instrument in the sense that it is not subject to all defenses when in the hands of second and succeeding holders. I can think of no instance in which a forged instrument would become involved in the transaction of a municipal corporation occasioning a financial loss on account thereof unless it had passed through the hands of the treasurer of the corporation and been honored or accepted by him. Unless money is advanced or credit given on account of a forged instrument, whether it be a municipal warrant or negotiable paper, no loss is incurred and no official of a municipal corporation is authorized by the general laws relating to municipal corporations to pay out the money of the corporation or extend the credit of the corporation so as to involve financial responsibility on the corporation except the treasurer. If he honors a forged instrument, it amounts to a failure to faithfully perform his duties as treasurer, and is a breach of the conditions of his bond for which the surety on his bond is liable. This is definitely held by the Court of Appeals in the case of New Amsterdam Casualty Company vs. City of Norwalk et al., 19 O. A. 476.

In the Norwalk case, supra, it appears that the City of Norwalk had by proper legislation offered for sale certain bonds of the city. Afterwards, bids were duly made therefor and the bid of H. B. Bennett & Company, accepted. The bonds were signed and sealed and were in the hands of the auditor, ready for delivery. Afterwards, a representative of the purchaser appeared with a receipt for the treasurer of the city to sign, showing that the bonds had been paid for by the purchaser. The purchaser then presented checks payable to the city for the purchase price of the bonds. The treasurer signed the receipts. The checks turned out to be forgeries. In the meantime, however, the bonds had gotten into the hands of bona fide purchasers and the city was held to be liable for the full amount of the bonds. The purchaser of the bonds from the city received full value therefor and left for parts unknown.

Suit was begun by the city to recover on the bond of the treasurer. The conditions of the treasurer's bond read as follows:

> "NOW, THEREFORE, if the said Alvin B. Terry during the said term of office shall well and truly perform the duties thereof, and account to the said City of Norwalk, for all money and property coming into his hands as such Treasurer, then this obligation shall be void, otherwise to be and remain in full force and effect."

The court held as stated in the headnotes:

> "1. A city's offer to sell its bonds having been accepted by a purchaser, there is a debt due the city from such purchaser, and the treasurer having undertaken to collect it, it is his duty to demand and receive proper payment, and the giving of a receipt for payment is one of the ordinary duties of the treasurer.
>
> 2. Where, in such case, the checks in payment of the bonds are given to the city auditor, the treasurer, by giving his receipt therefor without demanding the money and by permitting the auditor to receive and hold the checks instead of money, thereby adopts the acts of the auditor in accepting the checks

> in payment of the bonds, and the holding of the checks by the auditor becomes the treasurer's holding, and the latter's failure to account for the funds because of the checks being worthless renders his bondsmen liable."

Motion to certify the record in this case to the Supreme Court was overruled.

Manifestly, where the Legislature has provided the means by which a municipality shall protect itself against loss resulting from forgeries, it would not be authorized to do so by any other means such as the procuring of liability insurance therefor. If a loss of that kind falls on the treasurer and the surety on his bond is liable to the municipality for the loss, the municipality itself has no risk to protect. It is the duty of the mayor of the municipality to see that the treasurer gives a bond with proper securities and of the council of a municipality to fix the amount of that bond sufficiently high to protect the municipality against all possible loss which might occur by reason of any failure of the treasurer to faithfully perform the duties of his office, including loss occasioned by reason of forgeries as well as defalcations of the treasurer himself.

In an opinion of my predecessor found in Opinions of the Attorney General for 1927, Volume II, page 874, it is held:

> "County commissioners have no authority to purchase and pay for burglary or holdup insurance for the county treasurer or for any other county officer, nor have they authority to pay for insurance against forgery for the county treasurer."

The aforesaid opinion is based on the fact that the bond of the county treasurer covers any risk to which the county might be subjected by reason of loss sustained by the treasurer on account of burglaries and forgeries.

In my opinion, the bond which a municipal treasurer is required to give protects the municipality against loss that might be sustained by reason of forgeries, and therefore there is no risk which the municipality might insure against, so far as forgeries are concerned.

No consideration has been given in this opinion to forms of government that might be adopted by municipalities upon their adoption of charters.

It is possible that a municipality might adopt a charter providing for a form of government whereby the bond to be given by its fiscal officer would not protect it from losses sustained as a result of forged instruments including "raised" municipal warrants. I do not have before me copies of the charters that have been adopted by a number of municipalities in Ohio and for that reason do not pass upon that question.

In specific answer to your question I am of the opinion that municipalities operating under the general laws relating to municipal corporations in Ohio are not authorized to provide against loss occasioned by forgeries and "raised" municipal warrants by effecting insurance against the same.

Respectfully,
GILBERT BETTMAN,
Attorney General.