

This opinion is also in conflict with a former opinion of this office (Opinions of Attorney General, 1916, Volume II, p. 1858). In that opinion no consideration was given to the provisions of Section 1058-26 of the General Code and sufficient consideration was not given to the fact that the legislature when making exceptions in section 1058-7 did not designate boilers under the jurisdiction of state governmental agencies, although specially exempting those "under the jurisdiction of the United States."

It is therefore my opinion

(1) That it is the duty of the Department of Industrial Relations to inspect boilers owned by boards of education, except such boilers as are exempted from said inspection by Section 1058-7 of the General Code.

(2) When such inspection is made by the Department of Industrial Relations, it is the duty of the board of education to pay to said department the fees provided by law therefor.

Respectfully,

EDWARD C. TURNER.

*Attorney General.*

110.

NEITHER WORKMEN'S COMPENSATION NOR TEACHERS' RETIREMENT FUND CAN LAWFULLY BE USED FOR THE PURPOSE OF ERECTING A STATE OFFICE BUILDING.

*SYLLABUS:*

*Neither the Workmen's Compensation Fund nor the Teachers' Retirement Fund can lawfully be used for the purpose of erecting a state office building.*

COLUMBUS, OHIO, February 28, 1927.

*Committee on State Buildings, Parks and Public Works, House of Representatives, Columbus, Ohio.*

Attention: H. S. Keifer, Chairman; F. A. Burkhardt, Secretary.

GENTLEMEN:—I am in receipt of your request for opinion, reading:

"The committee on state buildings, parks and public works, of the House of Representatives, finds that there are several proposals before the General Assembly for financing the purchase of land and construction of a new state office building by the investment of the workmen's compensation fund or the teachers' retirement fund in such land and building. While there is some variation in methods suggested, the act enacted by the last Assembly which was Senate Bill No. 300 and House Bill No. 124 of this session, which amends said act, are typical of the proposals of this character.

This committee respectfully requests an opinion as to the constitutionality of Section 9 of said act and of the proposed amendment of said Section 9 by said House Bill No. 124. Copies of said act and bill are herewith enclosed.

The reason for this request is that the committee believes that one of the most urgent problems before this Assembly, which demands effective action, arises in the deplorable conditions in regard to the housing of the offices and records of important state departments, combined with the fact that there is strong sentiment in favor of a method of financing along the line suggested

above, and the additional fact that doubts have been expressed as to the validity of such legislation.

The committee will appreciate having such opinion at as early a time as convenient to yourself. In case you find that such proposals are probably unconstitutional, we should be glad to have any suggestions in regard to modification of such proposals which in your opinion would render such proposals valid."

Any bill attempting to authorize or direct the use of trust funds for the state's benefit would be futile legislation. The state does not own the funds of either the workmen's compensation fund or the teachers' retirement fund. The state, through its officials, is a trustee for each of these funds.

If there is any principle or law or equity which is settled and which needs no citation of authority to convince lawyers or laymen of its propriety, it is that a trustee may not use trust funds for his own benefit. I beg to advise you that there is no exception of this rule in favor of the state.

The workmen's compensation fund is made up of assessments made against the employers of labor (including governmental subdivisions) for the protection of the workmen killed or injured in the course of employment, and those who have contracted certain occupational diseases.

The teachers' retirement fund is made up of assessments or contributions from the teachers throughout the state on one hand and the school boards (as a part of the teachers' compensation) on the other hand, for the purpose of providing pensions to super-annuated or/and disabled teachers.

Aside from the fundamental doctrine applicable to trustees, I am of the opinion that the courts of this state would neither compel nor permit either the Industrial Commission or the Teachers Retirement Board to expend their respective funds in the erection of a state office building and for the following reasons:

(a) No valid assurance of a return of either the income or principal could be made on behalf of the state.

(b) The investment of a large portion of an insurance reserve in any single building is an unsound practice.

(c) The proposed building would be a single purpose building not adapted to produce revenue from any source other than the state. If some succeeding legislature did not see fit to continue to lease the building or to purchase it, the particular fund would have on its hand an excellent example of a "white elephant."

Section 35 of Article II of the Constitution of Ohio provides in part as follows, in respect of workmen's compensation funds:

"Laws may be passed establishing a board which may be empowered to classify all occupations, according to their degree of hazard, to fix rates of contribution to such fund according to such classification, and to collect, administer and distribute such fund and to determine all rights of claimants thereto."

The constitutionally prescribed purposes for which the funds may be collected are clear and unambiguous. I am of the opinion that contributions may not be compelled which are not necessary for the purposes of the fund itself. Before the Industrial Commission could lawfully freeze such a large proportion of its fund in real estate it would have to show that such moneys would not reasonably be needed for the purpose for which collected and upon any such showing the contributors of such fund would be entitled to a relief in their assessments.

What has been said in respect of the workmen's compensation fund applies with

even more force to the teachers' retirement fund. The latter fund is created by statute; the teachers' contributions are voluntary; the teachers may withdraw and receive all accumulations paid in; the fund is much smaller than the workmen's compensation and therefore the amount to be used for a building would be a greater proportion of the total fund.

Section 3 of Article VIII of the Constitution of Ohio provides:

"Except the debts above specified in sections one and two of this article no debt whatever shall hereafter be created by or on behalf of the state."

No promise which this present legislature might make, or authorize any board or official to make, to purchase a building would be valid unless the money necessary for such purchase was appropriated at the same time. Therefore when the legislature attempts to direct the trustees of either of the funds in question to invest such funds in a building, neither the legislature nor any official of the state has the power to bind the state to repay the amount expended or to purchase the building unless in pursuance of a present appropriation for which there is money in the treasury or in process of collection. (Even then, those funds could not be compelled to erect the building.) The legislature cannot authorize any board or official to make a valid lease for such building beyond the life of the present legislature. By valid lease I mean one which would oblige the state to pay future rentals.

It is true that in the case of *State ex rel Ross vs. Donahay*, Auditor of State, 93 O. S., p. 414, the Supreme Court of Ohio upheld the payment of rent under a lease, *but from moneys appropriated by the legislature*. That lease contained the following language, which demonstrates what I have hercinbefore sought to bring out:

"This lease is made subject to the appropriation by the state legislature and the individual members of the industrial commission are relieved from all liability for the payment of rent, if such appropriation is not made."

In the opinion of the court it was said:

"The rent provided for in the lease is for the period of only two years, a period contemporaneous with the life of the general assembly, whose approval was necessary in order to give vitality and validity to the lease."

In the case of *State vs. Medbery, et al.*, 7 O. S., 522, the syllabus opens with the following:

"The board of public works made contracts on behalf of the state, stipulating to pay defendants in error and others yearly, for the period of five years, for materials and repairs of the canals of the state, an amount in the aggregate of \$1,375,000."

and the court held in the syllabus:

1. That, except in certain specified cases, no debt of any kind can be created on behalf of the state.
2. That no officers of the state can enter into any contract, except in cases specified in the constitution, whereby the general assembly will, two years after, be bound to make appropriations either for a particular object or a fixed amount—the power and the discretion, intact, to make appropriations in general devolving on each biennial general assembly, and for the period of two years.

3. The contracts of the board of public works, creating a *present obligation* to pay the defendants and others, *for the period of five years*, a certain amount, do not come within said constitutional exceptions, and are in contravention of the provisions of Article 8, Section 3, and Article 2, Section 2. (See 93 O. S., p. 417.)

In the case in 93 O. S., above referred to, the court distinguished it from the Medbery case on the ground that at the date of the lease there was no "present" obligation because, by the terms of the lease, it was expressly provided that the whole lease—all its terms and provisions—was subject to the appropriation by the state legislature.

These two cases above referred to demonstrate what I mean when I have said that the present legislature could not authorize any official to make a contract valid and binding upon the state for the purchase of a building at a future date or for a lease beyond two years.

There is but one way for this legislature to provide for the erection of a building and that is by levy and appropriation. This is the only way that the General Assembly can comply with the provisions of the constitution. The substance of the present plan outlined in the bill submitted is that the present legislature attempts to avoid a levy and passes the matter on to some future legislature in the hope that the future legislature will make the necessary levy. If there has been one thing in our governmental fiscal system which has proven a curse to the tax payers of the state, it has been the past practice of issuing bonds and attempting to "pass the buck" on to future generations. So great has this burden become that for many years past the greater part of every dollar collected by taxation has gone to pay interest on old indebtedness, much of which should never have been created and which could easily have been avoided by a little courage and backbone on the part of the various legislative bodies from state to township.

Our great misfortune is that the makers of the constitution of 1851 did not place the same specific inhibition on the various subdivisions that was placed on the General Assembly. Perhaps they thought that the greater included the less, or at least they did not anticipate that the General Assembly would, except in cases of great emergency, adopt a different policy in giving authority to the state's subdivisions.

Specifically answering your question:

Section 9 of House Bill 124 seeks to accomplish an end by means which are unconstitutional.

A court might hold the section itself constitutional by limiting it to be an *authorization* rather than a *mandate*; by limiting the term of the lease to *two years without any obligation* on the part of a future legislature *to pay the rentals* and by holding that there was no *binding effect* upon any future legislature *to appropriate* anything toward the purchase of such building. Such interpretation would, of course, render the legislation futile.

Neither the Industrial Commission nor the Teachers Retirement Board could be compelled to erect the building, while, on the other hand, either of these boards could be prevented by injunction, at the instance of a contributor to such fund, from proceeding.

In answer to your request for suggestions in regard to the modification of such proposal, which in my opinion would render it valid, I beg to advise you:

Inasmuch as there is not in the treasury at this time, and will not be there within any period for which the present legislature could make a lawful appropriation, sufficient funds available for the purpose, the only effective way in which the present

legislature can authorize a state office building is by the levying of a sufficient tax and the making of an appropriation.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

111.

STATE SCHOOL FOR DEAF—POWER OF SUPERINTENDENT TO RECEIVE OR REJECT PERSONS COMMITTED BY COURT—COUNTY MUST PAY FOR EXPENSES OF PUPIL.

*SYLLABUS:*

1. *When a court seeks to commit a person to the State School for the Deaf, for the purpose of having him receive instruction therein, it is within the discretion of the Superintendent and Trustees of the institution either to receive or reject such person.*

2. *Each county, from which a pupil in the State School for the Deaf came, is obligated to reimburse the State from county funds for the cost of clothing furnished to such pupil, and for the amount of such incidental expense as it may be necessary to pay for said pupil.*

COLUMBUS, OHIO, February 28, 1927.

HON. J. W. JONES, *Superintendent, State School for the Deaf, Columbus, Ohio.*

DEAR SIR:—I have your inquiry of recent date, as to whether or not counties are obligated to pay delinquent bills of pupils in the State School for the Deaf, whether commitment was made thereto by order of a court, or otherwise.

The General Code of Ohio, under Title V thereof, provides for the administration of state institutions. Division I of this title sets out certain general provisions with reference to the government of state institutions, and divisions II, III and IV of this title classifies such institutions as benevolent, correctional or penal.

Under division I, designated "Benevolent Institutions" and in chapter 1 thereof, (Sections 1872 to 1881, inclusive of the General Code) are to be found rules for the administration of the State School for the Deaf.

Sections 1872 and 1873 of the General Code provide for the admission of pupils to this school, and read in part, as follows:

"Sec. 1872. The state school for the deaf shall be open to receive such persons too deaf to be educated in the public schools, residents of the state, as the trustees and superintendent deem from reliable information and examination, to be suitable persons to receive instruction, according to the methods therein employed."

"Sec. 1873. The state school for the deaf shall also be open to receive such blind and deaf children, residents of the state, as the trustees and superintendent deem to be suitable persons to receive instruction therein."

Under the provisions of Division I of this title 5, setting out general provisions for the government of the state institutions, are to be found Sections 1815 and 1816 of the General Code, reading as follows:

"Sec. 1815. All persons now inmates of, or hereafter admitted into, a