

necessary to determine the meaning of the terms of the act as intended by the Legislature, but not when the intention of the Legislature is clear by the very terms of the act.

In specific answer to your inquiry, I am of the opinion that under the terms of Section 1165-3 of the General Code, the county commissioners of a county have no authority to appoint more than one deputy apiarist.

Respectfully,
GILBERT BETTMAN,
Attorney General.

923.

STREET LIGHTING—CONTRACT ENTERED INTO BY MUNICIPALITY WITHOUT CERTIFICATE OF FISCAL OFFICER—PROCEDURE OUTLINED IN SENATE BILL 187 MAY VALIDATE SUCH VOID CONTRACT.

SYLLABUS:

Application of the provisions of Senate Bill No. 187 to certain contracts discussed.

COLUMBUS, OHIO, September 26, 1929.

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

GENTLEMEN:—I am in receipt of your letter of September 11, enclosing a letter addressed to your bureau by the city solicitor of Canton, Ohio, advising me that the subject matter is one of general interest and that my views will be appreciated. The letter is as follows:

"I respectfully request that you obtain an opinion from the Attorney General of the State of Ohio bearing on the following situation:

The city of Canton, Ohio, negotiated a contract for street lighting purposes with the Ohio Power Company, which contract was effective November 1, 1926. At the time the contract was executed no certificate was made by the fiscal officer of the city that the funds to be expended under the contract were either in hand or in process of collection. Both the city solicitor and the power company were relying upon the terms of Section 3809, O. G. C., which specifically provided that no certificate was necessary in cases involving contracts for lighting streets.

Prior to the time that the contract was executed, and on April 17, 1925, the Legislature passed Section 5660, O. G. C., which by its terms required a certificate by the fiscal officer even in the case of contracts for street lighting. Unfortunately at the time this last mentioned section was enacted, Section 3809, O. G. C., above referred to, was not specifically repealed, and the existence of the section was overlooked, because of the failure to insert a specific clause of repeal in the new law.

Section 5660, O. G. C., has since that time, been repealed, as was the old Section 3809, O. G. C. The repeal of these sections being effected in Section 40 of House Bill No. 80, now 112 Ohio Laws 391, 409. For our purposes, however, we may disregard this fact because the present statute is substantially the same as the old Section 5660.

At the last session of the Legislature, Senate Bill 187 was passed. This bill is general in its terms, and briefly attempts to provide a method of curing defects in contracts executed without compliance with the provisions of the General Code. The law contemplates the execution of a certificate by the taxing authorities of any taxing district to the Auditor of State not later than the first Monday of October, 1929. This certificate is to set forth the balance or overdraft, in any fund available for the payment of the obligations, validity of which are in question; the certificate is next to contain a statement of all claims and obligations which the taxing authorities might find were created or attempted to be created without complying with the requirements of the General Code of Ohio, with respect to the procedure governing the execution of contracts by the municipality; and finally, a statement of all sums and accounts receivable on December 31, 1928, applicable to the payment of such questioned claims.

This bill then contemplates an investigation by your bureau, with a view of determining the accuracy of the certificate supplied by the taxing authorities, and a further finding by your bureau of whether the obligation attempted to be created is a fair one to the taxing district. Upon receipt of such a certificate from your office the taxing authorities are authorized to pass an amendatory or supplemental appropriation measure, appropriating or re-appropriating from any appropriate fund sufficient funds to pay the obligations the validity of which may be questioned because of failure to comply with the procedure relating to the execution of contracts by municipalities.

During the course of Section 5 of the bill, this language appears:

'Upon such contracts and obligations being presented to said fiscal officer of the taxing district, such fiscal officer shall make the certificate or certificates provided for by General Code, Section 5625-33, to the extent of any and all funds appropriated or reappropriated therefor in the amendatory or supplemental appropriation measure hereinbefore provided for. Such contracts or obligations, made or attempted to be made, shall thereupon be fully validated and shall have the same force and effect as though fully executed or created in full compliance with the provisions of the General Code of Ohio.'

Again the same section of the bill in the last paragraph contains this language:

'The intent and purpose of this act is to authorize the payment of, and to authorize and require the certificate provided for by G. C., Section 5625-33, from receipts from the calendar year 1929, with respect to, all sums found to be due on contracts made or sought to be made, or obligations created or sought to be created prior to the 31st day of December, 1928, and with respect to which the defects and irregularities hereinbefore described may exist, in taxing districts desiring to avail themselves of the provisions of this act, and with respect to which the bureau makes the investigation and the Auditor of State the finding and certificate hereinbefore provided for.'

The contract which the city made with the Ohio Power Company was by its terms to run for ten years from the date of its execution or ten years from November 1, 1926. Our question then is this:

Assume that the council of the city of Canton initiates the proper legislation, and makes the proper certificate to your office and upon receipt of the certificate from the Auditor of State certifying the correctness of the amounts set forth in the original certificate filed by the city council, and after supplemental appropriation legislation has been enacted by the council, is the contract validated for all purposes, so that by the execution of the annual certificate by the city auditor as required by Section 5625-33, O. G. C., all further

payments provided for in the contract during its lifetime, may properly and safely be made by the municipal authorities.

We have used the term taxing district as synonymous with municipal corporation in this inquiry. The term taxing authority is intended to mean city council wherever it occurs, and the term fiscal officer refers to the city auditor. We might add that by the terms of Section 5661, O. G. C., which was in effect at the time the contract in question was executed, any contract or agreement executed on behalf of a municipality contrary to the provisions of the statute requiring a certificate, is void, and no recovery can be made against a municipality on such a contract.

By the terms of said Senate Bill 187, the legislation to be initiated by council in the form of the certificate to the State Auditor must be completed not later than the first Monday in October, 1929. Accordingly, we request that you obtain an opinion on the point raised in this inquiry as soon as possible."

Section 3809 of the General Code as it existed in 1926, was as follows:

"The council of a city may authorize, and the council of a village may make, a contract with any person, firm or company for lighting the streets, alleys, lands, lanes, squares and public places in the municipal corporation, or for furnishing water to such corporation, or for the collection and disposal of garbage in such corporation, or for the leasing of the electric light plant and equipment, or the water-works plant, or both, of any person, firm, company or municipality or for the purchase of electric current for furnishing light, heat or power to such municipality or the inhabitants thereof for a period not exceeding ten years, and the requirement of a certificate that the necessary money is in the treasury, shall not apply to such contract, and such requirement shall not apply to street improvement contracts extending for one year or more, nor to contracts made by the board of health, nor to contracts made by a village for the employment of legal counsel, nor to contracts by a municipality for the leasing or acquisition of the electric light plant and equipment, or the water-works plant, or both, of any person, firm or corporation therein situated."

This section was repealed in 1927 (112 O. L. 409).

Section 5660, General Code, effective July 21, 1925, was as follows:

"No expenditure, excepting from the proceeds of bonds, shall be made unless authorized by appropriation both as regards purpose and amount, nor shall any expenditure be made from the proceeds of bonds unless duly authorized or directed. No contract, agreement or other obligation calling for or requiring for its performance the expenditure of public funds from whatsoever source derived, shall be made or assumed by any authority, officer, or employee of any county or political subdivision or taxing district, nor shall any order for the payment or expenditure of money be approved by the county commissioners, council or by any body, board, officer or employee of any such subdivision or taxing district, unless the auditor or chief fiscal officer thereof first certifies that the money required to meet such contract, agreement or other obligation or to make such payment or expenditure has been lawfully appropriated or authorized or directed for such purpose and is in the treasury or in process of collection to the credit of the appropriate fund free from any previous and then outstanding obligation or certification, which certificate shall be filed with such authority, officer, employee, commissioners,

council, body or board, or the chief clerk thereof. The sum so certified shall not thereafter be considered unencumbered until the county, subdivision or district is discharged from the contract, agreement, or obligation or so long as the order is in force. Taxes and other revenues in process of collection or the proceeds to be derived from lawfully authorized bonds, notes, or certificates of indebtedness sold and in process of delivery shall, for the purposes of this section, be deemed in the treasury or in process of collection and in the appropriate fund.

This section shall not apply to the investment of sinking funds by the trustees of such funds. *In the case of contracts running beyond the termination of the fiscal year in which they are made for salaries of educational employees of boards of education, or for street lighting, collection or disposal of garbage or other current services for which contracts may lawfully be made extending beyond the end of the fiscal year in which made, or to the making of leases the term of which runs beyond the termination of the fiscal year in which they are made, the certification of the auditor or chief fiscal officer as to money in the treasury or in process of collection, above required as a condition precedent to the making of such contract or lease shall be deemed sufficient if such certification cover the money required to meet such contract or lease throughout the fiscal year in which such contract or lease be made; provided further that in each subsequent fiscal year in which such contract or lease is in effect the auditor or fiscal officer shall make a certification for the amount required to meet the obligation of such contract or lease maturing in such year.* In all such contracts or leases, the amount of the obligation remaining unfulfilled at the end of a fiscal year and which will become payable during the next fiscal year shall be included in the appropriations for such next year.

The above-mentioned certificate as to money in the treasury shall not be required for the making of contracts on which payments are to be made from the earnings of a publicly operated public utility; but in the case of any such contract made without such certification of the auditor or other fiscal officer, no payment shall be made on account thereof, and no claim or demand thereon shall be recoverable except out of said earnings." (Italics the writer's.)

This section was also repealed in 1927 (112 O. L. 409), being at the same time substantially re-enacted as Sections 5625-33, et seq., which sections are now in effect. The contract between the city and the power company was executed November 1, 1926, at which time both Sections 3809 and 5660 were in effect.

It is true that Section 3809 had not been expressly repealed when Section 5660 was enacted, but under the well known principle of statutory construction that an earlier statute is repealed by implication by a subsequent enactment where they both deal with the same subject matter and cannot be reconciled, there is no doubt but that Section 5660 must be looked to as the controlling statute in reference to this contract.

In *Goff et al., vs. Gates et al.*, 87 O. S. 142, we find the first paragraph of the syllabus as follows:

"An act of the legislature that fails to repeal in terms an existing statute on the same subject matter must be held to repeal the former statute by implication if the later act is in direct conflict with the former; or if the subsequent act revises the whole subject matter of the former act and is evidently intended as a substitute for it."

Referring back to the italicized portion of Section 5660, as quoted above, the

language is unmistakably intended to cover the subject of street lighting contracts, and certification by the auditor is expressly required annually. There can be no question, therefore, under both Sections 5660 and 5625-33, General Code, that until the passage of Senate Bill No. 187, in this last session of the Legislature, the contract between the city of Canton and the Ohio Power Company was, and is, void.

This act is too lengthy to set forth here in its complete form but the machinery provided and procedure to be followed by any taxing district desiring to avail itself of its provisions are clear and definite. It is clearly intended to provide for the validation and payment of contract obligations which taxing authorities may have sought to create prior to the 31st day of December, 1928, but with respect to which the fiscal officer has not executed the certificate required by Section 5625-33, General Code, where the bureau, after examination, determines that the contracts so made or sought to be made or other obligations created or sought to be created, are fair and equitable and that the taxing district has received fair value for the compensation which the taxing authorities have agreed upon or attempted to agree upon. This language is adopted from Section 4 of the act.

No attempt is made to distinguish between contracts which are to be discharged within one year as contrasted with those extending beyond one year. The term "contract obligations" is so general as of necessity to include all contracts authorized by law. The particular contract here was unquestionably authorized by Section 3809, as it was then in force on November 1, 1926, and but for the failure of the Auditor to certify, as then required by Section 5660, *supra*, would have been valid from its inception.

I quote the last two sentences of Section 5 of Senate Bill No. 187, as follows:

"Such contracts or obligations, made or attempted to be made, shall thereupon be fully validated and shall have the same force and effect as though originally executed or created in full compliance with the provisions of the General Code of Ohio.

The intent and purpose of this act is to authorize the payment of, and to authorize and require the certificate provided for by Section 5625-33 of the General Code from receipts for the calendar year 1929 with respect to, all sums found to be due on contracts made or sought to be made or obligations created or sought to be created prior to the 31st day of December, 1928, and with respect to which the defects and irregularities hereinbefore described may exist, in taxing districts desiring to avail themselves of the provisions of this act, and with respect to which the bureau makes the investigation and the auditor of state the finding and certificate hereinbefore provided for."

There is nothing ambiguous in the foregoing language, the intent and purpose being to legalize the payment of and certification for all sums found to be due and contracts made or sought to be made or obligations created or sought to be created prior to December 31, 1928, with respect to defects and irregularities such as existed in this instance.

Answering the specific question propounded in the basic inquiry, it is, therefore, my opinion that this act, referred to as Senate Bill No. 187, establishes the procedure whereby the contract in question may be validated, and that upon the satisfactory completion of this procedure and the payment of the obligations provided thereunder the contract will have been validated for all purposes so that by the execution of the annual certificate of the Auditor thereafter, as required by Section 5625-33, General Code, all future payments incurred during its lifetime will be properly and legally made.

Respectfully,

GILBERT BETTMAN,
Attorney General.