

While the land to be leased to the City is the thing to be appraised, the appraisers are at liberty to consider the probable uses of the land in determining the value thereof, and in so far as the possibility of continuing the lease in question or of making other hydraulic leases may affect that value, they may take them into consideration.

Respectfully,
EDWARD C. TURNER,
Attorney General.

725.

APPROPRIATION — ENCUMBRANCE CERTIFICATE — LAPSE OF AN
APPROPRIATION — EFFECTIVE DATE OF REAPPROPRIATION.

SYLLABUS:

1. *It is not necessary in order to encumber an appropriation made by the General Assembly that an encumbrance certificate be filed in the office of the Auditor of State.*

2. *An appropriation made by the General Assembly or the unexpended balance of such an appropriation lapses at the end of two years from the date when such an appropriation became effective, whether or not such appropriation or balance of an appropriation has been duly encumbered according to law.*

3. *While the 87th General Assembly has reappropriated the unexpended balances of all appropriations and reappropriations made by the 86th General Assembly against which contingent liabilities have been lawfully incurred, such balances, in so far as appropriations for other than current expenses are concerned, so reappropriated will not become available until August 9, 1927, ninety days after the date of the filing of the appropriation act in the office of the Secretary of State, to wit, May 11, 1927.*

COLUMBUS, OHIO, July 11, 1927.

HON. HERBERT B. BRIGGS, *State Architect and Engineer, Columbus, Ohio.*

DEAR SIR:—In your letter dated June 24, 1927, transmitting for examination and approval several contracts in connection with the Agronomy Building for the Ohio Agricultural Experiment Station, Wooster, Ohio, you ask the following question:

“As the appropriation for the Agronomy Building has not been reappropriated by the Legislature, we would like to know if it will be necessary that the encumbrance estimates and contracts be filed with the Auditor of State on or before June 30, 1927. The encumbrance estimates have been approved by the Director of Finance and are attached to above contracts.”

Your attention is directed to Section 2288-2, General Code, which provides as follows:

“It shall be unlawful for any officer, board or commission of the state to enter into any contract, agreement or obligation involving the expenditure of money, or pass any resolution or order for the expenditure of money, unless the director of finance shall first certify that there is a balance in the appropriation pursuant to which such obligation is required to be paid, not otherwise obligated to pay precedent obligations.”

You will note that this section does not require that the encumbrance certificate be filed in the office of the auditor of state in order that the appropriation be encumbered and I find no other provision of law which requires such filing prior to the encumbering of the appropriation.

I am therefore of the opinion that the filing of an encumbrance certificate with the auditor of state is not a condition precedent to encumbering the appropriation.

While it is not necessary in my opinion that the encumbrance certificates and contracts be filed with the auditor of state in order to encumber the appropriation, a further question presents itself as to whether or not appropriations or balances unexpended on June 30, 1927, will lapse after that date unless reappropriated, even though such appropriations and balances have been encumbered by the issuing and certification of encumbrance certificates as provided by law, and the entering into of the contract. In other words even though an appropriation or balance of an appropriation has been properly certified and contracts have been entered into will the appropriation or balance of the appropriation lapse at the end of the present fiscal period, to wit, June 30, 1927, or will such appropriations or balances be available to pay the obligations arising out of such contracts during the next fiscal period beginning July 1, 1927?

The question narrows itself down to whether or not liabilities incurred prior to the date of the lapse of an appropriation may be paid out of such appropriation subsequent to such date.

Section 22 of Article II of the Ohio Constitution reads as follows:

"No money shall be drawn from the treasury, except in pursuance of a specific appropriation, made by law; and no appropriation shall be made for a longer period than two years."

The above question has been considered on several occasions by this department. In an opinion rendered June 17, 1913, and appearing in the Annual Report of the Attorney General for that year, Vol. I, page 139, it was held that in view of the long standing practice on the part of the auditor of state to issue warrants in favor of liabilities incurred prior to the date of lapse of an appropriation, principles of propriety and justice should permit the payment of such liabilities subsequent to the date of the lapsing of the appropriation. In the course of the opinion it is said:

"While, undoubtedly, the better practice for the general assembly to follow would be to appropriate receipts and balances wherever any part of them were intended to be expended after the date at which the appropriation would otherwise lapse, yet the general assembly doubtless in failing to reappropriate expressly acted in the light of the then well known practice."

In a later opinion, however, rendered on December 31, 1913, and appearing in the Annual Report of the Attorney General for 1914, Vol. I, page 3, the third branch of the syllabus reads as follows:

"An appropriation lapses after a period of two years whether a contract has been let or not. It does not affect the appropriation so far as its lapsing at the end of the two years is concerned."

On page 15 of the opinion it is said:

"In the case you submit the contract, payable out of a specific appropriation, has been let within the life of the appropriation itself, but the work is not completed at the expiration of the two year period.

Here, care must be taken to distinguish between the effect of this state of facts upon the contract and its effect upon the life of the appropriation. I incline to the view, although an expression of opinion thereon is not required by your letter, that a contract made under such circumstances is valid when entered into, and that its binding force and effect as to subsequent transactions under its terms are not affected by the expiration of the two year period. That is to say, the contractor is entitled to proceed with the performance of the work done by him after the expiration of the two year period, and he will be entitled in law and in morals to payment of his claim for so much of the contract price as has not been paid to him. Putting it in another way, the state would be indebted to the contractor for the work performed by him under his previously let contract after the expiration of the two year period.

But this is not equivalent to saying that the appropriation itself, or so much of it as remains unexpended after the expiration of the two year period, is to continue in force. The language of the constitution is so explicit as to the life of an appropriation as to permit of no interpretation whatever; the requirement is that no appropriation shall be made for a longer period than two years, this cannot be construed as being subject to an exception to the effect that where contracts have been entered into, payable out of a given appropriation, the appropriation is thereby continued beyond the period of two years and until the state's liability is discharged. The word 'appropriation' in its exact sense (and I am not aware of any shades of meaning which might be applied to it) signifies the setting apart of public moneys for a specified purpose, coupled with authority to expend for that purpose. The authority to draw money from the treasury for a given object is of the very essence of the appropriation. It is this authority which cannot extend beyond the period of two years, as well as the mere ministerial act of the auditor and treasurer in carrying the appropriation on their respective books for that period of time.

So, when an appropriation is made, for example, to the state board of administration, for the construction of a certain building, there is inherent in the appropriation the idea that the board has authority to draw upon the general revenue fund of the state to the amount indicated, for the purpose specified. This authority can only last for two years. In like manner, the authority of the auditor and treasurer to carry the appropriation account on their respective books terminates at the end of two years.

Looking at it in still another way, the requirement of article II, Section 22, of the constitution, which I have been discussing, is coupled with a positive prohibition against money being drawn from the treasury of the state except in pursuance of a specific appropriation made by law. The thing prohibited is not the making of contracts, which, by their operation under proper contingencies, may ultimately require the drawing of money from the state treasury, but the actual drawing of money itself. So that, while the scope of the more stringent regulation includes the less stringent one, and while, because money cannot be drawn out of the treasury without a specific appropriation, it necessarily follows that no officer can contract, except for official salaries, without the authority of an appropriation, (*State vs. Medbery, supra*), it does not therefore follow that if the officer has contracted against

a specific appropriation, properly made, the constitution is thereby satisfied and the appropriation remains at all times available to pay the contract.

On the contrary, I am clearly of the opinion that there is no condition imaginable which can prolong the life of an appropriation beyond the constitutional period of two years; and that when the end of the constitutional period transpires before work under a lawful contract is completed, and the succeeding session of the general assembly makes no appropriation for the completion of the work the contractor, whatever may be his rights and remedies in the premises, cannot compel the executive officers of the state to make further payments on account of his contract and the work done under it, nor to answer to him in damages."

In my opinion the latter of the opinions above mentioned contains the better discussion and correctly states the law. The conclusion therefore is inescapable that the appropriation lapses even though contracts have been entered into and the fund has been properly encumbered. Unless, therefore, the legislature has made appropriations to cover the liabilities arising out of such contracts there will be no funds out of which such liabilities can be discharged.

Your attention is, however, directed to Section 2 of the Appropriation Act (House Bill No. 502), passed by the 87th General Assembly on April 21, 1927, which reads in part as follows:

"Unexpended balances of all appropriations and re-appropriations, made by the 86th General Assembly, against which contingent liabilities have been lawfully incurred, are to the extent of such liabilities, and whether the same have been lapsed prior to the taking effect of this act with respect thereto or not, hereby appropriated from the funds from which they were originally appropriated or reappropriated and made available for the purpose of discharging such contingent liabilities."

By virtue of the provisions of Section 2 of the Appropriation Act, supra, the appropriation made by the 86th General Assembly for the Agronomy Building, at Wooster, Ohio, has been reappropriated by the 87th General Assembly to the extent that the same was encumbered prior to July 1, 1927. However, the above act was not filed in the office of the Secretary of State until May 11, 1927, and, in so far as appropriations for other than current expenses are concerned, will not become effective until August 9, 1927. In other words no payments may be made on account of any contract entered into pursuant to the appropriation for the Agronomy Building made, by the 86th General Assembly from the period beginning July 1, 1927, until August 9, 1927, when the appropriation act passed by the 87th General Assembly goes into effect.

Respectfully,

EDWARD C. TURNER,

Attorney General.

726.

BOARD OF EDUCATION—NOT AUTHORIZED TO PAY TUITION OR FURNISH TRANSPORTATION FOR PUPILS ATTENDING PRIVATE SCHOOLS.

SYLLABUS:

There is no authority for the payment of tuition or the furnishing of transportation