that such bonds shall be payable by a levy of taxes outside the fifteen mill limitation. Section 2293-13, General Code, providing that bonds issued to pay final judgments may be disregarded in calculating the net indebtedness of a subdivision, merely serves to place such bonds beyond the limitations provided in the Uniform Bond Act as to the amount of net indebtedness which may be incurred with or without authority of the electors. The section has no direct bearing upon the status of the levy to meet the interest and principal requirements of the bonds therein referred to. Of course, in the event bonds are issued pursuant to authority of the electors, they are payable by a levy of taxes outside the fifteen-mill limitation.

Since the amendment of Section 2, Article XII of the Constitution, effective January 1, 1931, unless provided for by the charter of a municipal corporation or unless approved by at least a majority of the electors, levies to meet the principal and interest requirements of all bonds of Ohio subdivisions are within the fifteen mill limitation. The amendment of this section of the Constitution, however, has not affected the status of final judgment bonds authorized without authority of the electors pursuant to the provisions of Section 2293-3, General Code, for the reason that such bonds were payable by levies inside the fifteen mill limitation prior to January 1, 1931.

In view of the foregoing and in specific answer to your question, I am of the opinion that judgment bonds issued under Section 2293-3, General Code, may be issued without authority of the electors regardless of the net indebtedness of a subdivision, and when so issued are payable by a levy of taxes inside the fifteen mill limitation.

Respectfully,
JOHN W. BRICKER,
Attorney General.

599.

LEASE—MARKET EXCHANGE BANK TO STATE OF OHIO OF OHIO-HARTMAN BUILDING VALID—LEGISLATURE APPROPRIATIONS FOR SAME—LEASE EFFECTIVE IF LESSOR FAILS TO EXERCISE OPTION TO TERMINATE WHEN—CERTIFICATION BY DIRECTOR OF FINANCE MANDATORY.

SYLLABUS:

1. *The provision in the lease from The Market Exchange Bank to the State of Ohio of the Hartman-Ohio Building, whereby the obligation of the State to make the stipulated rental payments is conditioned upon appropriations by the General Assembly, is valid.*

2. *Unless and until the lessor exercises its option under the lease to terminate same upon the failure of the State to make rental payments as they accrue, the legislature may continue to make appropriations for such payments, in which case the lease will remain effective.*

3. *Unless the legislature makes an appropriation to meet such payments, there are no funds available for that purpose.*

COLUMBUS, OHIO, April 15, 1933.

HON. T. S. BRINDLE, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your letter of recent date which reads as follows:

"I am enclosing a copy of the 99-year lease between the State of Ohio and the Market Exchange Bank Company, dated the 31st day of May, 1921, at the variable rental and for the term stated. The present rental being $25,000.00 per annum, less $5,000.00 paid to the State by the banking company.

Your attention is called to Section 9, on page 6, which is as follows:

'It is understood that the payment of the rentals and other sums hereinabove provided for and the obligation of the State of Ohio under this contract and the lease to which reference is made, are contingent upon appropriations by the General Assembly of the State of Ohio.'

In our present budget, in view of the completion of the new State Office Building, we requested sufficient funds for the payment of three months' rent, January, February and March of 1933. This appropriation was granted in the Emergency Appropriation Bill.

As bills for the next three months, April, May and June, have been presented by the banking company, and for which there is no appropriation at yet, I am asking you for an opinion as to the validity of the entire contract as made, and authority to further continue the lease and rental payments."

The indenture and contract in question provides:

"The Bank hereby sells, transfers, assigns, sets over and delivers to the State of Ohio, its successors and assigns, all of that certain Indenture of Lease for 99 years renewable forever, executed and delivered to the said Bank on June 1, 1920, by Earl S. Davis, as Trustee of the Estate of Samuel B. Hartman, deceased, as well as all of the right, title and interest of the said Bank to said lease and leasehold estate, said lease being recorded in Volume 38, page 457, of the Lease Records of Franklin County, Ohio, reference to which is hereby made; provided, however, that this sale, transfer and assignment are subject to all of the modifications, conditions and covenants hereafter mentioned, to which both parties hereby agree."

This instrument was executed pursuant to a special act of the legislature (109 O. L. 405) authorizing the Adjutant General, subject to the approval of the Governor, to contract for and purchase all of the bank's right, title and interest in the perpetual lease on this property. The act also provided that, "The attorney general shall prepare or approve all papers necessary to effect the transfer herein provided for."

The lease from Earl S. Davis, Trustee, to the Market Exchange Bank appears to have been properly executed and is in due legal form. The indenture and contract between the bank and the State was properly signed in the presence of witnesses and acknowledged before a notary public, and bears the approval of the Governor. The certificate of the Auditor of State as to the balance in the appropriation will be discussed further in this opinion. A copy of the resolution of the directors of the bank authorizing its president and secretary to execute and deliver the indenture and contract, together with a certificate of the adoption of the resolution, is attached to the instrument.

There is no endorsement upon the lease of a certificate of approval by the Attorney General, nor can I find where the Attorney General approved the lease by a formal opinion. However, these facts do not indicate that the Attorney General did not "prepare or approve" the instrument. There is always the

presumption that a public officer has performed his duties. See *Felch* vs *Hodgman,* 62 O. S. 312. In the absence of facts to rebut this presumption, I cannot say that the Attorney General did not perform the duty imposed upon him by the legislature in relation to the instrument in question.

There is one defect in the execution of the lease which must be considered in relation to the validity of the instrument. Section 2288-2 (109 O. L. 105, 130, effective April 26, 1921, *State ex rel.* vs. *Smith,* 102 O. S. 591) provides:

> "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." (Italics, the writer's.)

The certificate attached to this lease which purports to have been made pursuant to this section was signed "Joseph T. Tracy, Auditor of State." The Auditor certified that there was a balance in the appropriation, not otherwise obligated, for the purposes of this lease, involving an expenditure of not to exceed $46,000. This was the amount of the rental under the lease for the first two years of the term.

The act, of which section 2288-2 was a part, repealed section 2288-1 (enacted, 107 O. L. 453). Section 2288-1 was verbatim in the language of the present section 2288-2 with one exception. Section 2288-2 substituted "director of finance" for "auditor of state" in the section which it superseded about a month before the making of the certificate attached to this lease. It thus appears that while a certificate in proper form was executed, it was made by the wrong officer.

Public officers have only those powers and duties prescribed by statute. *State ex rel.* vs. *State Medical Board,* 107 O. S. 20; *Throop's Public Officers,* Sec. 542. At the time this certificate was made, the legislature had taken from the Auditor of State the power and duty to so certify and had designated another officer to perform this act. The certification by the auditor was therefore a nullity. It thus becomes material to inquire as to the effect upon the validity of the lease of the absence of the certificate required by section 2288-2.

In the case of *State* vs. *Kuhner & King,* 107 O. S. 406, the court had before it section 5660 (repealed 112 O. L. 391) which required a certificate similar to the one in question to be made by the county auditor before the county commissioners could take action involving the expenditure of money. Sections 5660 and 2288-2 are very similarly worded. The court held, as appears in the first paragraph of the syllabus:

> "The provision of Section 5660, General Code, that no contract or obligation involving the expenditure of money may be entered into by the public officials there designated unless the officer named first certifies that the money required is in the treasury to the credit of the fund from which it is to be drawn, is mandatory, and the making of such certificate is a prerequisite to the execution of a valid contract, but it is not essential to the validity of such contract that the certificate be recorded."

In *State ex rel.* vs. *Baker,* 112 O. S. 356, the court considered the section now in question. The third syllabus of that case reads:

> "By virtue of Section 2288-2, General Code, no public improvement constructed by the expenditure of state funds can lawfully proceed unless the *director of finance* shall first certify that there is a balance in the appropriation not otherwise appropriated to pay precedent obligations. In the event the money is in fact in the fund, it is the ministerial duty of the director of finance to make the required certificate, and the discharge of this duty may be compelled by mandamus." (Italics the writer's.)

The following is the syllabus of *State ex rel.* vs. *Guthery,* 125 O. S. 603:

> "In an action of mandamus to compel the director of agriculture and the commissioner of conservation to issue a voucher based on a contract for the purchase of land by the conservation department, the allegation 'that the money required to pay for said premises is and was in the treasury of the State of Ohio and not appropriated for any other purpose,' is insufficient without the averment in the petition that the director of finance has first certified to that fact pursuant to Section 2288-2, General Code."

Judge Day quoted section 2288-2, and said: "We hold this to be mandatory."

It appears from these cases that no state officer, board or commission can legally make any contract to create any obligation involving the expenditure of public money unless the Director of Finance shall first make the certificate required by section 2288-2. There is, however, a distinction between the obligations involved in those cases and the one created under this lease. In each of the former, the obligations were to be completed within two years, so that the required certificate was as to the existence of an appropriation to meet the entire expenditure. In regard to this lease, the certificate in question covered only the rental for the first two years of the term. The rental for that period was actually paid. Subsequently, the various general assemblies have appropriated funds for paying the yearly rental under this lease. Thus the State has performed those things to be performed by it under the terms of the lease for a period of about twelve years.

Obviously, if the whole lease and all the State's obligations under it were void *ab initio,* voluntary compliance with its terms for even a long period of time would not render it valid. In one respect this instrument was an indenture transferring all of the rights of the lessor in a perpetual leasehold of realty. In another aspect, it was a contract under which the State agreed to pay a stipulated rental during the term of the lease. 24 O. Jur., 765. It is the latter aspect which is here involved.

Article II, section 22 of the Ohio Constitution provides that "no appropriation shall be made for a longer period than two years." Under section 9 of the lease quoted in your letter, all payments under the lease "are contingent upon appropriations by the General Assembly of the State of Ohio." The certificate in question related only to the original appropriation for the first two years of the operation of this lease. Under both the constitution and the terms of the lease, all subsequent payments by the State came from later appropriations by the legislature. Since the appropriation for the first two years had in fact been made,

and since the rental for this period was made without being questioned, I am of the opinion that the decisions above referred to do not require me to say that the failure of the Director of Finance to make the proper certification now prevents the State from continuing the lease.

The purpose of such certificates was set forth in *State* vs. *Kuhner & King,* supra. The court there said at page 413:

> "The purpose in requiring such certificate to be made and in prohibiting public officials entering into any such contracts unless such certificate is first made is clearly to prevent fraud and the reckless expenditure of public funds, but particularly to preclude the creation of any valid obligation against the county above or beyond the fund previously provided and at hand for such purpose."

Since further compliance by the State with the terms of the lease has no relation to the original appropriation covered by the certificate, the purpose of requiring the certificate would not be furthered by holding the defect in the certification to prevent the State from continuing the lease.

You inquire specifically concerning the effect on Section 9 of the lease whereby the obligation of the State is made contingent upon appropriations by the General Assembly. You state that appropriations for rental up to and including March, 1933, have been made by the legislature but that no further appropriation has been made. Under section 12 of the lease, in case the State of Ohio fails to make any payments required under the terms of the lease, the lessor "at its option" may forfeit the lease and re-enter the premises.

In my opinion, they are both valid provisions. At the time the lease was entered into, the legislature was limited by Article II, section 22 of the Constitution to making an appropriation payable during two years only. Subsequent payments of rental were contingent upon future appropriations by the legislature. It was evidently with this in mind that the legislature in enacting the special act authorizing the execution of this lease, provided that "the contract entered into shall be contingent upon appropriations to be made by the General Assembly." Section 9 of the lease carries out the mandate of the legislature. It is clear that the State has not made an absolute agreement to pay the stipulated rental during the entire term of the lease, but that its promise was conditioned upon future appropriations.

By the terms of section 12 of the lease, the failure of the legislature to make the necessary appropriations does not automatically terminate the lease. Such failure gives the lessor the option to declare a forfeiture and re-enter. It appears that the lessor has not yet taken this action.

You also inquire specifically as to your authority to further continue the lease and the rental payments. Without further action by the legislature there is, of course, no appropriation and no funds are available for payments after the March rental. If the lessor does not exercise its option to terminate the lease and the legislature makes a further appropriation, in my opinion, the lease will continue in operation.

I assume that the lessor has fully performed all the covenants of the lease by it to be performed. Since I find no defects except as hereinabove mentioned in the form or manner of execution of the lease, I am of the opinion that:

1. Said indenture and contract as made is a valid instrument.

2. Section 9 of the lease whereby payments by the State are made contingent upon appropriations by the General Assembly, is valid.

3. Unless and until the lessor, The Market Exchange Bank, exercises its option to terminate the lease for nonpayment of rent, the legislature may continue the lease by making appropriations for rental payments.

Respectfully,
JOHN W. BRICKER,
Attorney General.

600

DIVISION OF CHARITIES—CHILD PLACING AND ADOPTION—PROSECUTING VIOLATIONS OF STATUTES PERTAINING THERETO—DUTY OF PROSECUTING ATTORNEY NOT ATTORNEY GENERAL TO PROSECUTE—G. C. SECTION 1352-13 APPLICABLE TO CHILD PLACING.

SYLLABUS:

1. *The duty imposed by section 12789-1 of the General Code upon the Division of Charities, Department of Public Welfare, does not preclude others from taking the necessary steps preliminary to prosecuting violations of sections 1352-12, 1352-13 and 1352-14, General Code.*

2. *The prosecuting attorney of the county where the offense occurs, and not the Attorney General, has the duty to prosecute violations under section 12789-1, General Code, in the Common Pleas Court. Solicitors of municipal corporations shall prosecute such violations before mayors and in municipal courts.*

3. *Section 1352-13, General Code, is applicable to child placing in contemplation of adoption.*

COLUMBUS, OHIO, April 15, 1933.

HON. JOHN MCSWEENEY, *Director of Public Welfare, Columbus, Ohio.*

DEAR SIR:—I have your letter of recent date, which reads as follows:

> "We are submitting herewith for your opinion questions on the alleged violation of Sections 1352-12, 1352-13, 1352-14, and 12789-1 of the General Code; and on the procedure to be followed in this department through its Division of Charities in enforcing the provisions of these sections."

With your letter you submitted a brief, together with detailed statements of three cases involving child placement and adoption, in each of which several parties are believed to have violated the statutory provisions in question. Referring to these cases, it is stated in the brief:

> "Inasmuch as it would be the duty of the trial court to pass upon the question as to whether in any specific case, such as those above mentioned, there had been a violation of these sections, as part of the case of the State of Ohio, we are not particularly interested in an opinion from the office of the Attorney-General on these points."

It thus appears that your request does not call for a detailed discussion of these three cases.