800.

CONSERVATION PROJECTS—CONTRACT—STATE MAY CONTRACT AS INDIVIDUAL UNDER LEGISLATIVE OR CONSTITUTIONAL AUTHORITY THEREFOR — DEBT AS USED IN CONSTITUTION DEFINED — GOVERNOR UNAUTHORIZED TO CONTRACT WITH FEDERAL GOVERNMENT WITHOUT LEGISLATIVE OR CONSTITUTIONAL AUTHORITY.

SYLLABUS:

1. *Within constitutional limitations, the state of Ohio is as capable of becoming obligated by contract as is an individual.*

2. *Obligations of the state of Ohio, to be satisfied from revenues or profits accruing to the state in connection with the operation of, or as an outgrowth of, the property or project for which the obligation was created is not a "debt" as that term is used in Sections* 1, 2 *and* 3 *of Article* VIII *of the Constitution of Ohio.*

3. *The power of the state to contract is a legislative prerogative, and no executive officer of the state can contract for it without legislative or constitutional authority.*

4. *Under existing law, the Governor of Ohio is without power to bind the state of Ohio on a contract to reimburse the federal government from profit accruals for moneys expended by it in furtherance of conservation projects on publicly owned land within the state.*

5. *A proposed contract between the state of Ohio and the federal government whereby the state of Ohio becomes obligated to reimburse the federal government in part, for money expended by the federal government on emergency conservation work projects on publicly owned lands within the state, said reimbursement to be made in the event and to the extent only, of direct profits realized by the state from such conservation work, will not, if entered into according to law, contravene the inhibition contained in the Constitution of Ohio upon the contracting of debts by the state.*

COLUMBUS, OHIO, May 10, 1933.

HON. GEORGE WHITE, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—This will acknowledge receipt of your request for my opinion which reads as follows:

> "Mr. Robert Fechner, Director of Emergency Conservation of the U. S. Department of Labor, has ruled that before any emergency reforestation program is begun upon a state forest reserve, the governor of such state must pledge the federal government that the state concerned will repay the federal government an amount equal to $1.00 per day for each man employed in reforestation work in state forests, at such future time as the state concerned receives an actual financial profit resulting from the services of the emergency reforestation personnel.
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> In view of the limitations of the Ohio Constitution, prohibiting the State of Ohio from incurring debt except by vote of the people, and the inability of the Ohio General Assembly to make appropriations for state expenditures binding future general assemblies, I desire your opinion as

to whether the Governor of Ohio has the right or authority to make the promises required by the Director of Emergency Conservation.

More than 1,000 of the emergency reforestation personnel could be utilized within a short time in Ohio state forests with great advantage to the state, and I sincerely hope that some way may be found to comply with Director Fechner's request, if he can not be induced to modify the present restrictions."

I am advised that since submitting the above inquiry you have received a telegram from Mr. Fechner, Federal Director of Emergency Conservation Work, relating to emergency conservation work projects on publicly owned lands within the state of Ohio. This telegram supplements and clarifies to some extent the government's proposal as it was before you at the time of submitting your inquiry. The telegram is as follows:

"George White
Governor of Ohio
Columbus, Ohio.

Before approving emergency conservation work projects on state county and municipally owned land President desires assurance that you will urge the state legislature if now in session or if not at its next succeeding session to enact legislation providing that if as a result of the work done the state derives a direct profit from the sale of the land or its products the proceeds will be divided equally between the state and the federal government until the state shall have paid for the work done at the rate of one dollar per man per day for the time spent on projects subject to a maximum of three dollars per acre stop President desires that no work shall be done on privately owned land except as may be necessary in the public interest for regional or statewide forest.

Protection against fire insects and disease and/or simple flood control measures to arrest gully erosion and flash runoff at headwaters of mountain streams stop Where public interest demands work on privately owned land for these purposes the President requests that it be conditioned on state assuming responsibility for maintenance of works by landowners or otherwise and obtaining contracts with the landowners by which the state reserves the right to remove at its option and without recompense to landowner any structures or other things of removable value which may result from the work done including products of trees planted to arrest erosion stop Please wire at your earliest convenience whether you agree to this plan."

Robert Fechner,
Director of Emergency
Conservation Work."

It has long been the settled rule of the land that a state has the same power to contract, within constitutional limitations, as an individual or corporation, and that a contract once entered into by a state in a proper manner can not be abrogated by subsequent legislation. *Fletcher* vs. *Peck,* 6 *Cranch,* 87, 3 L. Ed., 162; *State of New Jersey* vs. *Wilson, 7 Cranch,* 164, 3 L. Ed. 303. Since the decision of these cases this principle has been recognized in a great variety of cases. It is referred to by the Supreme Court of Ohio in a recent case, *State* vs. *Cooper,* 122 O. S. 321 (1930) where it is stated:

"A contract made by the state of Ohio is just as valid and binding upon the state and all the executive officers of the state as the contract of any citizen of the state is binding upon such citizen."

See also *State* vs. *Donahey,* 93 O. S. 414; *Rarick* vs. *Board of Commissioners of Everglades Drainage District (1932),* 57 Fed., 2d, 1048; *In re. Opinion of Justices,* 81 N. H. 573, 128 Atl. 812; *Saratoga Water Corporation* vs. *Pratt,* 237 N. Y. 429; *United States* vs. *Metropolis,* 15 Peters 342; *In re. Incurring State Debts,* 19 R. I. 610, 37 Atl. 14; *Wadsworth et al* vs. *State (1932)* 142 So. 529, citing many authorities. Corpus Juris, Vol. 59, page 171.

The power of the state to contract is, of course, subject to express constitutional limitations and to the further limitation that a state cannot by contract divest itself of the essential attributes of sovereignty, such as the police power or the power of eminent domain.

The power of the state to contract is a legislative prerogative and no officer can bind the state without legislative authority, not even the Governor. *Wadsworth et al.* vs. *State, supra; Young* vs. *State,* 19 Wash. 634, 54 Pac. 36; *State ex rel.* vs. *Cochran,* 113 Neb. 846, 205 N. W. 568, 569, C. J., Vol. 59, page 171.

Contracts of a state are usually made by officers or agents duly authorized by constitutional or legislative provisions. Such a contract may be made, so far as the terms and conditions are concerned, by the legislature itself, and its execution delegated to designated officers or agents, or the determination of the precise terms and conditions of a contract within limitations imposed by legislative act, as well as the due execution of the contract, may be delegated to officers or agents of the state.

The Governor of Ohio has no power to contract for the state of Ohio except as that power may be granted to him as the agent of the state, by the legislature or by the Constitution. In him is vested the supreme executive power of the state. (Section 5, Article III, Constitution of Ohio.) A large number of executive powers are vested in the Governor by the terms of the Constitution, together with the power to approve or disapprove acts of the legislature. None of these general or special powers granted to the Governor of Ohio by force of these constitutional grants of power include the power to bind the state by a contract with the federal government such as the one proposed nor is there such power delegated to him by statute. There are some instances in which the Governor is empowered to approve certain public contracts and the validity of these contracts is made dependent upon his approval but I find no general or special statutory authority for his entering into a contract to reimburse the federal government for money expended on federal work projects within the state of Ohio, nor is any other officer or agent of the state empowered to make such a contract. The contract, if entered into, must be made by the legislature or an officer or agent of the state duly empowered by the legislature to do so.

The power of the legislature in the making of contracts concerning state owned lands, or authorizing the same, is plenary, except as it is limited by constitutional provisions. It is sometimes said that the Constitution of the State is a part of state contracts and, when an agent is appointed by law to contract for the State, the law under which he acts is as much a part of the contract made by him as if it were formally embodied in the contract.

Section 1, Article VIII of the Constitution of Ohio provides that the State may contract debts to supply deficits or failures in revenues and expenses not otherwise provided for, but that the aggregate amount of such debts contracted

by the General Assembly "shall never exceed $750,000." Section 2, of the same article provides that in addition to the above limited power the State may contract debts to repel invasion, suppress insurrection, defend the State in war, or to redeem outstanding indebtedness of the State.

Section 3, of Article VIII of the Constitution of Ohio reads 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."

If the obligation of the state which will be created in the event the state enters into a contract to reimburse the federal government, as proposed, creates a "debt" of the state such contract clearly comes within the inhibition of the Constitution upon the creation of debts, as provided by the section quoted above.

It will be noted from the terms of Mr. Fechner's telegram that the state is not asked to assume an obligation to repay the federal government any moneys except such as will be realized from "a direct profit from the sale of the land or its products."

It is well established by the great weight of authority that a municipality or other political subdivision as well as a state, does not create an indebtedness or liabilities within the meaning of a constitutional or statutory debt limitation by acquiring property or assuming obligations to be paid for wholly out of income or revenue to be derived from the property purchased or the project for which the obligation is assumed. This question was directly passed upon by the Supreme Court of Ohio in the case of *Kasch* vs. *Miller, Supt.,* 104 O. S. 281. The syllabus of this case reads as follows:

> "1. The act authorizing the initiation and construction of a proposed improvement under the supervision of the state superintendent of public works, with a view to the conservation of surplus, flood and other waters of the state, is valid. Where the entire improvement is to be paid for by the issue and sale of bonds in the name of the state, and the principal and interest are to be paid entirely out of the revenues derived from the improvement or from the sale of the corpus in case of default, a state debt is not thereby incurred within the purview of the state constitution; nor do the bonds so issued become an obligation or pledge the credit of the state under the express provisions of Section 412-2, General Code.
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> 2. Section 412-1 et seq. General Code (108 O. L., pt. 1, 219) authorizing the construction of such improvement and the issue and sale of bonds therefor, under the facts stated, do not violate Section 3, Article VIII, or any other provision, of the constitution, prohibiting the incurring of debts or obligations by the state."

To the same effect is a later case decided by the Supreme Court of California under constitutional provisions practically the same as those contained in the Constitution of Ohio. In this case, *California Toll Bridge Authority* vs. *Wentworth,* 298 Pac. 485 (Calif. 1931), it is held:

> "Bonds issued for toll bridges to be payable only from revenues of toll bridge do not constitute 'debt' of state within constitutional provisions limiting incurring of indebtedness."

See also *Estes* vs. *State Highway Commission,* 235 Ky. 86, 29 S. W., 2d, 583; *Connor* vs. *Blockwood State Highway Commissioner,* 176 Ark. 139, 2 S. W., 2d, 44, 47; 72 A. L. R., 687 note.

With respect to the right of the state to obligate itself as proposed, in connection with federal conservation work on privately owned land when such work becomes necessary in the public interest involving protection against fire, insects and disease and flood control measures to arrest gully erosion and flash runoff at headwaters of mountain streams, such projects are universally recognized as being in the public interest and moneys expended therefor as being expended for a public purpose even though the actual work is performed on privately owned property. I am of the opinion that the proposal submitted with respect to these matters may lawfully be incorporated in any contract which the state may make looking to the furtherance of federal emergency conservation work projects within the state.

In conclusion, it may be stated as my opinion that, when proper action is taken by the legislature of Ohio authorizing the same, a contract may lawfully be entered into with the federal government in connection with federal emergency conservation work projects within the state of Ohio, as proposed.

Respectfully,
JOHN W. BRICKER,
Attorney General.

801.

JANITOR—COUNTY COURT HOUSE—APPOINTMENT MADE AND COMPENSATION FIXED BY COUNTY COMMISSIONERS—POOR RELIEF ADMINISTERED WHERE INDIGENT RESIDES AND HAS LEGAL SETTLEMENT—PUBLIC AID IN HOMES—SUPERINTENDENT OF COUNTY HOME UNAUTHORIZED TO AFFORD AID TO PERSONS IN HOMES RESIDING IN ANOTHER COUNTY.

SYLLABUS:

1. *The janitor of a county court house should be appointed by the county commissioners of the county and his salary or compensation fixed by such commissioners. Appointments should be made from a list prepared by the proper civil service commission if such a list exists.*

2. *Indigent persons in need of public relief other than medical or surgical, or the services of a hospital, who reside in a county other than the one in which they have a legal settlement, should be removed to the county of their legal settlement as provided by Sections* 3482 *and* 3484 *of the General Code of Ohio if their health permits, and such removal is practicable. Public aid may be extended to them in their homes by the township trustees of the township of their legal settlement or the proper officials of the city of their legal settlement, by authority of Section* 3476, *General Code.*

3. *No authority exists for the Superintendent of a county home to afford public aid to persons in their homes, when those persons reside in another county, even though they have a legal settlement in the county wherein the county home is located.*