924.

CITY OF CLEVELAND—CHARTER GIVES CITY POWER TO EXPEND PUBLIC FUNDS FOR BROADCASTING PUBLIC ENTERTAINMENTS.

SYLLABUS:

Under the authority of the charter of the city of Cleveland, it is within the power of the council of such city to appropriate and expend public funds of the municipality for the purpose of paying the expenses of broadcasting public entertainments.

COLUMBUS, OHIO, August 29, 1927.

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

GENTLEMEN:—This will acknowledge your recent communication as follows:

> "The city of Cleveland has equipped a room in its public hall for broadcasting purposes and frequently pays substantial sums to singers, etc., in connection therewith. The City Law Director stated to Mr. W. L. Heck, State Examiner, that the broadcasting was decided upon as an advertising measure for the public hall, which is rented and used for various public entertainments, and on the same theory that entertainment is provided for in public parks. All expenses of broadcasting are being paid from the revenues derived from the use of the public hall and none from taxation. The arrangement is purely administrative since council has taken no action authorizing this activity, nor has it made any specific appropriation for payment of such expenses. The charter contains no specific provision which would clearly authorize such expenditure and the only semblance of authority might be section two of such charter, of which we are enclosing copy.
>
> QUESTION: May the city of Cleveland by virtue of its charter, statutory provisions or constitutional home rule powers, legally engage in radio broadcasting and pay the expenses thereof from public funds?"

An answer to your inquiry demands a careful examination not only of the charter of the city of Cleveland, but also of the many decisions of the Ohio Supreme Court dealing with the subject of "home rule." You state that the only semblance of authority for the expenditure in question is the language contained in Section 2 of the charter. This statement, however, is in my opinion scarcely accurate. In so far as pertinent, Section 1 of the charter of Cleveland provides as follows:

> "The inhabitants of the city of Cleveland, as its limits now are, or may hereafter be, shall be a body politic and corporate by name the city of Cleveland, and * * * may appropriate the money of the city for all lawful purposes; * * * The city shall have all powers that now are or hereafter may be granted to municipalities by the constitution or laws of Ohio; and all such powers whether expressed or implied, shall be exercised and enforced in the manner prescribed by this charter, or when not prescribed herein, in such manner as shall be provided by ordinance or resolution of the Council."

Section 2 of the charter, to which you refer, is as follows:

"The enumeration of particular powers by this charter shall not be held or deemed to be exclusive but, in addition to the powers enumerated herein, implied thereby or appropriate to the exercise thereof, the city shall have, and may exercise all other powers which, under the constitution and laws of Ohio, it would be competent for this charter specifically to enumerate."

I have omitted from my quotation of Section 1 the very elaborate statement of powers therein contained and which may be said to comprehend almost every conceivable kind of municipal power. I think it clear from a reading of these two sections that the intention of the people of Cleveland, in adopting the charter, was to vest in themselves as a charter city all possible powers of local self government. As was said in the case of *Cleveland* vs. *Coughlin*, 16 O. N. P. (N. S.), 468, at page 474:

"When one reads the last sentence of Sections 1 and 2 of the Cleveland charter, it is plain that the intention of the people of Cleveland when they adopted this charter was to accept the benefits of home rule and provide for the exercise of 'local self government' to the fullest extent."

Your letter states that no appropriation has been made by council for the payment of the expense of broadcasting, but that it is paid from the rentals of the public auditorium.

I have ascertained, however, that there appears in the appropriation ordinance of the city of Cleveland, under the general head of Division of Cleveland Public Auditorium, Miscellaneous Services, the items, "Music, 1000" and "Other, 800." It is my understanding that these appropriations are used to defray the cost of broadcasting. While the descriptions are indefinite, I do not feel warranted in holding that such a use of these appropriations is improper, if otherwise legal. Your conclusion that there has been no appropriation is doubtless based on the fact that these descriptions are indefinite and on the further fact that the revenues of the auditorium, as a whole, exceed the aggregate of the expenses, so that no actual expenditure of money derived from taxation is necessary.

You will observe that I have quoted from Section 1 of the charter the provision which reserves to the city the right to appropriate its money for all lawful purposes. If, therefore, the purpose in this instance is a lawful purpose, then obviously there is specific charter authority for such an appropriation.

In the Nisi Prius case from which I have just quoted, the court had under consideration an appropriation to pay the city's share of the cost of the Perry's Victory centennial celebration. The court not only found that the charter contained authority for such an appropriation, but also passed affirmatively upon the question whether or not the expenditure was for a public purpose.

I may pass over without extended consideration the question of the effect of the Home Rule amendments to the Constitution, where there has been no charter adopted. If a charter has been adopted and a certain power specifically reserved to the municipality therein, the questions to be determined are:

1. Is the attempted authority so conferred in contravention of other provisions of the constitution?
2. Is the authority conferred in the exercise of a public purpose?

As I have before pointed out, the charter of Cleveland is so broad and contains such apt language that I believe it may properly be said that authority is conferred

to make any appropriation which may be properly classified as being in the exercise of local self government and not prohibited by specific constitutional provision. In so concluding I am not unmindful of the case of *State ex rel.* vs. *Semple,* 112 O. S. 559, where the court had under consideration the authority of the city of Cleveland to disburse funds of the municipality to contribute to the support and maintenance of a so-called conference of Ohio municipalities.

I have given consideration to the restriction placed upon municipalities by Section 13 of Article XVIII of the Constitution, which authorizes the passage of laws to limit the powers of municipalities to levy taxes and incur debts for local purposes. To the same effect is the provision of Section 6 of Article XIII of the Constitution. I do not find, however, any statutes passed pursuant to the authority therein contained which limit or prohibit the expenditure of funds for the purpose concerning which you inquire.

The expenditure in question is an incident to the maintenance and use of the public auditorium. As such it manifestly is a matter of peculiar local interest and, if it be for a public purpose at all, it certainly is made in the exercise of the power of local self government. I am, therefore, of the opinion that the charter contains ample authority for the appropriation and that there is no specific inhibition, constitutional or statutory, against the expenditure unless it may be said that the city of Cleveland has departed from the field of local self government and is engaged in a private enterprise so as to make the purpose of the appropriation other than public.

Whether or not the appropriation is for a public purpose is a matter of grave doubt. It may be helpful to give some consideration to the litigation which preceded the construction of the Cleveland Public Auditorium in the case of *Heald* vs. *City of Cleveland,* 19 O. N. P. (N. S.) 305. An injunction was sought against the issuance of bonds for the purpose of constructing this building. In the petition it was claimed that it was the purpose of the city to construct a large public hall, which would be used for auditorium and exposition purposes and that such an improvement was beyond the scope and power of the city. The court gave very exhaustive consideration to the questions presented and particularly with reference to the question whether or not this purpose was a public purpose. The construction of such a building was sustained on the ground that the people by the Constitution have a right peaceably to assemble and that incidental to such right there existed authority to provide a suitable place of assemblage. Passing upon the objection that the city was going into competition with the owners of private auditoriums, the court, while recognizing that a city cannot engage in a private enterprise in competition with similar enterprises, held that the possibility of such competition under the circumstances was so remote as to be purely speculative. The court expressly recognized, however, the right of the city to lease and derive revenue from the building during such period as it is not in use for assemblage purposes. On page 325 of the opinion is found the following language:

> "Assuming that the people would only demand the use of the auditorium for proper purposes, it must be conceded that such use will necessarily be infrequent at least only when necessity therefor arises. If its use is confined to these specific purposes, it will necessarily be unoccupied perhaps two-thirds of the time; and we see no reason, legal or otherwise, why the city may not, during such period, derive revenue from its use by private parties who may desire to occupy it for conventions or exposition purposes or for purposes not strictly competitive."

It appears to me that the reasoning of the court is entirely logical. Surely it is not an abuse of corporate power to derive a profit from a building which is tem-

porarily not in use. The statutes of Ohio recognize the right of a municipality to lease or sell unused property, and, by analogy, certainly is not only the right, but also the duty of municipal officials to realize as much profit from municipal property as may be done without entering into competition with private enterprises.

I am informed that the broadcasting concerning which you inquire is utilized as an advertising measure for the public hall. That is to say, the hall when unoccupied by public assemblages is leased upon a rental basis which increases the return to the municipality in proportion to the attendance at the entertainments for which the hall is leased. I am further informed that the effect of this broadcasting has been appreciably to increase the revenue of the city derived from the auditorium. It is, therefore, apparent that the effect of this expenditure is to lessen the burden of the tax payers in the maintenance of the auditorium. Being incident to the leasing of the building and the leasing itself being unquestionably lawful, such expenditure is in my opinion for a public purpose.

A very forcible statement of the extent to which municipal authority has been exercised is found in 19 R. C. L. 721, 722, as follows:

> "Municipal corporations are not limited to providing for the material necessities of their citizens. Under legislative authority, they may minister to their comfort, health, pleasure or education. They are not limited to policing the city, to paving the streets, to providing it with light, water, sewer, docks, and markets. The power of cities and towns to maintain institutions which educate and instruct as well as please and amuse their inhabitants, such as libraries and botanical and zoological gardens, is unquestioned. So, also, the public funds may be expended in providing an exhibit at a fair or exposition. The reasonable use of public money for memorial halls, monuments, statues, gates or archways, celebrations, the publication of town histories, parks, roads leading to points of fine natural scenery, decorations upon public buildings or other public ornaments or embellishments, designed merely to promote the general welfare, either by providing for fresh air or recreation, or by educating the public taste, or by inspiring sentiments of patriotism or of respect for the memory of worthy individuals, has received such general sanction that there can be no doubt that municipal corporations may be constitutionally authorized to expend money raised by taxation for such purposes. The trend of authority in more recent years has been in the direction of permitting municipalities a wider range in undertaking to promote the public welfare or enjoyment. Thus, the appropriation of money for public concerts has been held to be proper. So, too, the erection of an auditorium has been regarded as properly falling within the purposes for which a municipal corporation may provide. Generally speaking, anything calculated to promote the education, the recreation, or the pleasure of the public, is to be included within the legitimate domain of public purposes, and on this ground it has even been held that authority to erect and conduct an opera house may be conferred upon a municipal corporation."

Yet I find that the court, in the case of *Heald* vs. *City of Cleveland,* supra, in the discussion of what is a public purpose, makes this statement on page 314:

> "If it is conceded that the people should be given free music and free lectures on art, because the tendency of these things is toward higher idealities, hence better civilization, where will the line of demarkation be drawn? Surely, to properly feed and house a people will promote health, peace and

contentment. Shall food, raiment and shelter be provided free to all who demand them? This may seem an extreme view, but there is a growing tendency to demand state assistance observable everywhere."

I am not unmindful of the fact that the Supreme Court of Ohio, in the case of *State, ex rel.* vs. *Lynch*, 88 *O. S.* 71, to which reference has heretofore been made, held that the city of Toledo was not authorized under its charter authority of local self government to establish and maintain moving picture theaters. That case was decided in 1913, at the outset of judicial consideration of the constitutional amendments authorizing "home rule." The opinion may be said to be the first cautious step in the direction of the extension of home rule powers to municipalities. As I before pointed out, Judge Shauck held that the home rule amendment was not self executing, which conclusion has already been discredited in a succession of cases since decided. On page 97 is found a criticism of the extension of the governmental field into private enterprises. Judge Shauck, the writer of the opinion, says:

"The suggestion that moving picture exhibitions might be made educational is gratuitous because that is not their natural object. It is unavailing because Article VI of the Constitution shows that education supported by taxation is to be conducted by 'a system of common schools throughout the state.'"

This opinion would certainly negative the right of the city of Cleveland to expend public funds for broadcasting, but it is very questionable whether the distinct trend toward the enlargement of municipal powers has not nullified the effect of this language.

I am, therefore, of the opinion that the city of Cleveland may properly expend its funds for the payment of the expense of broadcasting entertainments in connection with the use of this public auditorium. As I stated at first, the result of this broadcasting is to increase the attendance at the expositions and entertainments and thereby increase the revenue of the city. In other words, the broadcasting feature brings increased rentals to the city due to the fact that the rentals received from its unused auditorium are based upon the attendance at the performances held therein and it has been satisfactorily demonstrated that the broadcasting stimulates attendance. Therefore, while the result may incidentally affect the revenue of the private enterprises, it brings added revenue to the city.

Respectfully,
EDWARD C. TURNER,
Attorney General.

925.

APPROVAL, LEASE TO OFFICE ROOMS IN COLUMBUS, OHIO FOR USE OF THE DEPARTMENT OF INDUSTRIAL RELATIONS.

COLUMBUS, OHIO, August 29, 1927.

HON. GEORGE F. SCHLESINGER, *Director of Highways and Public Works, Columbus, Ohio.*

DEAR SIR:—You have submitted, for my examination and opinion, a proposed lease between The Yuster Building Company, of Columbus, Ohio, as lessor, and the