2274.

WATERWORKS DEPARTMENT OR CITY MAY CHARGE A COUNTY GENERAL HOSPITAL FOR WATER SUPPLIED AND COLLECT SUCH CHARGE—IRONTON, LAWRENCE COUNTY.

SYLLABUS:

The City of Ironton or the waterworks department thereof may charge the Lawrence County General Hospital for water supplied and may collect therefrom the charges so made.

Hon. Roy L. Henry, Prosecuting Attorney,
Ironton, Ohio.

Dear Sir:

This will acknowledge receipt of your request for my opinion on the following:

> "At the instance of Dr. Ralph Massie, President of the Board of Trustees of the Lawrence County General Hospital, I wish to submit for your advice and opinion the following question:
>
> The city of Ironton located in this county owns and operates a

Water Works System and the Lawrence County General Hospital is located in the city and both private and indigent patients are cared for and the patients of the city that are indigent are cared for, which the city is supposed to pay the county the costs per day and the water is supplied to this hospital by the City Water Works. Now, are the Trustees of the Lawrence County General Hospital liable for the water bills to the city for the hospital purposes?"

At the outset I direct your attention to Section 3882-1, General Code, which provides as follows:

"The council of any municipality owning and operating municipal water, gas or electric light plants, may provide by ordinance to furnish free of charge the products of such plants when used for municipal or public purposes."

In Opinion No. 1587, rendered December 14, 1939, this office had occasion to consider said section and it was my opinion that a "municipality may constitutionally comply with the authority granted it by the Legislature in Section 3982-1, supra, unless limited by some agreement contained in a contract pledging revenues of waterworks for the payment of notes and bonds".

By reason of the above in answering your inquiry I am assuming that the City of Ironton has not seen fit by ordinance to furnish water free of charge to the Lawrence County General Hospital, but on the contrary has requested of the trustees of said institution payment of the charges made.

Pertinent to your inquiry is Section 3963, General Code, which provides in part as follows:

"No charge shall be made by a city or village, or by the waterworks department thereof, for supplying water for extinguishing fire, cleaning fire apparatus, or for furnishing or supplying connecnections with fire hydrants, and keeping them in repair for fire department purposes, the cleaning of market houses, the use of any public building belonging to the corporation, or any hospital, asylum, or other charitable institutions, devoted to the relief of the poor, aged, infirm, or destitute persons, or orphan or delinquent children, or for the use of the public school buildings in such city or village."

Under the terms of that section the Legislature has prohibited a city and the waterworks department thereof from charging any hospital for water furnished.

The Supreme Court of this state has considered that section on numerous occasions (see City of Cleveland vs. Board of Education of City

School District of East Cleveland, 112 O. S. 607, Board of Education of city School District of Columbus vs. City of Columbus, 118 O. S. 295, Board of Education of Willard Village School District vs. Village of Willard, 130 O. S. 311). The holdings in the East Cleveland and Columbus cases resulted in considerable confusion in the several appellate districts with respect to the constitutionality of Section 3963, supra. This, of course, was occasioned by Article IV, Section 2 of the Ohio Constitution which provides in part as follows:

> "No law shall be held unconstitutional and void by the supreme court without the concurrence of at least all but one of the judges, except in the affirmance of a judgment of the court of appeals declaring a law unconstitutional and void."

That confusion, however, was done away with by the Willard Case, supra, wherein the Supreme Court affirmed the Court of Appeals of Huron County which had held Section 3963, supra, to be unconstitutional. The opinion in the Willard case is as follows:

> "It is ordered and adjudged by this court, that the judgment of the said Court of Appeals be, and the same is hereby, affirmed on authority of *Bd. of Edn. of City School Dist. of Columbus,* 118 Ohio St., 295, 160 N. E., 902."

In each of the above cases the court was concerned with that portion of Section 3963, supra, which relates to furnishing free water "for the use of the public school buildings in any said city or village". However, the language employed by the court seems equally applicable to that portion of Section 3963 now under consideration. As shown above, the Willard case was decided on authority of the Columbus case, the syllabus of which reads as follows:

> "1. That portion of Section 3963, General Code, which prohibits a city or village or the waterworks department thereof from making a charge for supplying water for the use of the public school buildings or other public buildings in such city or village, is a violation of the rights conferred upon municipalities by section 4 of Article XVIII of the Ohio Constitution, and is unconstitutional and void. (*East Cleveland* v. *Board of Education,* 112 Ohio St., 607, 148 N. E., 350, overruled.)
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> 2. That portion of Section 3963, General Code, above referred to is unconstitutional and void for the further reason that it results in taking private property for public use without compensation therefor, in violation of Section 19, Article I, of the Ohio Constitution.
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> 3. Municipalities derive right to acquire, construct, own, lease and operate utilities the product of which is to be supplied to

> the municipality or its inhabitants, from Section 4 of Article XVIII of the Constitution and the legislature is without power to impose restrictions or limitations upon that right. (*Euclid* v. *Camp Wise Assn.,* 102 Ohio St., 207, 131 N. E. 349, approved and followed.)"

At page 297 of that opinion Marshall, C. J., speaking for the majority of the court, remarked as follows:

> "The several members of this court entertain their respective views upon the legal questions involved, as expressed in the opinions published in that case, (City of East Cleveland vs. Board of Education of City School District of East Cleveland, 112 Ohio St., 607) and the dissenting opinion in that case becomes the reasons of the five members of this court in support of the judgment of affirmance of the judgment in the instant case, and that opinion will therefore be adopted by reference and without repetition."
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> (Parenthetical matter the writer's.)

In view of the adoption by reference of the dissenting opinion in the East Cleveland case, supra, it becomes necessary to examine said opinion to determine the basis for the court's decision in the Columbus and Willard cases. At page 618 of the East Cleveland case, Marshall, C. J., who wrote the dissenting opinion on behalf of five members of the court said as follows:

> "It is the spirit of the unanimous decision of this court in the case of *Village of Euclid* v. *Camp Wise, Assn.,* 102 Ohio St., 206, 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. The first paragraph of the syllabus of that case, which received unanimous concurrence, is as follows:
>
> > 'By reason of the adoption of Section 4, Article XVIII of the Constitution, in 1912, municipalities may acquire, construct, own, lease and operate waterworks free from any restrictions imposed by Sections 3963 and 14769, General Code.'
>
> It did not seem to the court at that time that Sections 2 and 3 of Article XVIII had any bearing upon the case, because they are general sections, and it seemed that Section 4 being a special provision pertaining to utility service the special provision became paramount over the general provisions. The present controversy is not different in that respect. The pertinent parts of Section 4 provide:
>
> > '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.'
>
> This delegation of power to a municipality directly from the hands of the people is plain, unambiguous, and unequivocal, and it is free from conditions; it is apparently self-executing, requiring no enabling legislation to complete the grant of power. Any legislation relative to this subject must necessarily be confined to regulatory measures. The majority of the court are therefore of the opinion that any attempt by the Legislature to impose conditions upon the grant must be ineffective. We are not declaring the entire statute unconstitutional, because the second paragraph of the section is clearly regulatory."

It is true that our Supreme Court has never passed upon the constitutionality of that portion of Section 3963, supra, to which your request is directed. However, said portion was considered by the Court of Appeals of Summit County in the case of Kasch vs. The Peoples Hospital Company, et al., 54 O. App. 80, and by that court held unconstitutional as evidenced by the third branch of the syllabus as follows:

> "Section 3963, General Code, providing that no charge shall be made by a municipality for water furnished a hospital, is unconstitutional."

An appeal from the judgment of the Court of Appeals was perfected to the Supreme Court and by it dismissed (131 O. S. 286.)

The logic and reasoning of the dissenting opinion by Marshall, C. J. in the East Cleveland case hereinbefore quoted in part it seems to me may be applied with equal force to that portion of Section 3963, supra, which prohibits a municipality or the waterworks department from charging a hospital for water furnished and based thereon, it is my opinion, in specific answer to your question, that the City of Ironton or the waterworks department thereof may charge the Lawrence County General Hospital for water supplied and may collect therefrom the charges so made.

Respectfully,

THOMAS J. HERBERT,
Attorney General.