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OHIO UNIVERSITY—NOT WITHIN POWER OF “THE PRESIDENT AND TRUSTEES OF THE OHIO UNIVERSITY” TO ENTER INTO CONTRACT OR TO LEASE PROPERTY BELONGING TO UNIVERSITY TO PRIVATE CORPORATION ENGAGED IN ENTERPRISE FOR PROFIT, WHILE PROPERTY PRESENTLY USED TO CARRY ON EDUCATIONAL PROGRAM—ENTERPRISE OF PRIVATE CORPORATION NOT INCIDENTAL TO MAINTENANCE OF UNIVERSITY.

## SYLLABUS:

It is not within the power of “The President and Trustees of the Ohio University” either to enter into a contract with a private corporation engaged in an enterprise for profit for the use of property belonging to the university or to lease property to such corporation while such property is presently used in carrying on its educational program where the enterprise to be carried on by the private corporation is not incidental to the maintenance of the university.

Columbus, Ohio, June 8, 1949

Mr. Paul H. Ballard, Secretary, Board of Trustees  
Ohio University, Athens, Ohio

Dear Sir:

The request for my opinion submitted by your institution in your behalf and with your approval by the chairman of the Building and Planning Committee, reads as follows:

“The matter of policy as to whether or not the Board of Trustees wants to enter into an agreement with All American Airways, Inc., for their use of the Ohio University Airport will be decided by the Board.

“The Board seeks your advice on the following legal points :

“(1) Has the Board of Trustees the legal right to make any arrangement with an outside commercial agency relative to use in any way of such state property as its airport?

“(2) If it has, does the arrangement properly take the legal form commonly known as a lease, or must such arrangement be covered by an informal writing?

“(3) Your opinion in general is solicited as to the suitability of the suggested letter of agreement, an original copy of which was left with you personally and a carbon copy of which is enclosed herewith.”

In addition to the facts contained in the above request you have verbally informed me that the university airport lands comprise 95.8 acres of land acquired in 1943 from funds appropriated by the State of Ohio under House Bill No. 665 of the 94th General Assembly. You have further advised that the buildings proposed to be used by the airline company are located on these lands. Also, I have examined the deeds to the property and find that the fee simple title thereto is vested in “The President and Trustees of Ohio University.”

Ohio University was established by Act of the Legislature of Ohio on February 18, 1804, (2 O. L. 193.) This Act, entitled “An Act, establishing an University in the town of Athens,” which, among other things, enacts and declares that “There shall be an university instituted and established in the town of Athens, in the ninth township of the fourteenth range of townships, within the limits of the tract of land purchased by the Ohio Company of Associates, by the name and style of the ‘Ohio University,’ for the instruction of youth in all the various branches of liberal arts and sciences, for the promotion of good education, virtue, religion and morality, and for conferring all the degrees and literary honors granted in similar institutions.” The said Act also provides that “there shall be and forever remain in the said university, a body politic and corporate, by the name and style of “The President and Trustees of the Ohio University;” Section 5 of said Act reads as follows :

“That the said corporation shall have power and authority, from time to time, to make and ordain reasonable rules, orders

and by-laws for the government of the corporation, not incompatible with the constitution, laws and ordinances of the United States or this state, and the same to repeal as occasion may require, and also to determine the salaries, emoluments and tenures of their several officers.”

And it is further provided by Section 10 thereof :

“That the corporation may have and keep one common seal, which they may change or renew at pleasure; and that all deeds or instruments of writing, signed and delivered by the treasurer and sealed with the corporation seal, by order of the president and trustees, shall, when made in their corporate name, be considered in law as the deed and act of the corporation; and the said corporation shall be capable of suing and being sued, pleading and being impleaded, in any action, real, personal or mixed, and the same to prosecute and defend to final judgment and execution, by the name of ‘The President and Trustees of the Ohio University’: \* \* \* ”

Other sections of the Act provide for the appointment of officers and servants of the university; for the making of such rules, regulations and by-laws as necessary for the well ordering and good government of the university; for the vesting of townships numbered eight and nine, in the fourteenth range of townships, within the grant of land made by Congress to the Ohio Company of Associates, in said corporation, in trust for the sole use, benefit and support of the said university, forever; and for the leasing and improving of said land.

The original Act establishing the Ohio University has been amended from time to time, which amendatory acts have pertained to the disposition and handling of the original lands of the university and income therefrom; to the deposit and retention of monies derived from the sale of such properties; to the officers and corporate structure of the corporation and to the construction, equipping, maintenance and operation of certain buildings of the university. To ascertain the powers and duties of “The President and Trustees of the Ohio University” the original Act, together with the amendatory Acts, must be constructed as a whole with the resolution of the territorial legislature providing for the laying out of land donated by the United States “for the purposes of a university” in a manner which would be for the advantage of the university.

By virtue of the legislative acts establishing the university “The President and Trustees of Ohio University” is a corporate entity and as such

holds its property in its own right subject to the trusts and for the purposes for which it was created.

The university having been originally established and presently supported in part by a grant of land made by Congress and in part supported by appropriation of monies by the State is a public institution. But unlike state or municipal charitable, benevolent, penal or correctional institutions or similar institutions of the various subdivisions of the State, the ownership of the property of the corporation is not vested in the State or any of its subdivisions, nor is its continued existence dependent upon the legislative will of the State. Further, while it is supported by state funds, these legislative donations, in furtherance of education, may be withheld at will without necessarily terminating the existence or functioning of the institution. True, such action may drastically restrict its operation, but outside of the legislative appropriations the revenue of the university does not become state money or property. In short, while it is a public institution it is in no sense of the word an agency of the State or any political subdivision. In furtherance of this position it is interesting to note in the opinion in the case of *The President and Trustees of the Ohio University v. Oglevee*, 37 O. S. 1, the following statement of the Court at page 5 :

“The money intended to be appropriated by the act was not in payment of any claim against the state within the meaning of this provision. In the judgment of the general assembly this enactment was passed in the discharge of the duty imposed upon it by section 7 of article 1 of the constitution ; namely to pass suitable laws to encourage schools and the means of instruction. The Ohio University, an institution of learning, had no claim, in the nature of a debt, against the state, for which payment was demanded ; but, being without means to make necessary repairs upon the buildings of the University, she solicited aid from the state, which the general assembly granted, not by way of paying a claim, but as giving generous aid to a needy and worthy institution of learning. There is no constitutional objection to the statute, see *Ohio ex rel. v. Oglevee, ante*, where the same principle was applied to sustain an appropriation in favor of Longview Asylum.”

For these reasons the university would not be amenable to the constitutional limitations upon indebtedness or the loaning of credit applicable to the State and its subdivisions.

By the same token the argument presented in the case of *City of Cleveland, et al. v. Ruple*, 130 O. S. 465, 5 O. O. 69, 200 N. E. 507, that

the use of public buildings by a municipal corporation in carrying on a purely private business, is taking property without due process of law, would not apply, for the obvious reason that the university is not a taxing authority. In that case it was recognized that under certain conditions public property might be leased for private purposes.

In reaching this conclusion I am not unmindful of the reasoning used in Opinion No. 6119, Opinions of the Attorney General for the year 1936, Vol. III, page 1457 wherein it was held that Ohio University was an "institution" of the State of Ohio within the meaning of the term as used in Section 154-40, General Code, relative to the power of eminent domain vested in the Department of Public Works, to procure necessary lands by condemnation or otherwise, for the uses and purposes of institutions of the State of Ohio, including Ohio University. In the light of the above distinctions made in comparison to other state institutions, I am of the opinion that my analysis here in no way conflicts with the holding in that opinion.

Being of the opinion that there would be no constitutional or common law prohibition against either the leasing to or contracting with a private agency by "The President and Trustees of Ohio University" for the carrying on of a purely private enterprise on property owned by them, the question arises as to the power of said corporate body to enter into such agreements. As pointed out above, the powers of said corporation are contained in the original Act establishing the university and in the acts amendatory thereto. A thorough study of the provisions of these acts reveal that with the exception of the powers delegated to the President and Trustees with reference to the allotting, leasing and sale of the lands originally granted for university purposes, and the specific grants of power contained in Section 10 of the original Act, as above quoted, all of said provisions relate to the furtherance of education and the instruction of youth. No specific provision is made for the leasing of any property of the university except the lands originally granted for university purposes, which leasing had as its object the derivation of funds from which to operate and maintain the university. Subsequent enactments providing for the sale of these same lands and the conveyance of title thereto in fee simple in effect have rendered these powers a nullity as far as their present day operation is concerned. It is evident from these statutes that the prime object in view of all the legislative enactments was the establishment of a

university with sufficient corporate power to do all things necessary for the furtherance of those purposes.

In 10 O. Jur. page 83, in discussing the construction of the charters of corporations created prior to the Constitution of 1851, which have not by election or some other act come to be governed by the laws since passed, I find the following statement :

“\* \* \* But in determining the corporate rights secured by a special charter, the rule of construction is that a corporation takes nothing by intendment except that which is necessary to the enjoyment of the powers expressly granted; it is to be inferred that the legislature intended that it should exercise only those corporate powers which might be necessary to carry on the business for which it is organized; and it may be stated as a rule of construction that where the grant of special privileges in derogation of common right, or an exemption from the operation of general laws governing other persons and corporate bodies, is given, it is to be presumed that the legislature does not design to confer franchises of this character, unless a contrary intention be expressed in unambiguous terms. \* \* \* ”

Although the question presented here is one of rental of university properties by a private corporation, an analogous question would be the power of such institution to, itself, engage in enterprises for profit. On this point, in discussing the powers of universities and colleges generally, to carry on private enterprises, 55 Am. Jur. at page 7, contains the following statement :

“The problem whether a university or college may engage in an enterprise for profit has risen most frequently in relation to the operation of college presses or book stores. As to the right of educational institutions generally to engage in commercial enterprises for profit, no hard and fast rule may be laid down. Rather, each case must turn upon its own facts, subject to the test as to whether the carrying on of the undertaking in question is within the scope of the powers granted by the charter of the college or university, either expressly or by implication.”

Using similar reasoning the court in Long v. Board of Trustees, 24 O. App. 261, 157 N. E. 395, in upholding the right of Ohio State University to engage in the operation of a book and supply store said, at page 264 :

“It would follow, necessarily that all the enterprises undertaken by the university should be reasonably incidental to the main purpose, to wit, the maintenance of a university. \* \* \* ”

An analysis of the proposed agreement, which you have submitted with your request for my opinion indicates that the airline corporation proposes, among other things, to use the facilities of your airfield for the purpose of conducting private air transportation service in conjunction with the university student flight training program, in consideration of certain fees to be computed on a percentage revenue basis with a guaranteed minimum; that the conduct of the operations of the airline corporation is to be in accord with the instructions of the university's field manager; that in addition thereto the university will furnish certain utility and janitor services for the building spaces occupied by the airline company. In short, the proposed agreement amounts to the granting of a license on the part of the university, in consideration of a fee, to permit the use of the university facilities by the airline company. Nothing in the proposed arrangement pertains to the advancement of education, and the strongest argument which might be advanced in favor of a contract or agreement of this nature would be that the income derived therefrom would be applied to such purposes. The actual income derived from such an operation would be highly speculative for it would be conjectural as to what proportion of the fee paid would in fact be profit and what proportion would represent depreciation and depletion of the existing facilities through the additional use of such facilities as the result of normal operations of the airline company. The fallacy of this argument is apparent when it is remembered, as pointed out above, that the property of the university is held by the corporate body subject to the trusts and for the purposes for which it was created. It could not be seriously argued that the property of the university which was needed and used in the operation of the institution could properly be applied to other than educational uses and at the same time not be in derogation of the trust upon which it was held.

In further support of my conclusion in regard to the question presented, I wish to point out that it is a basic rule of law that monies derived from taxation may not be used for private purposes. Legislative appropriations to universities have been sustained on the theory not only that they are in furtherance of education but that educational assistance is a public purpose. Since the airport in question was acquired by tax monies, its use by a private corporation would be accomplishing indirectly what could not be accomplished directly.

As pointed out above, public property under certain circumstances, may be subject to lease. In most instances the prerequisites, mode and

manner of such leasing is prescribed by statute. Since I have discussed above the extent of the express power of "The President and Trustees of Ohio University" with reference to leasing property owned by it, it remains to determine under what circumstances, if any, the said corporate body may enter into a lease in furtherance of the duties imposed upon them by law. The same objections would apply with equal force to a lease arrangement covering the facilities proposed to be used as would apply to the contract proposal. However, I am of the opinion that it would be within the power of the President and Trustees, would violate no trust of the corporate body, and would be in furtherance of the objectives of the university, to lease such property of the university not presently used for instructional purposes, as may be determined by its governing body to be presently unnecessary for its proper functioning.

In conclusion, it is my opinion that it is not within the power of "The President and Trustees of the Ohio University" either to enter into a contract for the use of or lease any property belonging to the university that is presently used in carrying on its educational program.

Respectfully,

HERBERT S. DUFFY,  
Attorney General.