2029.

WATERWORKS—MAY BE ENLARGED BY A MUNICIPALITY AND COST BORNE BY ADJOINING MUNICIPALITY UNDER SECTION 3973-1, GENERAL CODE—AMOUNT OF WATER SUPPLIED SAID ADJOINING MUNICIPALITY NOT LIMITED BY ARTICLE XVIII, SECTION 6, OHIO CONSTITUTION.

SYLLABUS:

1. *The provisions of Section* 3973-1, *General Code, do not relate exclusively to the creation and construction of a new waterworks by two or more municipalities, but authorize as well, the enlargement, extension or improvement of a waterworks owned by one municipality by joint agreement of two or more municipalities, where, by the terms of the agreement, the waterworks so enlarged, extended or improved will, when the enlargement, extension or improvement is completed, be owned and operated jointly by the municipalities, parties to the agreement.*

2. *When two or more municipalities unite in the construction of a waterworks plant, by authority of Section* 3973-1, *General Code, the amount of water that may be furnished to each of the municipalities, parties to the agreement, is not limited by the provisions of Section* 6 *of Article XVIII of the Constitution of Ohio.*

COLUMBUS, OHIO, June 25, 1930.

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

GENTLEMEN:—This will acknowledge receipt of your request for my opinion, which reads as follows:

"The village of Wyoming, Ohio, owns and operates a waterworks and by contract supplies the village of Lockland, which adjoins it, with its water supply. It has been deemed advisable to enlarge the waterworks system by the installation of new pumps and filtration and purification apparatus. It is proposed that the cost of the enlargement be borne by the village of Lockland, by arrangement with the village of Wyoming, and that said village of Lockland thereby acquire an interest in the waterworks plant to the extent of their investment.

Section 3973-1, G. C., reads:

'Two or more municipalities may unite in the construction of a waterworks plant for the purpose of supplying water to such municipalities and the inhabitants thereof for domestic, manufacturing and other purposes. Such municipalities shall have power, through their duly authorized officers, to contract with each other for the construction and maintenance of such waterworks, and to agree as to a division of the cost and maintenance of such plant and a division of the water produced thereby.'

Question 1. Do the provisions of this section relate exclusively to the creation and construction of a new waterworks by two or more municipalities, or may enlargement, extension or improvement as contemplated be considered authorized by the provisions of this section?

Section 6 of Article XVIII of the Constitution, reads:

'Any municipality, owning or operating a public utility for the purpose of supplying the service or product thereof to the municipality or its inhabitants, may also sell and deliver to others any transportation service of such utility and the surplus product of any other utility in an amount not exceeding in either case fifty per centum of the total service or product supplied by such utility within the municipality.'

Question 2. If the village of Lockland may acquire an interest in the Wyoming plant, in the manner proposed, does the constitutional provision above mentioned limit the amount of water which may be supplied said village of Lockland?"

Municipal corporations in Ohio have such powers as are conferred upon them by the Constitution and by the General Assembly within constitutional limits. By the terms of the Constitution of Ohio, Article XVIII, Sections 4, 5 and 6, there is extended to municipalities the right to acquire and operate public utilities, subject to certain limitations therein set forth, absolved from any conditions or restrictions which may be imposed by the Legislature. Said Section 4 of Article XVIII, reads in part as follows:

"Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. * * * "

Section 5 provides for a referendum on any ordinance of a municipality providing for the acquisition, operation, owning or leasing of public utilities by the municipality.

Section 6 of Article XVIII is quoted in your letter.

Chief Justice Marshall, in his dissenting opinion in the case of *East Cleveland* vs. *Board of Education,* 112 O. S., 607, which opinion was in a later case (*Board of Education* vs. *City of Columbus,* 118 O. S., 295) adopted by specific reference as the opinion of the court, after referring to Sections 4, 5 and 6 of Article XVIII of the Constitution of Ohio, as amended in 1912, said:

"There has heretofore been perfect unanimity and harmony upon the proposition that by those amendments certain utilities within the State of Ohio have been placed within the entire control of the municipalities within whose boundaries their operations have been carried on.

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. * * * "

It has been generally recognized that the power granted to a political subdivision does not necessarily extend to that political subdivision the right to exercise that power jointly with another political subdivision. Whether or not the general home rule powers extended to municipal corporations, by virtue of Sections 3 and 7 of Article XVIII of the Constitution of Ohio, would empower two or more such municipalities to join in the construction and operation of a public utility may well be questioned. The Legislature, apparently with the thought that two or more municipalities did not possess the power under existing law to join in the operation of a waterworks, enacted Section 3973-1, General Code, which is quoted in your letter.

The terms of Section 3973-1, General Code, are broad, and extend to two or more municipalities the power to unite in the construction of a waterworks plant for the purpose of supplying water to such municipalities and the inhabitants thereof, and to enter into a contract with each other for the construction and maintenance of such waterworks by which they may agree to the division of the cost of the construction

and maintenance of such plant and the proportionate share of the product of the plant to be furnished to each of the joint owners and their inhabitants. There are no limitations in the statute as to the terms of any such agreement. The terms of such agreement are left to the good judgment of the duly authorized officers of said municipalities.

There can be no good reason for construing said statute so as to limit it to two or more municipalities which do not, at the time of such agreement, own waterworks plants, or to prevent municipalities making such agreement from utilizing plants which they may already own.

The power extended to unite in the construction of a waterworks plant clearly, in my opinion, authorizes municipalities to utilize in the construction of a joint plant any material or plants which may then be owned and operated by the parties to the joint agreement or any one of them.

When such a joint plant is constructed and operated, the furnishing of water to the municipalities which are parties to the agreement is not a sale of water by one municipality to another, but is merely the furnishing of the product of the plant to the owners thereof, and the amount of water which may be furnished to each of the joint owners, is a proper subject for agreement among themselves. Such an agreement may lawfully provide that one of the joint owners shall be furnished more water than another. It is contemplated that the division of the water produced by the plant will, by agreement, be proportionate to the division of the investment and cost of maintenance of the plant.

Section 6 of Article XVIII of the Constitution, limiting the amount of the product of any public utility owned by a municipal corporation that may be sold and delivered to others, makes no provision with reference to the division of the product of a public utility which may be provided for by agreement between two or more municipalities jointly owning such utility. It has reference only to the sale and delivery of the product of the utility to another than the one owning the utility.

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

1. The provisions of Section 3973-1, General Code, do not relate exclusively to the creation and construction of a new waterworks by two or more municipalities, but authorize as well, the enlargement, extension or improvement of a waterworks owned by one municipality by joint agreement of two or more municipalities, where, by the terms of the agreement, the waterworks so enlarged, extended or improved will, when the enlargement, extension or improvement is completed, be owned and operated jointly by the municipalities, parties to the agreement.

2. If the village of Lockland acquires an interest in the waterworks plant now owned by the village of Wyoming, in the manner proposed, the amount of water which may be supplied by the jointly owned plant, to the village of Lockland, is not limited in any way by the provisions of Section 6 of Article XVIII of the Constitution of Ohio.

Respectfully,
GILBERT BETTMAN,
Attorney General.