5564

1. MUNICIPAL CORPORATION — POPULATION LESS THAN 5000 AT LAST FEDERAL CENSUS — REMAINS PART OF GENERAL HEALTH DISTRICT DESPITE INCREASE IN POPULATION — SECTION 1261-16 G.C.

2. VILLAGE IN GENERAL HEALTH DISTRICT — HAS LEGAL RIGHT TO ENACT ORDINANCE TO REGULATE LICENSING OF PLUMBERS, ISSUANCE OF PERMITS FOR INSTALLATION AND INSPECTION OF PLUMBING.

3. VILLAGE COUNCIL — CONCURRENT JURISDICTION WITH BOARD OF HEALTH OF GENERAL HEALTH DISTRICT — REGULATIONS AFFECTING SANITATION AND PUBLIC HEALTH — PLUMBING — ORDINANCES INVALID IF INCONSISTENT WITH REGULATIONS OF GENERAL HEALTH DISTRICT.

4. IF OWNER OR PLUMBER COMPLIED WITH VILLAGE REGULATIONS IN MATTER OF LICENSE OR PERMIT, PLUMBING INSTALLATION, THERE WOULD BE LIABILITY TO ARREST AND FINE FOR FAILURE TO COMPLY WITH AN INCONSISTENT REGULATION OF GENERAL HEALTH DISTRICT.

SYLLABUS:

1. A municipal corporation, which had less than 5000 population at the last federal census, remains as a part of a general health district under the provisions of Section 1261-16 of the General Code, notwithstanding the fact that its actual population may have increased to more than 5000.

2. A village in Ohio has the legal right to enact an ordinance regulating the licensing of plumbers, the issuance of permits for the installation of plumbing and the inspection thereof, notwithstanding the fact that it is in a general health district.

3. The council of a village has concurrent jurisdiction with the board of health of a general health district in the enactment of regulations affecting sanitation and the public health, including the regulation of plumbing, but such ordinances, to the extent that they are inconsistent with the regulations of such general health district, will be invalid.

4. A plumber or owner wishing to install plumbing, who has complied with the regulations of the village in the matter of license or permit, would be liable to arrest and fine for failure to comply with an inconsistent regulation of the general health district.

Columbus, Ohio, October 28, 1942.

Hon. Paul J. Reagen, Prosecuting Attorney,
Warren, Ohio.

Dear Sir:

I have your letter requesting an opinion as follows:

> "Several questions have arisen between the Trumbull County General Health District and the Village of Newton Falls concerning the respective authority, in this county, of each, and I request your opinion upon the following matters:
>
> *First*: May an incorporated municipality, which had less than five thousand population at the last Federal Census but is at the present time greater than five thousand in population, organize its own Board of Health?
>
> *Sccond*: If such a municipality may not organize its own Board of Health, may it, by ordinance, regulate the licensing of plumbers, the issuance of permits for installation of plumbing, and the inspection thereof, notwithstanding the fact it is in a general Health District?
>
> *Third*: If such an ordinance may be passed and is passed, does the general health district have concurrent jurisdiction within the municipality?
>
> *Fourth*: If a plumber or an owner wishing to install plumbing received the necessary license from the municipality but not from the general health district, would they be liable to arrest and fine as the general health district regulations provide?"

Your first question involves a consideration of the provisions of the Constitution and the statutes of Ohio relative to the classification of municipal corporations and their advancement from the status of a village to that of a city.

Section 1 of Article XVIII of the Ohio Constitution reads as follows:

> "Municipal corporations are hereby classified into cities and villages. All such corporations having a population of five thousand or over shall be cities; all others shall be villages. The method of transition from one class to the other shall be regulated by law."

This section in its present form was adopted September 3, 1912.

Long prior to its adoption, Sections 3497, 3498 and 3499 of the General Code were in effect and they have not been changed.

Section 3497 is a substantial reiteration of the constitutional pro-

vision above noted, classifying municipal corporations as cities and villages on the basis of population.

Section 3498 reads as follows:

> "When the result of any future federal census is officially made known to the secretary of state, he forthwith shall issue a proclamation, stating the names of all municipal corporations having a population of five thousand or more, and the names of all municipal corporations having a population of less than five thousand, together with the population of all such corporations. A copy of the proclamation shall forthwith be sent to the mayor of each municipal corporation, which copy shall be forthwith transmitted to council, read therein and made a part of the records thereof. From and after thirty days after the issuance of such proclamation each municipal corporation shall be a city or village, in accordance with the provisions of this title."

It would seem from the section last above quoted that the Legislature, acting under the powers given it by the constitutional provision, has seen fit to make the federal census the basis for determination whether a municipality is a city or a village, and has provided that from and after thirty days after the issuance of the proclamation by the secretary of state, each municipal corporation shall be a city or village, depending on its population as so found and proclaimed.

The Legislature has by Section 3625, General Code, authorized the taking of the census of a municipality. This is one of the general powers of municipalities set forth in the enumeration of powers contained in Chapter 1, Division II, Title III, General Code.

Section 3616, General Code, provides as follows:

> "All municipal corporations shall have the general powers mentioned in this chapter, and council may provide by ordinance or resolution for the exercise and enforcement of them."

Section 3625 reads as follows:

> "To take and authenticate a census of the municipality."

It would doubtless have been within the power of the Legislature to provide that a village should pass to the status of a city upon the taking of a census such as that authorized by the section last quoted, but the Legislature has not seen fit to do so.

The case of Murray v. State ex rel., 91 O.S. 220, settles quite clearly the proposition that a village must remain a village, no matter what its actual population may become, until a "federal census" shows that it has reached a population of five thousand or more. A portion of the syllabus of that case is as follows:

> "A municipal corporation which had a population of less than five thousand at the last federal census did not advance to a city when it was made to appear by an official census taken by the municipal corporation subsequently thereto that it had a population of more than five thousand."

Section 1261-16 provides in substance that for the purpose of health administration the state shall be divided into health districts, each city constituting a city health district, while the townships and villages in each county constitute what is called a general health district. The full text of that section is set out later in this opinion.

Section 4404 provides for the appointment by the mayor, with the approval of the council of each city constituting a city health district, of a board of health for the district. The appointment of the board of a general health district is provided for by Section 1261-18, to which reference will be later made.

A consideration of these sections, in the light of what has been said as to classification and transition from a village to a city, leaves no doubt whatever but that the village of Newton Falls, not being in the eyes of the law a city, is not qualified to organize its own board of health, but remains a part of the general health district.

Coming to your second question, as to the right of the village of Newton Falls to enact an ordinance regulating the licensing of plumbers, the issuance of permits for installation of plumbing, and the inspection thereof, nothwithstanding the fact that it is in a general health district, I note first the provisions of certain sections of the General Code giving general authority to municipal corporations, whether cities or villages, to provide by ordinance for many matters touching the public health. Among others, there are included in the general powers of municipalities embraced in Chapter 1, Division II, above referred to, the following.

Section 3637: "To provide for the licensing of house movers, electrical contractors, plumbers and sewer tappers and vault cleaners."

Section 3639: "To regulate by ordinance, the use, control, repair and maintenance of buildings used for human occupancy or habitation, * * * for the purpose of insuring the healthful, safe and sanitary environment of the occupants thereof."

Section 3646: "To provide for the public health, to secure the inhabitants of the corporation from the evils of contagious, malignant and infectious diseases, * * *."

Section 3647: "To open, construct and keep in repair sewage disposal works, sewers, drains and ditches, and to establish, repair and regulate water-closets and privies."

Section 3647-1: To compel the drainage of any lots where stagnant water stands.

Section 3649: To provide for the collection and removal of garbage, refuse, dead animals and animal offal.

Section 3650: To cause nuisances to be abated.

Section 3652: "To provide for the inspection of spirits, oil, milk, breadstuffs, meats, fish, cattle, milk cows, sheep, hogs, goats, poultry, game, vegetable and all food products."

In line with the general spirit of the above statutes, the courts have frequently sustained the action of municipal councils in dealing, by ordinance, with many matters that directly concern the public health. Thus the right of a city to provide for the collection and disposal of garbage, and to make a contract for the exclusive privilege of doing so, was sustained in the case of State ex rel v. Cincinnati, 120 O.S. 500; the regulation of hauling garbage through the streets was upheld in the case of Yutze v. Caplan, 12 O.App. 461; inspection of dairies and dairy cattle, Watson v. Toledo, 3 C. C. (N.S.) 295; and prohibiting nuisances generally, Mansfield v. Bristow, 76 O.S. 270.

In addition to the above powers granted by the Legislature to all municipalities, the Constitution, in Article XVIII, Section 3, has given to municipalities, in general terms, all that the Legislature has granted and doubtless more, in the following language:

> "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

The courts in many decisions have construed this constitutional grant as conferring upon municipalities the entire police power of the state, subject only to the qualifications that charter provisions or ordinances enacted pursuant thereto shall not be "in conflict with *general laws.*"

As stated by the court in Meyers v. Cincinnati, 128 O.S. 235:

> "Generally, the power of municipalities to enact and enforce police regulations is limited only by general laws in conflict."

To like effect: Fitzgerald v. Cleveland, 88 O.S. 338; Billings v. Railroad Company, 92 O.S. 478; Fremont v. Keating, 96 O.S. 468; Greenburg v. Cleveland, 98 O.S. 282.

The right of a city to enact ordinances for the preservation of the public health was expressly upheld in the case of City of Dayton v. Jacobs, 120 O.S. 225, where an ordinance to prohibit the sale of diseased or unwholesome meat, and to provide for inspection of meat and to impose a charge for such inspection, was upheld as being within the clear grant of power of Section 3 of Article XVIII of the Constitution. Many more cases might be cited sustaining the same principle in its application of the powers of a municipality in matters of public health.

As against these broad powers that have been granted to municipalities by the Constitution and acts of the Legislature, I find that the Legislature has also granted many powers relating to the preservation of the public health to boards of health created by law. Thus Section 4420, General Code, gives a board of health express power to abate and remove all nuisances within its jurisdiction and further authorizes it to regulate the location, construction and repair of water closets, privies, cess pools, sinks, plumbing and drains.

Section 4421 deals further with the same subjects.

Section 4424 authorizes such board to abate all nuisances and remove or correct all conditions detrimental to health or well-being found upon school property.

Section 4425 authorizes the board to adopt and enforce quarantine regulations for the protection of the public health in the case of an epidemic.

But all of the statutes above referred to were enacted long before the passage of the Hughes Act (108 O.L. Pt. 1, p. 236), and the Griswold Law (108 O. L. p. 1085) which amended it and to which specific reference will be made. By these acts the state was divided, each city constituting what is called a "city health district" and the townships and villages in each county being combined into a "general health district."

Section 1261-16 provides as follows:

> "For the purposes of local health administration the state shall be divided into health districts. Each city shall constitute a health district and for the purposes of this act (G.C. Secs. 1261-16 et seq.) shall be known as and hereinafter referred to as a city health district. The townships and villages in each county shall be combined into a health district and for the purposes of this act shall be known as and hereinafter referred to as a general health district. As hereinafter provided for, there may be a union of two general health districts or a union of a general health district and a city health district located within such district."

Section 1261-18 provides for the appointment of a district board of health by the advisory council consisting of the mayors of the several villages and the chairmen of the trustees of the townships comprising the district.

Section 1261-42 provides as follows:

> "The board of health of a general health district may make such orders and regulations as it deems necessary for its own government, for the public health, the prevention or restriction of disease, and the prevention, abatement or suppression of nuisances. All orders and regulations not for the government of the board, but intended for the general public, shall be adopted, recorded and certified as are ordinances of municipalities and record thereof shall be given in all courts of the state the same force and effect as is given such ordinances, but the advertisements of such orders and regulations shall be by publication in one newspaper published and of general circulation within the general health district. Publication shall be made once a week for two consecutive weeks and such orders and regulations shall take effect and be in force ten days from date of first publication. Provided, however, that in cases of emergency caused by epidemics of contagious or infectious diseases, or conditions or events endangering the public health, such

boards may declare such orders and regulations to be emergency measures, and such orders and regulations shall become immediately effective without such advertising, recording and certifying."

All of the sections above referred to were part of the Hughes-Griswold acts. There was no provision in either of those acts authorizing a board of health to fix penalties for violation of its regulations, but Section 4414, General Code, already in force, provides as follows:

"Whoever violates any provision of this chapter, or any order or regulation of the board of health made in pursuance thereof, or obstructs or interferes with the execution of such order, or wilfully or illegally omits to obey such order, shall be fined not to exceed one hundred dollars or imprisoned for not to exceed ninety days, or both, but no person shall be imprisoned under this section for the first offense, and the prosecution shall always be as and for a first offense, unless the affidavit upon which the prosecution is instituted, contains the allegation that the offense is a second or repeated offense."

The Supreme Court, in the case of State ex rel. v. Zangerle, 103 O.S. 566, held the Hughes-Griswold acts constitutional and, referring to the purpose and scope of this legislation, further held:

"1. The general assembly in the exercise of the legislative power conferred by the constitution has authority to enact general laws prescribing health, sanitary and similar regulations effective throughout the state; and to provide such reasonable classifications therein as may be deemed necessary to accomplish the object sought.

2. The peace, morals, health and safety of the people are a matter of concern to the state, and when the state has enacted general laws providing sanitary and similar regulations effective throughout the state the different subdivisions of the government may be required to contribute to the carrying out of the legislation."

The court at page 576 of the opinion referred to the constitutional provisions giving home rule to municipalities, and said:

"Section 3, Article XVIII of the Constitution, the home-rule amendment, provides that 'Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.'

> Concerning the term 'general laws' it was said in Fitzgerald v. City of Cleveland, 88 Ohio St., 338, at page 359: 'The general laws (as used in Section 3, Article XVIII) referred to are obviously such as relate to police, sanitary and other similar regulations, and which apply uniformly throughout the state. They involve the concern of the state for the peace, health and safety of all of its people, wholly separate and distinct from, and without reference to, any of the political subdivisions.' "

Referring to the case of Board of Health v. Greenville, 86 O.S. 1, which was decided before the adoption of Article XVIII, the court said:

> "In Board of Health v. Greenville, supra, it was held that the act which authorized the state board of health to require a municipal corporation to install a sewage purification system, and a levy made for the distinct purpose, do not violate the constitution, and in the opinion it is said, at page 29: 'The health of the inhabitants of the city is still a matter of concern to the state, and of such vital concern that the general assembly has not thought proper to commit it exclusively to the control and discretion of men who may or may not have any particular ability or experience in sanitary affairs. * * * The sanitary condition existing in any one city of the state is of vast importance to all the people of the state.' "

The case of Bucyrus v. Department of Health, 120 O.S. 426, was a proceeding in error from an order of the department of health of the state, requiring the city of Bucyrus to install works for the collection and disposal of its sewage. The court said in its syllabus:

> "The provisions of Article XVIII of the Constitution of Ohio do not deprive the state of any sovereignty over municipalities in respect to sanitation for the promotion or preservation of the public health which it elects to exercise by general laws.
>
> The holdings of this court in the case of State Board of Health v. City of Greenville, 86 Ohio St., 1, 98 N.E., 1019, Ann. Cas., 1913D, 52, are as applicable to municipalities since the adoption of Article XVIII as they were before the adoption of that article, and will be adhered to."

The view which the court takes as to the effect of Section 3 of Article XVIII of the Constitution is forcibly stated in the opinion of Judge Robinson, at page 427, from which I quote:

> "The surrender of the sovereignty of the state to the municipalities by that article was a partial surrender only, and, with reference to sanitary regulations, was expressly limited to such sovereignty as the state itself had not or thereafter has not

exercised by the enactment of general laws. With respect, then, to local sanitary regulations, the municipalities are in no different situation since the adoption of Article XVIII than they were before, except that before the adoption of that article they had such power to adopt local sanitary regulations as had been conferred upon them by the Legislature of the state, and since the adoption of that article they have such power to adopt local sanitary regulations as has not been taken away from them by the Legislature in the enactment of general laws. Therefore, that article, instead of being a limitation upon the power of the Legislature to enact general legislation upon the subject of sanitation, is a reservation of such power to the Legislature. In other words, the grant of power in that respect to the municipality by the Constitution is made subject to the limitation of general laws theretofore or thereafter enacted by the Legislature.

The effect of the constitutional provision granting to municipalities the power to adopt local sanitary regulations is therefore no different than though the power had been conferred by legislative enactment instead of constitutional provision; for if conferred by legislative enactment, the act would be subject at all times to revision or repeal by the Legislature. The constitutional provision, conferring the power with the limitation that the municipal regulation must not be in conflict with general laws, operates to bestow upon the Legislature the same power to control sanitation by general laws that it had prior to the adoption of that article. The power conferred by that article is conditioned upon the Legislature not having enacted general laws with which the local sanitary regulations of the municipality conflict."

In State ex rel. v. Underwood, 137 O. S. 1, it was held:

"When the state, by legislative enactment, withdraws from cities the health powers previously granted to them and transfers them to newly created city health districts, such health districts become agencies of the state government, and their employees are governed by state law."

In the opinion by Judge Day, at p. 4, the court quotes Section 4404, which in its amended form was a part of the Griswold act, as follows:

"The council of each city constituting a city health district, shall establish a board of health, composed of five members to be appointed by the mayor and confirmed by the council, to serve without compensation, and a majority of whom shall be a quorum. The mayor shall be president by virtue of his office. *Provided that nothing in this act contained shall be construed as interfering with the authority of a municipality constituting a municipal health district, making provision by charter for health administration other than as in this section provided.*"

(Emphasis mine.)

The court then proceeds to discuss this section as follows:

"In dividing the state into health districts, the General Assembly, in the same act, also repealed the then existing statutes which authorized municipalities to establish and appoint boards of health as part of their local governments. This, in our opinion, evidences *a legislative intent to withdraw from municipalities the powers of local health administration previously granted to them,* and to create in each city a health district which is to be a separate political subdivision of the state, independent of the city with which it is coterminus, and *to delegate to it all health powers thus withdrawn from municipalities.* As such, the city health district becomes an agency of the state and is governed by the laws of the state.

To so hold is not to interfere with municipal home rule. By conferring upon cities the authority to rule themselves, the state did not surrender its sovereign power to protect the public health of the state." (Emphasis mine.)

Referring to the portion of Section 4404 which I have emphasized, the court says on page 6 of the opinion:

"It is our opinion that under the above quoted provision, a municipality constituting a city health district is authorized to make reasonable provision, by charter, for supplementing the health administration work covered by the aforementioned section of the statute. To sustain the contention of appellant that the phrase 'other than' was used by the Legislature in the sense of 'different from' may lead to ludicrous situations, for it is conceivable that local health administration may be so 'different from' that provided by statute as to be contrary thereto. The Legislature could not possibly have intended to use the phrase in that sense."

In Cincinnati v. Gamble, 138 O.S. 220, the court, construing Section 3 of Article XVIII of the Constitution, held:

"In matters of state-wide concern the state is supreme over its municipalities and may in the exercise of its sovereignty impose duties and responsibilities upon them as arms or agencies of the state.

In general, matters relating to police and fire protection are of state-wide concern and under the control of state sovereignty."

Williams, J., in the opinion at p. 231, says:

"The state, considered in relation to its subdivisions is the imperium and as such by its very nature has state control in

> state affairs. Since the municipality is *imperium in imperio* only in the exercise of powers conferred upon it by the state Constitution, it must in all other respects be subordinate to state authority. If fire, police and health departments be deemed purely matters of local self-government, they could be abolished and the state would be unable to step in. Obviously the abolishment of any or all of them would affect state interests. So would even impairment. Indeed, police and fire protection and health preservation are essential to the administration of state government in such a way as to accomplish vital purposes expressed in its organic law."

None of the early sections to which I have referred, which gave to municipalities powers relative to health matters, have been repealed, and notwithstanding the statement of Judge Day in State ex rel v. Underwood, supra, to the effect that the Legislature had given evidence of an "intent to withdraw from municipalities the powers of local health administration previously granted to them," the Supreme Court seems not to have acted consistently with that principle. In the case of Dayton v. Jacobs, 120 O. S. 225, decided shortly before the case of Bucyrus v. Board of Health, supra, and in an opinion written by Judge Robinson, the right of a municipality, under Section 3 of Article XVIII of the Constitution, to prohibit the sale of diseased or unwholesome meat and to require a fee for inspection, was upheld, and in State ex rel v. Cincinnati, 120 O.S. 500, decided a few days after the Bucyrus case, the court upheld the right of the city to regulate the collection and disposal of garbage, saying in its syllabus:

> "The adoption of regulations pertaining to health and sanitation, including the process of collection and disposal of garbage, is within the proper exercise of the police powers of the state and of its municipalities."

The court's opinion by Judge Jones says at p. 505:

> "Ample power to enact regulations conserving the public health and providing for the collection and disposition of garbage has been conferred upon municipalities by Sections 3646 and 3649, General Code. If the city is a chartered, home-rule city, it also has power to adopt and enforce sanitary regulations not in conflict with the general law, under our Constitution as amended in 1912."

These holdings are not challenged or criticized in the later decisions above noted.

The effect of these holdings seems to be that municipalities have been deprived of the powers relative to public health given them by the statutes aforesaid, and by the provisions of the home rule amendment, to the extent that the Legislature, or a board of health created by it and endowed with powers of regulation, have entered the field and have enacted regulations with which municipal enactments are inconsistent.

The rule which the Supreme Court established in the case of Struthers v. Sokol, 108 O. S. 264, and which it has repeatedly cited with approval, seems to me to apply when we consider the questions of concurrent power in a municipality to enact ordinances relative to such matters as health and sanitation, and also to the question of the effect of such ordinances when they cover matters which are also dealt with by general laws. The syllabus of that case is as follows:

> "1. Municipalities in Ohio are authorized to adopt local police, sanitary and other similar regulations by virtue of Section 3, Article XVIII, of the Ohio Constitution, and derive no authority from, and are subject to no limitations of, the General Assembly, except that such ordinances shall not be in conflict with general laws.
>
> 2. In determining whether an ordinance is in 'conflict' with general laws, the test is whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa.
>
> 3. A police ordinance is not in conflict with a general law upon the same subject merely because certain specific acts are declared unlawful by the ordinance, which acts are not referred to in the general law, or because certain specific acts are omitted in the ordinance but referred to in the general law, or because different penalties are provided for the same acts, even though greater penalties are imposed by the municipal ordinance."

In a later case, Youngstown v. Evans, 121 O.S. 342, the court at p. 347 of the opinion, discussing Section 3 of Article XVIII of the Constitution, uses this language:

> * * * "It is more consonant with reason, in interpreting the constitutional provision as a whole, to assume that it was intended to clothe municipalities with power to prescribe rules of conduct in all matters relating to local police, sanitary, and other similar regulations, where no rules had been prescribed by the General Assembly; and, as to the matter where the General Assembly had theretofore or might thereafter prescribe rules, the municipal ordinances and regulations would be effective only so far as consistent with general law. That is to say,

> if the entire ordinance were wholly repugnant to a general law, it would be wholly invalid; if repugnant in certain of its provisions, the repugnant part would be invalid."

In an opinion rendered by one of my predecessors, found in 1935 Opinions Attorney General, 624, it was held:

> "When a city health district unites with a general health district under the provisions of section 1261-20, General Code, the council of the city embraced within such city health district has the power to enact an ordinance regulating the pasteurization of milk, unless such ordinance is in conflict with regulations of the board of health of the combined health district in which said city is located."

I see no reason why the same principle may not apply to villages which are a part of a general health district. My conclusion, therefore, in answer to your second, third and fourth questions, is that a village may enact and enforce an ordinance regulating the licensing of plumbers, and providing for the issuance of permits and the inspection of plumbing installation, unless there are regulations of the board of the general health district covering such matters, in which case the village ordinances, in so far as they are in conflict with the regulations of the general health district, would be of no effect. It would follow, and it is my opinion in specific answer to your inquiry, that a plumber or owner desiring to install plumbing, who has complied with the municipal ordinance, would still have to comply with the regulations of the general health district relating to such plumbing installation.

Respectfully,

THOMAS J. HERBERT
Attorney General.