

county commissioners may purchase or appropriate such real estate adjoining the existing site of the county home as they deem necessary for infirmary purposes."

This opinion also held that a part of the real estate upon which a county home is situated could be set aside as a burial ground, the first branch of the syllabus being as follows:

"It is the duty of the board of county commissioners to pay the burial expenses of indigent county charges; and in the discharge of this duty the commissioners may provide burial lots in public or private cemeteries, or may set aside a part of the real estate, upon which the county home is situated, as a burial ground for such deceased persons."

It is evident in view of the foregoing that the legislature has not seen fit to provide that the site for a county tuberculosis hospital shall be separate and apart from the land of a county infirmary.

I infer from your communication that the electors have voted favorably upon the question of issuing bonds for the acquisition of a site and the construction thereon of a county tuberculosis hospital. I shall not in this opinion discuss the question of whether or not the entire proceeds of such bond issue may be used for the construction of the building and no part of such proceeds used for the acquisition of a site, since you do not inquire as to this point. It may be noted in passing, however, that a board of county commissioners may not issue bonds pursuant to authority of the electors for any purpose other than voted upon at such election.

In specific answer to the inquiry which you have presented, it is my opinion that a board of county commissioners may set aside part of the real estate of a county infirmary farm which is not needed for the purposes of the county infirmary as a site for a county tuberculosis hospital.

Respectfully,
GILBERT BETTMAN,
Attorney General.

2218.

PERSONAL SERVICE CLAIMS—OHIO STATE UNIVERSITY—VACATION WITH PAY OR LUMP SUM PAYMENT FOR SERVING FOR TWELVE QUARTERLY PERIODS IN SUCCESSION—PAYABLE FROM CURRENT APPROPRIATIONS—NOT "DEBTS" WITHIN CONSTITUTION.

SYLLABUS:

1. *Under a rule adopted by the Trustees of Ohio State University, permitting professors and instructors in the university to render extra service by remaining on duty for a fourth quarterly period of any year for three years, and receive credit therefor on a vacation to be taken with pay at some time in the future, or a lump sum payment in lieu of such vacation, as he may elect, the said professor or instructor rendering extra service for such purpose may lawfully be paid his regular salary during such vacation period, when taken, or a lump sum in lieu thereof, from the appropriation for "personal service then current at the time the vacation is taken or the election made to accept a lump sum in lieu of such vacation.*

2. *Claims for pay for "Personal Service" during a vacation period earned by the accumulation of credits for extra service rendered some time in the past, or claims for*

lump sum payments in lieu thereof being current expenses as of the time when the vacation is taken, or the election made to accept lump sum payments in lieu thereof, are not "debts," as the term is used in Sections 1, 2 and 3 of Article VIII of the Constitution of Ohio.

COLUMBUS, OHIO, August 8, 1930.

HON. JOSEPH T. TRACY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your request for my opinion which reads as follows:

"I respectfully request your written opinion upon the following question. A payroll for personal service is presented to this office carrying two names in payment of personal service rendered for the 'fourth quarter of 1925' and the 'fourth quarter of 1928' Ohio State University. These are certified as being paid from the appropriation for 'Student Fees.'

For your information, I am just advised that these services referred to were rendered in accordance with a rule, or order, of the trustees of the University that professors and instructors who render service in the fourth quarter of three succeeding years accumulate a vacation with pay, which may be taken by them at any time in the future that is agreeable to them, or in lieu of the vacation with pay they may accept a lump sum payment in cash with one-third of the accumulation being deducted.

Question: In view of the constitutional provision that appropriations shall be made for a period not exceeding two years, and inasmuch as we are operating in the biennium beginning January 1, 1929, and ending December 31, 1930, may the appropriation for 'Student Fees,' Ohio State University, be legally drawn upon in this biennium to pay the lump sum allowance certified to this office for payment?"

By authority of Sections 7948 and 7949, General Code, the Board of Trustees of Ohio State University is empowered to adopt by-laws, rules and regulations for the government of the university, and to elect, and fix the compensation of, and remove the president, teachers and such other employes, as may be deemed necessary.

It appears that some years ago the trustees of the university adopted a rule to the effect that professors and instructors employed upon a yearly basis, were required to be on duty but three quarterly periods of the year. If they rendered service during the fourth quarterly period of each year for three years they were entitled to a vacation for three quarterly periods of any year, with pay, any time in the future. If, later on, they did not choose to take this vacation with pay, they should be permitted to elect to receive, in cash, two-thirds of what their salary would amount to for any accumulated quarterly period, in a lump sum. All contracts of hire made with such professors and instructors are made in the light of this rule. That is to say, the rule is read into such contracts, whether expressly mentioned therein or not.

As I understand this rule, the professors or instructors are not required at the time the service is actually rendered, to elect which of the alternatives they will accept, but may do so in some future year, as they choose. In many cases I presume, it is not convenient or even possible for one to determine definitely at the time he is rendering this additional quarterly service whether he desires it credited to a vacation period in the future or whether he will later be in a position to take the vacation.

It is clear that in carrying out such an arrangement it is contemplated that the rendering of service by the professor or instructor in the extra or fourth quarter of a year is not gratuitous, and is not ordinarily to be paid for from the then current biennial appropriation. It becomes important, therefore, to inquire whether or not it constitutes the incurring of a debt by the State, such as is forbidden by the Constitution of Ohio.

The Ohio State University being an institution of the State (*Neil vs. Board of Trustees*, 31 O. S. 15), and maintained from State funds, is subject to the provisions of the Constitution of Ohio with reference to the incurring of debts and the drawing of money from the State treasury, whether that money be accumulated from student fees or moneys which are the proceeds of taxation. Moneys derived from student fees must be paid into the State treasury the same as other moneys collected by State officers or agencies (Section 24, General Code), and must be appropriated by the State Legislature before being drawn from the State treasury. The only difference between student fees and other moneys, in this respect, is that accumulations from student fees may not be made or be appropriated by the Legislature for the uses and purposes of any other institution than the institution which is the source of the fees. See Section 7986-1, General Code.

Sections 1 and 2 of Article VIII of the Constitution of Ohio, authorize the contracting of debts by the State to supply casual deficits or failures in revenues or to meet expenses not otherwise provided for, and debts to repel invasion, suppress insurrection, defend the state in war, or to redeem certain outstanding indebtedness of the State. Section 3 of Article VIII of the said Constitution provides as follows:

“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.”

Section 22 of Article II of the Constitution of Ohio provides 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.”

As bearing upon the question before us, it is important to note the holding of the Supreme Court in the case of *State vs. Medbery et al.*, 7 O. S. 522, the syllabus of which reads as follows:

“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. HELD—

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.”

To my mind the situation arising whereby a person renders service in consideration of which he is permitted to, sometime in the future take a vacation with pay, is clearly distinguishable from that upon which the court passed in the *Medbery* case, *supra*. By a vacation with pay is meant a period of rest during which time the pay of the person goes on as though he were in the performance of his regular duties, and that pay is a current expense for the period during which the vacation is taken.

Likewise, it seems clear that if a person entitled, for the reasons stated, to a vacation with pay elects to accept in lieu thereof, a lump sum payment, in accordance with the terms of his contract, the amount of such lump sum payment is in my opinion a current expense as of the time when the election is made.

Under the rule here under construction as adopted by the trustees of the university, a right arises at the time the service was rendered in favor of the person rendering the service with a view to its being credited to a vacation with pay sometime in the future, or payment in lieu thereof, and a corresponding liability is created on the university at that time, but it is not a present liability to pay but a liability to grant a vacation, or make payment in lieu thereof, sometime in the future, when the person rendering the service elects which of the alternatives he will accept. The liability which thus arises at the time the service is rendered is not a liability to pay. The liability to pay does not arise until the election is made, and is then, in my opinion, a current expense as of that time, which may be paid from the then current appropriation.

Claims for pay for "Personal Service" during a vacation period, earned by the rendering of service at some time in the past, or claims for lump sum payments in lieu thereof, being a current expense as of the time when the vacation is taken, or the election made to accept lump sum payments in lieu thereof, are not "debts", as the term is used in Sections 1, 2 and 3 of Article VIII of the Constitution of Ohio. *State ex rel Ross vs. Donahey*, 93 O. S., 414-419.

As an abstract proposition of law, I am of the opinion that payments may not be made for services rendered to the Ohio State University during the years of 1925 or 1928, from appropriations made to said university for "Personal Service" in the general appropriation act (House Bill No. 510) of the 88th General Assembly. In view, however, of the facts stated in your letter, upon which your inquiry is based, I am of the opinion that payment may lawfully be made of the claims in question from the appropriation of "Student Fees" made to "Personal Service" for the Ohio State University by the 88th General Assembly, in the act referred to above.

Respectfully,

GILBERT BETTMAN,
Attorney General.

2219.

ELECTION LAW—COMBINING PRECINCTS CONTAINING LESS THAN
250 VOTERS—BOARD HAS DISCRETIONARY POWER.

SYLLABUS:

Under the provisions of Section 4785-24, General Code, when notice of a combination of precincts containing less than two hundred fifty voters has been given, remonstrances made against such combination and a public hearing held as therein provided, the board of elections has discretionary power to determine whether or not such combination shall be made.

COLUMBUS, OHIO, August 9, 1930.

HON. JOHN K. SAWYERS, JR., *Prosecuting Attorney, Woodsfield, Ohio.*

DEAR SIR:—Your letter of recent date is as follows:

"The board of elections of my county has recently put the following question to me for determination. The question in brief that the board of elec-