239.

TAXATION—SCHOOL LANDS GRANTED BY UNITED STATES TO STATE FOR SCHOOL PURPOSES NOT SUBJECT TO TAXATION OR ASSESSMENT.

SYLLABUS:

Lands granted by the United States to the State of Ohio for school purposes are held in trust, and are not subject to taxation by the state, and are not liable to assessment for benefits arising from the construction of drains.

COLUMBUS, OHIO, April 13, 1923.

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

DEAR SIR:—This will acknowledge receipt of your letter requesting the opinion of this department as follows:

> "The Upper Scioto Drainage and Conservancy District has assessed Sec. 16, Range 9E, Township(Marion) No. 4s, Hardin County school lands $24,495.00 for the Scioto River Improvement.
>
> Has the Auditor of State as Supervisor of School and Ministerial Lands statutory authority to pay said assessment from funds derived from rents received from said lands?"

Your inquiry evidently calls for a construction of that part of House Bill No. 255 included in an act passed by the General Assembly of Ohio, 108 O. L., Part I, page 612, entitled "An act to amend section 5330 of the General Code, so as to provide a definite rule in valuation of school and ministerial lands held under perpetual lease." The language of said amendment material to our inquiry involved in said act is as follows:

> "* * * Whenever such lands are held on leases for terms not renewable forever, such lands shall be subject to special assessments benefitting such lands, which shall be paid out of the annual rents accruing to the trust."

In connection with the foregoing act of our legislature, it will be necessary in order to answer your inquiry to make an examination of and consider the act of Congress in respect to these lands. By section 7 of the act, approved April 30, 1802 (1st Chase St. 72), the Congress offered to the convention of the eastern state of the territory northwest of the River Ohio, a proposition for "its full acceptance or rejection", which if accepted, was to be obligatory upon the United States.

> "First, that the section number sixteen, in every township, and where such section has been sold, granted, or otherwise disposed of, other lands equivalent thereto, and most contiguous to the same, shall be granted to the inhabitants of such township *for the use of schools.*"
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> "On the 29th day of November, 1802, the convention resolved to accept said proposition, provided that like donations of unlocated lands in the United States Military tract and other government lands should

be made for the support of schools in such other territory; and that "all lands before mentioned to be appropriated by the United States for the support of public schools should be vested in the legislature, in trust for said purpose.'

This modification of the proposition was assented to by congress by the act of March 3, 1803 (1 Chase 72) which enacted that all said lands should be 'vested in the legislature * * * in trust for the use aforesaid, and for *no other use, intent, or purpose, whatever.*'

This action constituted a compact between congress and the people of Ohio, whereby the object of the grant was clearly defined, and limited to the support of public schools in this state; and the state cannot in good faith divert the subject of the trust to any other use.

To secure the faithful application of the trust property, it is ordained by the constitution, Art. VI, Sec. 2, that 'the principal of all funds arising from the sale, or other disposition of lands, or other property, granted or entrusted to that state for educational * * * purposes, shall forever be preserved inviolate and undiminished; and the income arising therefrom shall be faithfully applied to the specific objects of the original grants, or appropriations.'

So far as we know the trust created by the appropriation of these lands to the use of the schools of the state has been maintained. The revenues arising from the lands have been faithfully applied to the support of schools, and where the lands have been sold, the proceeds have been preserved inviolate and undiminished, the interest only being used for school purposes. Conceding that the general assembly has exempted school lands from taxation, it is contended that such exemption is limited to taxation as distinguished from assessments. That inasmuch as the exemption refers expressly to taxation, all other exemptions are excluded, and therefore an assessment such as is sought to be upheld in this case is lawful. * * * These school lands are not private property, but a public trust, to be managed and administered for the benefit of the public schools of the state. The framers of the Constitution do not seem to have thought it necessary to throw any specific safeguard about this trust; but they did provide that 'the principal of all funds arising from the sale or other disposition of lands or other property, granted or entrusted to this state for educational * * * purposes, shall forever be preserved inviolate and undiminished.' Const., Art. VI, par. 1.

Is it not clear, the above provision and the legislation by which this trust was created being considered, that the purpose of the law-givers was that school lands, and the proceeds of the sale thereof, and the rents arising therefrom, should be kept intact, and applied solely to the support of the schools of the state?

To hold otherwise is to recognize the right to destroy the school funds arising from such lands."

See 4 C. C. R., 41.
9 C. C. R., 18.

It will be observed that these school lands came from the territory commonly designated "original surveyed townships."

Mr. William E. Peters of the Athens Bar in his work entitled "Ohio Lands and Their Subdivision," Second Edition, at page 352 says:

"Altho the title to the land in Ohio, appropriated and set aside by the United States for the use of schools, was considered to have vested in the legislature in fee simple, by the enabling act of 1802, the ordinance and resolution of the Ohio constitutional convention of November 29, 1802, the constitution of Ohio, the act admitting the state into the union and the act of March 3, 1803, assigning land for the support of its schools, yet it was doubted if the state thereby acquired the power of sale, or could convey the fee in the land to others. Therefore, the legislature, in 1824, petitioned congress to vest it with that power. Whereupon, congress, in 1826, authorized the legislature to sell and convey all the school lands in fee simple, but required it first to obtain the consent of the inhabitants to their sale; to invest the money in some productive fund and *apply the proceeds to the use of the schools* within the respective districts, or townships, for which the lands were originally reserved."

The United States Land Laws, School, are as follows:

"Sec. 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.* That the Legislature of the State of Ohio shall be, and is hereby, authorized to sell and convey, in fe simple, all or any part of the lands heretofore reserved and appropriated by Congress, for the use of schools within said State, and to invest the money arising from the sale thereof in some productive fund, the proceeds of which shall be forever applied, under the direction of said Legislature, *for the use and support of schools within the several townships* and districts of county for which they were *originally reserved and set apart,* and *for no other use or purpose whatsoever;* Provided, said land, or any part thereof, shall in no case be sold without the consent of the inhabitants of such township or district, to be obtained in such manner as the Legislature of said State shall by law direct; *And, provided also,* that, in the apportionment of the proceeds of said fund, each township and district aforesaid shall be entitled to such part thereof, and no more, as shall have accrued from the sum or sums of money arising from the sale of the school lands belonging to such township or district.

Sec. 2. And be it further enacted. That if the proceeds accruing to any township or district, from said fund, shall be insufficient for the support of schools therein, it shall be lawful for said Legislature to invest the same, as is hereinbefore directed, until the whole proceeds of the fund belonging to such township or district shall be adequate to the permanent maintenance and support of schools within the same.

Approved February 1, 1826."

It is observed here, however, that the State of Ohio has never sold this section of land, but is renting the same out on share rent.

The educational features of our own constitution, section 1, Article VI, provides as follows:

"The principal of all funds, arising from the sale, or other disposition of lands, or other property, granted or entrusted to this state for educational and religious purposes, shall forever *be preserved inviolate,* and *undiminished;* and, the *income arising therefrom,* shall be *faithfully applied* to the *specific objects* of the *original grants,* or appropriations."

A similar question to the one involved in your inquiry arose in the State of Illinois, whose constitutional provision in this behalf is somewhat similar to ours, and in passing on the question, the court in 80 Ill., 384, in the case of Chicago v. the People ex rel. says:

> "The judgment of the county court, against certain school lands for taxes, was reversed, the supreme court holding that the constitutional provision above quoted * * * 'clearly prohibits the perversion of the fund to other purposes. * * * The general assembly is prohibited from directly appropriating this fund to state, county or municipal purposes, or any portion of it, and they cannot accomplish the same end by indirect means. If they cannot so appropriate it directly, they cannot by the indirect means of taxation; because, so much as would be taken from the fund by taxation would be an unconstitutional perversion of the fund to that extent.'"

And again, the supreme court of Illinois, in construing the special drainage assessment in the case of the People ex rel. v. Little, Collector, in 118 Ill., page 52, reviewing the decision of the county court, which gave judgment against the collector who appealed, the supreme court affirmed the judgment, holding that

> "School property or school lands held in trust for school purposes are exempt from *special assessments* as well as from *general taxation.*
>
> It does not meet the objection to a special assessment to say that it takes nothing from the property, and the assessment is only to the extent of the benefit conferred upon it by the improvement. This may be so in theory, but not in certainty. The property should be held *sacred* for the use to which it was appropriated. It may be sold, or it may be rented for school purposes, but no authority is conferred upon any one to improve it. It should not be exposed to the danger of being improved away, by being made to pay for supposed benefits conferred upon it by said improvements.
>
> It is said the purpose is not to have a sale made of the land to pay the assessment, but to obtain judgment, which may be paid out of any moneys unappropriated, of the township, or there may be the remedy by *mandamus,* requiring the board of the trustees to levy a tax for the payment of the judgment. But any payment so obtained would come from the school moneys, and there would be equally involved a perversion of the school fund, as if the property itself should be sold to satisfy the judgment."

In Volume I of Page and Jones on Taxation by Assessment, at section 586, in discussing the subject of public school property, the author says:

> "If property has been conveyed by the United States to a state for school purposes, it is held in some jurisdictions that it can be assessed like other school property."

The author cites the single case of St. Louis Public Schools vs. the City of St. Louis, 26 Mo., 468. An examination of that case does not seem to reach the question involved in this inquiry. On the other hand, the same author in the same section says:

"In other jurisdictions, it is held that such property cannot be assessed, and this rule has been applied even in jurisdictions where other school property is held liable to assessment. Under this theory, *lands given by the United States in trust for school purposes, cannot be assessed for the cost of drainage.* In other jurisdictions, school property is regarded as devoted to a special use, inconsistent with the diversion of part of its funds to pay local assessments. Under this theory school lands which are used for school purposes cannot be assessed for the cost of local improvements. Thus, school property cannot under this theory be assessed for the cost of streets, sidewalks, *drainage,* sewers or sprinkling. A school property held by a school board for the use of the state to carry on a system of common schools is said to be exempt from local assessment, because it is not subject to execution, or levy, or sale under decree of court to satisfy a lien."

The People ex rel. Little v. Trustees of Schools, 118 Ill., 52, 7 N. E. 262;

Edgerton v. Huntington School Township, 126 Ind. 261, 26 N. E. 156;

Board of Improvement v. School District, 56 Ark. 354, 35 Am. St. Rep. 108, 16 L. R. A. 418, 19 S. W. 969;

Witter v. Mission School District, 121 Cal. 350, 66 Am. St. Rep. 33, 53 Pac. 905;

City of Toledo v. Board of Education, 48 O. S. 83, 26 N. E. 403;

Erickson v. Cass County, 11 N. D. 494, 92 N. W. 841;

Assessment of School Property, 7 Ohio N. P. 568;

City of Butte v. School District, No. 1, 29 Mont. 336, 74 Pac. 869.

Practically the same question as here submitted was before the Supreme Court of North Dakota in the case of Erickson et al. v. Cass County et al., in which the fifth paragraph of the syllabus recites:

"Lands granted by the United States to the state for school purposes are held in trust and are not subject to taxation or *assessment for benefits* arising from the construction of drains."

In a very well considered case from our neighboring jurisdiction of Indiana, the Supreme Court in the case of Edgerton v. School Township, 26 N. E., 156, says:

"This tract is a portion of the lands granted by the United States to the state in trust for school purposes. The provisions of the grant and its acceptance forbid the imposition of assessments.

It will thus be seen that these lands came to us as a sacred trust, to be applied exclusively to school purposes, and that the people, by their fundamental law, have placed it beyond the power of *even the legislature of the state* to make any provision by which the principal of the funds arising from such lands shall be diminished. *The state has no power to tax such lands,* for, if it were permitted to do so, it could tax them out of existence, and divert them to the use of the state in the payment of ordinary expenses; * * * and * * * assessments should be made against such lands only as are subject to taxation."

Notwithstanding the specific statutory enactment of our own legislature referred to, and notwithstanding the fact that the annual rentals received from this section of 640 acres of very fertile land amounts to about $13,000 per annum, and that the lands will be especially benefited by this drainage improvement, and should

ordinarily be expected to pay for same, yet, considering the condition of the grant and in view of the very emphatic pronouncement of our own courts above mentioned on the subject, especially in the case of Louis H. Poock, Treasurer, etc., v. Joseph Ely et al., trustees of original survey township No. 1, reported in 4 O. C. R. at page 401, as well as the decisions of the courts of last resort of our neighboring jurisdictions above referred to, I am inclined to express very grave doubts as to the constitutionality of the above mentioned act of the General Assembly of Ohio (108 O. L., Part I, page 612), and I am inclined to the opinion that you are justified in withholding payment of said assessment out of the rentals of said premises until authorized by a court of competent jurisdiction.

Respectfully,

C. C. CRABBE,
Attorney General.

240.

MAYOR—SUSPENDED FROM OFFICE PENDING INVESTIGATION UNDER SECTION 4268 G. C., IF PERMANENTLY REMOVED NOT ENTITLED TO SALARY DURING SUCH SUSPENSION—IS ENTITLED TO SALARY IF WRONGFULLY REMOVED.

SYLLABUS:

A mayor suspended from office pending investigation under section 4268, General Code, and permanently removed, is not entitled to salary during the period of such suspension.

However, should it ultimately be decided by a court of competent jurisdiction that he was wrongfully removed, then and in that event he will be so entitled to his salary.

COLUMBUS, OHIO, June 13, 1923.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Relative to my opinion No. 240, heretofore rendered to your department in answer to your request of March 14th, regarding the right of Mayor Herbert H. Vogt to draw his salary as Mayor for the period of thirty days during which time he was suspended by the Governor, beg to say that I desire to modify my said former opinion No. 240, not in the conclusion reached that he was not entitled to the salary upon the facts as stated in your letter, and at the date of your letter, March 14, 1923 at which time he had been permanently removed by the Governor.

However, on March 17th Herbert H. Vogt commenced an action in mandamus against the Governor and on March 26th another action in quo warranto against his successor in office, to obtain reinstatement to the office as such Mayor, and both said actions are now pending in the Supreme Court of this state.