Section 2293-8, General Code, provides that bonds shall bear interest at not to exceed six per cent per annum. I find no statute which indicates an intent that unpaid bonds should cease to bear interest after maturity. Of course, if the money is available to pay the bonds at maturity and they are not presented for payment at the place at which they are payable, interest would cease to run at maturity.

I am therefore of the opinion that bonds of a political subdivision which are not paid upon presentation at maturity continue to bear interest until they are paid.

Respectfully,
GILBERT BETTMAN,
Attorney General.

4631.

EXEMPTION—TAX AND TAXATION—STADIUM AND PLAYGROUND OF OHIO UNIVERSITY.

SYLLABUS:

1. *Property owned by a university and devoted to use in furtherance of a proper university purpose is exempt from taxation, although, as an incident to such use, certain income is derived therefrom, which income is wholly devoted to university purposes.*

2. *Where property would otherwise be exempt from taxation, the fact that the title thereto is in another in trust solely for the purpose of facilitating the acquisition of what is in effect a mortgage loan to finance the improvement of such property, does not destroy the right to exemption.*

COLUMBUS, OHIO, September 20, 1932.

HON. E. B. BRYAN, *President, Ohio University, Athens, Ohio.*

DEAR SIR:—Acknowledgment is hereby made of the following request from you:

> "I have the honor to request an opinion on the exemption of the Stadium and Playground of Ohio University from taxation. The grounds for asking exemption are, as follows:
>
> The Stadium and Playground, including 35 acres of land, are used exclusively for university activities—tennis, intramural games, track and field sports, as well as intercollegiate football. All are carried on within the boundaries of this tract. The Stadium was planned and built after plans were formulated and developed by university officers as directed by the Board of Trustees.
>
> The contract and trust agreement by which the university Board of Trustees, through their regularly constituted officers, acquired complete control and use of this property was set up, as follows:
>
> The Bank of Athens, National Banking Association, is Trustee of the property for and in behalf of the holders of $150,000, principal sum in land trust certificates. Funds were provided by the Trustee. The agreement sets forth that the Board of University Trustees shall set aside annually sufficient funds from athletic activities, receipts and athletic fees, to pay the annual leasehold rental as well as $3,000, principal

sum, until all the land trust certificates shall have been retired. The agreement further provides that the Trustee, the said Bank of Athens, shall then deliver to the University a warranty deed covering the property. We feel that this property being under full control of university authorities, used exclusively for university activities, and eventually to be the sole property of the University, and, through the University, of the State of Ohio, should be exempt from taxation."

Article XII, Section 2, of the Ohio Constitution reads, in part, as follows:

"* * Land and improvements thereon shall be taxed by uniform rule according to value. * * * and, without limiting the general power, subject to the provisions of Article I of this constitution, to determine the subjects and methods of taxation or exemptions therefrom, general laws may be passed to exempt burying grounds, public school houses, houses used exclusively for public worship, *institutions used exclusively for charitable purposes,* and public property used exclusively for any public purpose, but all such laws shall be subject to alteration or repeal * * *". (Italics the writer's.)

Section 5353 of the General Code reads as follows:

"* * * * Property belonging to institutions used exclusively for charitable purposes shall be exempt from taxation * *".

That a college or university is a charitable institution is a principle of law which has been firmly established. As early as 1874, it was declared in *Gerke* vs. *Purcell,* 25 O. S. 229, at 243, that:

"The meaning of the word 'charity', in its legal sense, is different from the signification which it ordinarily bears. In its legal sense it includes not only gifts for the benefit of the poor, but endowments for the advancement of learning, or institutions for the encouragement of science and art, and, it is said, for any other useful and public purpose. 3 Steph. Com. 229. Lord Camden described a charity as a 'gift to a general public use, which extends to the rich as well as to the poor.' Ambl. 651.

The maintenance of a school is a charity. Gifts for the following purposes have been declared to be charities: For schools of learning, free schools, and scholars of universities (2 Story's Eq. Jur. sec. 1160); to establish new scholarships in a college *(Attorney-General* vs. *Andrews,* 3 Ves. 633); to found and endow a college *(Attorney-General* vs. *Bower,* 3 Ves. 714); and in the case of the *American Academy* vs. *Harvard College,* 12 Gray, 594, it was said to be well established, that 'a gift designed to promote the public good, by the encouragement of learning, science, and the useful arts, without any particular reference to the poor, is a charity'.

And, in *Phillips* vs. *Bury,* 2 Term, 353, it was said by Lord Holt: 'Now, there is no manner of difference between a college and a hospital, except only in degree; a hospital is for those that are poor, and mean, and low, and sickly; a college is for another sort of indigent persons; but it hath another intent, to study in, and breed up persons in the world, that have not otherwise to live; but still it is as much within the reason of hospitals, . . . and both are eleemosynary'."

In *Wattenson* vs. *Halliday,* 77 O. S. 350, 176, the court speaking of colleges and other higher institutions of learning, quoted the following from the Gerke case, supra:

> "All of these institutions stand, as respects their claim to exemption from taxation under the constitution, on the ground of their being institutions of purely public charity".

In the opinions of the Attorney General for 1915, Volume 2, page 1305, it was stated:

> "A charity is said to include not only gifts to the poor, but endowments for the advancement of learning and for any other useful and public purposes. Schools, colleges and hospitals are charities in the legal sense of the terms as well as homes and asylums for indigent and afflicted persons".

To the same effect are *Myers* vs. *Aikins,* 8 C. C. 228, 232-233; *Gymnasium* vs. *Edmondson,* 13 N. P. N. S. 489, 491; *Gilmour* vs. *Pelton,* 5 Oh. Dec. Rep. 447, 455-456; Annual Reports of the Attorney General for 1910-1911, at pages 616-617.

In order that real estate belonging to charitable institutions may be exempt from taxation it is necessary that it be actually used for purposes of the institution and that those purposes be charitable. As stated in *Rose Institute* vs. *Myers,* 92 O. S. 238, 262:

> "The all but universal judicial deliverances along the line have had the effect of confining the exemption to such property as is directly used and employed by the institution in the actual carrying on of the business of the charity."

However, that the erection of structures and facilities for physical education, such as stadiums, playgrounds, gymnasiums, natatoria, tennis courts and the like, is a legitimate university purpose, and that their use in the usual manner by colleges is charitable, are no longer open to question. The equal necessities of having a sound body as well as a sound mind have awakened educators to the necessity of providing a means of developing bodies as well as of training minds. In Opinion No. 3038, directed to you in 1928, concerning the power of Ohio University to enter into the transaction referred to in your letter quoted at the beginning of this opinion, it was clearly stated (1928 O. A. G. Page 2866):

> "* * * so far as the question as to whether the erection of a stadium is a university project is concerned, I am of the opinion that there can be little doubt. In the past there might have been some doubt on this point, but the modern development of institutions of higher learning has resulted in an almost universal recognition of the importance of the physical development of the students as a proper and necessary adjunct to mental training. As a result, organized athletics of many kinds are recognized and form, in fact, part of the required work in most of our institutions. I accordingly have no hesitancy in saying that the acquisition of an athletic field, with modern equipment therefor, is a proper university purpose".

The first paragraph of the syllabus in the *University of Cincinnati* vs. *City of Cincinnati,* 1 N. P. N. S. 105, says:

"A contract granting to its university the necessary grant for university purposes by the city authorities, includes physical culture as a necessary university purpose".

In the 1922 opinions of the Attorney General, Volume 1, page 183, it is said:

"The word 'charitable' is to be given a rather broad meaning and not limited merely to the dispensing of alms or direct relief of the poor. Thus, a library, a museum of art, a school, an athletic association—all of these have been held to be 'charities' when they satisfy the test about to be mentioned. The test is that the enterprise is not conducted with a view to private gain".

In *Gymnasium* vs. *Edmondson,* 13 N. P. N. S., 489, where the organization in question was a gymnasium and athletic club, the court said at page 491:

"What is meant, in law, by the use of the word charity?

Charity is not strained, is unlimited, is not alone aid to the needy, is rather, broad; means love, the brotherhood of man, and embraces, includes, all which aids mankind and betters his condition. Profanely, the chief end of man is a sound mind in a sound body. The one depends upon the other—can not survive without the other. Therefore everything which tends to produce this end aids mankind, is love, brotherhood—charity.

Plaintiff does not claim to be an institution of learning—an aid to the sound mind; but rather to be an institution of physical culture, calisthenics, hygienes, including bathing, swimming—an aid to the sound body.

Institutions of learning have long been held fit for charity. In recent years culture of the body has become a part and parcel of institutions of learning—a necessary adjunct thereto, and the court does not see why there can not be then an institution of physical culture separate from one of learning and quite as fit for charity".

It is also well settled that, in order that real estate of a charitable institution be held exempt from taxation, it must not be used with a view to private gain or profit. On first consideration, one might think, therefore, that because the university derives money from athletic contests, the exemption of the stadium falls under the rule as to private gain and profit. Thus, it is generally held that if a charitable institution has a piece of real estate which it does not use directly in carrying on its charitable business, but which it rents to a third party for a consideration, and that third party uses the real estate for its own purpose, then such realty is subject to taxation even though the charitable institution uses for its charitable purposes all of the rents and profits which it derives from the lease. However, judicial pronouncements have established the principle that realty of a charitable institution is not taxable as being used for private gain merely because some revenue is derived from the use of it. An examination of a number of the leading cases will help to illustrate the line of demarcation which has been drawn. First, it is necessary to admonish that different cases have, down through the years, arisen under different constitutional and statutory set-ups, and it is, therefore, necessary to consider each decision as it is silhouetted in the light of its particular background.

In *Cincinnati College* vs. *State,* 19 Ohio 110, the question arose as to whether a building belonging to Cincinnati College and in which it conducted the college, was exempt from taxation, it appearing that the building contained a number of storerooms which were rented to others for commercial purposes. There was

no constitutional provision relating to tax exemption at that time, and the case came up solely under a statute which exempted:

> "All buildings belonging to scientific, literary, or benevolent societies, used exclusively for scientific, literary or benevolent societies, together with the land actually occupied by such institutions, not leased or otherwise used, with a view to profit, and all books, papers, furniture, apparatus, and instruments belonging to said societies, used solely for literary, scientific, or benevolent purposes."

The court held the building subject to taxation, saying:

> "We suppose the plain and palpable meaning of this statute is, that the houses and property which these different institutions need to use whilst engaged in the pursuit of their respective objects, shall be exempt from taxation. Such property, when thus used, does not produce an increase. It is used for purposes other than making money; * * * * But when any society, no matter of what kind, whether scientific, literary, or religious, enters the common business of life, and uses property for the purpose of accumulating money, the government should, and we think the statute does, treat it in the same way persons are dealt with, who are using property in a similar manner, and engaged in the same business." (P. 114.)

Cleveland Library Association vs. *Pelton,* 36 O. S. 253, presented the situation of a library association conducting a library in a building belonging to it, and charging an annual fee of one dollar for membership and a fee of ten cents per week if more than one book was withdrawn at one time. The lower floor of the building consisted mostly of storerooms which were rented to third parties. Under a statute which exempted:

> "All buildings belonging to institutions of purely public charity, together with the land actually occupied by such institution, not leased or otherwise used with a view to profit, and all moneys and credits appropriated solely to sustaining, and belonging exclusively to such institutions."

it was held that so much of the building as was used for the library was exempt from taxation, but that the portions which were leased to others were subject to taxation.

In *Davis* vs. *Camp Meeting Association,* 57 O. S. 257, it was held as disclosed by the syllabus:

> "Where an association, organized and conducted for the purpose of a purely public charity, as a camp meeting, under the supervision and control of some church, owns real estate devoted exclusively to the same use; and thereon provides privileges for the comfort and convenience of those who may attend the meeting, the fact that it makes charges for the use of these privileges, does not subject its property, nor the privileges so provided, to taxation under the laws of this state."

This case came up under a statute providing that "All buildings belonging to institutions of purely public charity, together with the lands actually occupied by such institutions, not leased or otherwise used with a view to profit," are exempt from taxation. It appeared that there was a grocery conducted on the grounds to sell provisions to those attending the meetings; likewise an ice house

furnished ice at cost. Another building was given over to sleeping and boarding accommodations for which a small charge was made. The grounds also contained a water tower and pumping station, and a small charge was made for providing water service in the various cottages. Sometimes a fee was charged for admittance to the grounds. Some revenue was derived by the camp association by reason of granting certain concessions to other parties, such as the right to run public stables, a grocery, board and rooming houses, and for other privileges. These concessions were let with a view to accommodate the people attending the meetings. Charges were made only to assist paying the expenses. All of the revenues so derived were never sufficient to pay the expenses of the meetings, which expenses were largely supported by donations. In the court's opinion, it is said:

> "And though charges are made for the use of certain privileges, these are not inconsistent with the finding, that none of its property is leased or used with a view to profit. None of its lands, as shown by the finding, are used for any other purpose than to provide for the convenience and comfort of those who may attend the meeting; and these are not sufficient to meet the expenses of the association, and have to be met in part by donations from those interested in the maintenance of the meeting. So that the charges are not then made with a view to profit.
>
> The auditor relies principally, on two cases heretofore decided by this court. In the case of *Cincinnati College* vs. *The State,* 19 Ohio, 110, after a fire, the buildings of the college were restored, and were constructed with special reference to a renting of a part of them for secular purposes, such as stores for the carrying on of ordinary business, and were so rented for profit only, not to uses that would be ancillary to the necessary uses and purposes of the college, such as dormitories and the like. Such parts of the buildings so constructed and rented, were held subject to taxation; and the same distinction exists in the case of *Library Association* vs. *Pelton,* 36 Ohio St., 253." (P. 270.)

In *Rose Institute* vs. *Myers,* 92 O. S. 252, a charitable institution sought exemption for certain parcels of real estate which were rented to other parties for residence and commercial purposes. The Constitution provided that "* * * institutions of purely public charity * * may, by general laws, be exempted from taxation", and the General Code contained a provision exempting "property belonging to institutions of public charity only." This property was held taxable, the court saying:

> "The property belonging to this institution is being commercially used. It is competing with other landlords in the city of Cleveland, in securing tenants for its business houses and residences. * * * No pretense is made that The Citizens Savings & Trust Company, the holding trustee, is managing this property on any other than strictly money-making principles, * * *. It is the use of property for purposes other than making money that justifies its exemption from taxation, and all constitutions and laws on this subject are fairly replete with this spirit and no other." (pp. 267 and 268.)

In *Gymnasium* vs. *Edmondson,* 13 N. P. (N. S.) 489, the gymnasium and athletic field of an athletic club were held tax exempt under the provisions of the

Constitution authorizing the legislature to exempt "institutions of purely public charity", and a statute which exempted "property belonging to institutions of public charity only". The institution was supported by initiation fees and donations in the form of life memberships, and it also appeared that:

> "A small charge is made for the use of billiard tables, but only sufficient to maintain them. Certain athletic goods are sold to members at a price only to cover the cost, and chiefly sold by the institution to insure uniformity in kind among its members. Exhibitions are held at which a charge of admission is made, but only to cover the necessary expenses. The athletic grounds are occasionally rented to encourage culture of the body in the vicinity, and the rental is only nominal to cover expenses in keep of grounds, with no view to profit." (p. 492.)

But the court said:

> "The evidence clearly shows the instituiton has kept within its class as a corporation not for profit. Any charges which have been made are simply incidental and subsidiary to its use—the cultivation of the body—and never with a view to profit.
>
> This court has held that the purpose of the institution is purely public charity and the court must hold from the evidence that the property in question has been used for a purely public charity. This property is neither held nor used for the purpose of profit. If any part of this property—that is the real estate, not money or credits—were set apart to produce an income or to be held as an investment, that part would not be exempt." (pp. 492, 493.)

The court corroborates its position by a liberal number of citations.

Similarly, in *O'Brien* vs. *Hospital Association,* 96 O. S. 1, a hospital, conducted by a corporation not for profit, was held tax exempt even though patients who were able to do so were required to pay, the court saying:

> "Nor does the fact that a public charitable hospital receives pay from a patient for lodging and care affect its character as a charitable institution." (P. 6.)

A study of the above cases makes the line between exemption and non-exemption obvious. On the one hand, where the charitable institution uses, or, for a consideration, permits another to use real estate belonging to it, for purposes which are wholly foreign to the charitable purposes of the institution, such property is subject to taxation, even though profits derived from such uses are applied entirely to the furtherance of the charity.

On the other hand, if the real estate of the charitable institution is being used for the legitimate charitable purposes of the institution, and not with a view to profit, the right to exemption from taxation is not lost merely because revenues are derived from charges made for privileges or uses which are ancillary and incidental to the necessary purposes and uses of the institution. Though cases have been reviewed where provisions of the law varied somewhat from the present wording of the law, it is believed that the principles above enunciated are applicable under the existing provisions quoted in the first part of this opinion.

Applying these principles, I come to the conclusion that the stadium and playgrounds at Ohio University are exempt from taxation. As has been shown, these facilities have been provided to serve, for an institution which is without

doubt charitable, a purpose which is a thoroughly proper one for the type of institution which Ohio University is. The income obtained from the stadium is merely an ancillary and incidental derivation in connection with the use of the stadium. If this property were being used, with a view to profit, to conduct a shoe factory or to pursue some other purpose wholly foreign to the business of a college, a different result would obtain.

You do not state, but it is assumed (for, no doubt, your situation is the same as that of most colleges in the country) that the Ohio University stadium and playgrounds are not run with a view to profit, but that the revenues which arise are used with a view to meet the expenses accruing in connection with the use of such facilities and with the physical education activities of the college.

It need hardly be mentioned that the arrangement by which the property is held in trust does not constitute a bar to exemption, for property which would otherwise be exempt if the legal title were held by the institution itself does not lose its exemption merely by reason of the fact that a trustee holds legal title for the institution. *Gerke* vs. *Purcell*, 25 O. S. 229, 245; 1930 Opinions of the Attorney General, Vol. II, pp. 1387-1388. It is apparent that the arrangements entered into by Ohio University and the bank with reference to the building of the stadium are merely a convenient method to facilitate the financing of the project. In Opinions of the Attorney General for 1922, Vol. I, p. 409, it was held as disclosed by the syllabus:

> "Where an incorporated charitable institution purchases property the title to which is taken in the name of an individual trustee for the purpose of facilitating a mortgage loan, the property is exempt from taxation under Section 5353 of the General Code."

Neither is the exemption lost in this case because of the rule that where a charitable institution is merely the lessee of real estate no exemption exists. True, the transaction under which the university enjoys possession of the stadium is specifically described as a lease. It is well known, however, that certain transactions, though specifically described as leases, are, when considered together with other documents which are essentially a part of the same transaction, really mortgage security transactions and not mere leases. *Patrick* vs. *Littell*, 36 O. S. 79; and *Coleman* vs. *Miller* 6 Bull., 199. This is particularly true when the lessee is to pay a certain amount of so called rent which is to be applied first on interest charges and secondly on the principal sum secured, and the lessee is to receive a conveyance when the principal sum is fully paid. Measured by the rule which is enunciated, it is obvious that the transaction concerning the Ohio University stadium, though specifically described as a lease, is a lease in name only, and is actually a transaction of purchase secured by a mortgage trust. See Opinions of the Attorney General for 1928 at p. 2866 where the terms of the transaction are more fully described.

Respectfully,
GILBERT BETTMAN,
Attorney General.