In view of the foregoing, it is my opinion that the copy of the permit which you enclose and which the Secretary of War proposes to deliver is within the legal authority of the Secretary of War to make, and it is within the legal power of the Director of Highways to accept the same if he finds that in so doing the interest of the public will be served in connection with the reconstruction and realignment of said proposed highway improvement.

Respectfully,
GILBERT BETTMAN,
Attorney General.

4732.

RELIGIOUS SEMINARY—ENDOWMENT FUNDS EXEMPT FROM TAXATION—NOT EXEMPT WHERE INCOME RESERVED TO DONOR DURING HIS LIFE

SYLLABUS:

1. *The deposits representing ordinary endowment funds of a college-seminary, composed of a high school, college and seminary, fostered by a religious sect for the purpose of developing vocations towards the ministry and charging tuition but not conducted for profit, are, when the income from such endowments is being presently used in the operation of such school, exempt from taxation under the provisions of section* 5406, *General Code.*

2. *So much of said deposits as represent donated funds upon which the donors have reserved the income for themselves during their lives is not exempt from taxation.*

COLUMBUS, OHIO, November 14, 1932.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Acknowledgment is hereby made of your letter making inquiry as to the exemption from taxation of certain funds of St. Charles College-Seminary, of Bexley, Ohio. These funds, which were donated by certain benefactors, are deposited in certain financial institutions in the name of St. Charles College-Seminary, Bishop Hartley, Trustee. The income from said funds being used for the general maintenance purposes of said school constitute what is known as endowment funds. Said institution, which was incorporated in 1928, is fostered by the Roman Catholic Church, and, as stated in its catalogue, "The primary purpose of the college * * * is to develop vocations to the Holy Priesthood." The institution consists of an ecclesiastical seminary, a college and a preparatory department. Though charges are made for such things as tuition, board and room, these sources of income are not sufficient to maintain the school, and a large part of the expenses are cared for by endowment funds and by contributions of the Catholic Church. The institution is not conducted on a commercial basis with a view to profit.

Section 5406, General Code, provides:

"The deposits required to be returned by financial institutions pursuant to this chapter include all deposits as defined by section 5324 of the

General Code to the extent that such deposits are made taxable by section 5328-1 of the General Code, *excepting deposits belonging * * * to an institution used exclusively for charitable purposes.*" (Italics the writer's.)

Since, by the express terms of section 5406, General Code, deposits of an institution used exclusively for charitable purposes are not required to be returned for taxation, it is pertinent to consider whether St. Charles College-Seminary is such an institution.

Because their purpose is the recognized charity of education, institutions of learning, not conducted for private gain, have long been considered charitable. The authorities establishing the principle that a college or university, not conducted for profit, is a charitable institution, were recently reviewed in Opinion No. 4631, issued September 20, 1932, to President Bryan of Ohio University. For the same basic reason, other institutions, such as primary and high schools, not conducted for profit, have been declared charities. Zollmann's "American Law of Charities" (1924 ed.) sections 298 and 299; *Gerke* vs. *Purcell,* 25 O. S. 229.

An institution of learning is not removed from the category of charitable institutions simply because it is a seminary teaching theology and preparing men for the ministry. As stated in Zollmann's "American Law of Charities", Section 296:

> "The broad meaning of the word education has already been indicated. All gifts for educational purposes in their ever-varying diversity are covered by it. It 'includes any department or extent of education primarily and fairly calculated to make the recipient self-supporting. A gift is not without the bounds of charity because the training contemplated thereby may include special or specific education.' "

For centuries, the ministry has been, not only one of the most honored, but one of the most learned professions. By no means can a seminary, because it teaches theology and prepares men for the ministry, be denied the educational attributes of a charity, any more than could a medical school, simply because it taught medicine and trained men to be physicians, be so denied.

Indeed, no less an authority than the Supreme Court held that an educational institution for the training of young men for the gospel ministry was an institution of purely public charity. *Little* vs. *Seminary,* 72 O. S., 417.

Neither does an educational institution lose its classification as charitable simply because it is fostered by a religious organization, or because religious instruction has an important place in the curriculum, or because students are required to attend religious services. In *Gerke* vs. *Purcell,* 25 O. S., 299 parochial schools, maintained by and under the auspices of the Catholic Church, and in which religious services formed a part of the daily exercises, were held to be institutions of purely public charity although it was admitted that a leading purpose was to educate the children of Catholic parents so as to keep them within the fold of the Catholic Church. In *Little* vs. *Seminary,* 72 O. S. 417, a theological seminary controlled by the United Presbyterian Church was declared an institution of purely public charity. In *Gilmour* vs. *Pelton,* 5 Oh. Dec. Repr. 447, 455-456, this significant statement was made:

> "* * * it is under the same construction we have given to the words 'purely public charity' that numerous literary and theological in-

stitutions and seminaries in this state under the control of the various denominations each, as Methodists, Presbyterians, Baptists, Episcopalians, etc., wholly or partially endowed by charity, or built up by voluntary contributions, are now and always have been held exempt from taxation * * *."

In Opinions of the Attorney General for 1921, Vol. 2, page 1020, in which such factors as religious motive and sectarian influences were thoroughly discussed, it was held that a bequest to a college for the purpose of establishing a "Bible Chair" was exempt from inheritance taxes under a clause exempting property passing to or for the use of "an institution for purposes only of public charity." In the "American Law of Charities" by Zollmann, it is stated, under section 294, entitled "Education by Religious Agencies", that:

"The great majority of all private schools in this country have been founded by persons religiously inclined. In consequence religious instruction has had an important part in their curriculum. This is no valid objection."

See also Opinions of the Attorney General for 1920, Vol. II, page 1233 at 1234.

It is not necessary to inquire whether St. Charles College-Seminary is open only to those of Catholic faith. That fact would not preclude it from being an institution used exclusively for charitable purposes, as described in section 5406, General Code. True, in 1872, in *Morning Star Lodge* vs. *Hayslip,* 23 O. S. 144, property belonging to the Odd Fellows Lodge, to be used for relieving the sick and needy members of the order and providing for widows and orphans of deceased members, was denied tax exemption under a clause exempting institutions of purely public charity, the court saying:

"A charitable or benevolent association which extends relief only to its own sick and needy members, and to the widows and orphans of its deceased members, is not 'an institution of purely public charity'; and its moneys held and invested for the aforesaid purposes are not exempt from taxation."

Likewise, in *Little* vs. *Seminary,* 72 O. S. 417, it clearly appeared that the seminary whose property was held exempt because it was an institution of purely public charity, was open to all upon the same conditions. The same was true in *Gerke* vs. *Purcell,* 25 O. S. 229.

However, it is to be noted that an institution which would otherwise be charitable is not, by the above decisions, removed from the status of a charitable institution simply because its benefactions are limited to members of the organization fostering it. Whether or not it is open only to such members is a factor which bears only upon the question of whether the charity is *"public."* The above cases do not decide that institutions which benefit only their own members are not *"charitable",* but simply that they are not *"public"* charities. This is demonstrated by the fact that after article 12, section 2, of the Ohio Constitution was amended in 1912 substituting, for a clause authorizing the legislature to exempt *institutions of purely public charity,* a new clause authorizing the exemption of *institutions used exclusively for charitable purposes,* the Supreme Court said:

> "Under the amendment adopted in 1912, the hospitals, homes, asylums and institutions for the care and maintenance of the aged and infirm members, their widows and orphan children, of the great benevolent and fraternal societies * * * may of course be exempt from taxation by general laws to that effect. Such institutions while not purely public charities, yet are devoted exclusively to charitable purposes."

Wilson vs. *Licking Aerie,* 104 O. S. 137, 141, 142, 147 and 148; *State* vs. *Fulton,* 99 O. S. 168, 183-185; *Jones* vs. *Conn,* 116 O. S. 1, 10.

Manifestly, if those words *"institutions used exclusively for charitable purposes"* found in the constitution, include the great homes of lodges which administer only to their own indigent numbers, then the almost identical words *"an institution used exclusively for charitable purposes"* found in section 5406, General Code, must include a seminary although it may be open only to members of the religious denomination fostering it. *Morning Star Lodge* vs. *Hayslip, supra; Gerke* vs. *Purcell, supra,* and *Little* vs. *Seminary, supra,* are not, in the respect under consideration, in point, because they concern *public* charity, while the charity with which we are concerned is not required to be public.

For this same reason, certain former attorney generals' opinions are not in point, namely, those which held that bequests to be used for the education of young for the ministry were not, when the benefits were open only to those professing a particular faith, exempt from inheritance taxes as bequests to "an institution for purposes only of *public* charity." Opinion No. 1126 for year 1920, Vol. 1, page 388; Opinion No. 1091, for year 1915, Vol. III, page 2373. Compare Opinion No. 2073 for year 1921, Vol. I, page 395, and Opinion No. 261 for year 1915, Vol. I, page 493.

Moreover, the charitable character of an institution of learning, when not operated for profit, is not destroyed merely because tuition is charged or payments are exacted for board and room. Were it otherwise, practically all colleges in the state would be stripped of their charitable character. As is truly explained in Zollmann's "American Law of Charities", section 718:

> "Schools, though they charge tuition, give more than they receive. They generally make up for the failure of the tuition fees to pay the actual costs by the self-sacrificing devotion of their teachers and the bounty of living donors or past generations. The mere taking of tuition, therefore, does not strip them of their charitable character."

In Vol. IV of the Opinions of the Attorney General, page 102 (1888) a college, though charging fixed rates of tuition, was held to be an institution of purely public charity. True, in some cases such as *Gerke* vs. *Purcell, supra,* and *Little* vs. *Seminary, supra,* it appeared that no charge was made for the enjoyment of the benefits of the particular institutions of learning, but these cases do not establish a principle that, in order to be charitable, such institutions cannot charge tuition. For a number of authorities having to do with charitable institutions making charges, see Opinions of Attorney General for 1928, Vol. I, page 463; Annual Report of Attorney General for 1912, Vol. II, page 1248; Attorney General's Reports for 1907-08, page 124 at page 129; Opinions of the Attorney General for 1918, Vol. I, page 828, at page 839; *Davis* vs. *Camp Meeting Ass'n,* 57 O. S. 257; *Gymnasium* vs. *Edmondson,* 13 N. P. (N. S.) 489; *O'Brien* vs. *Hospital Ass'n,* 96 O. S. 1, 6.

Coming, as I do, to the conclusion that St. Charles College-Seminary is a charitable institution, the next question is whether the funds in question fall within the meaning of "deposits belonging * * * to an institution used exclusively for charitable purposes," as used in Section 5406, General Code.

Inasmuch as said section 5406 was enacted subsequently to the last amendment of article XII, section 2, of the Ohio Constitution (1930) and inasmuch as said amendment abolished the requirement of taxing personal property by a uniform rule according to value and left it to the discretion of the legislature to determine, with respect to personalty, the subjects of taxation and of tax exemption, it is no longer necessary to look to the Constitution for specific authority to exempt deposits belonging to an institution used exclusively for charitable purposes.

However, prior to said amendment of 1930, inasmuch as all property was required to be taxed by a uniform rule according to value, as no property, real or personal, could be exempted unless it was expressly authorized by the Constitution, as a clause of article XII, Section 2, dealt with the exemption of charities, and as a number of judicial decisions pertaining to endowment funds of charitable institutions were handed down under those circumstances, it might be well to examine such decisions for any light which they might cast upon the present controversy. Two such cases—*Little* vs. *Seminary, supra,* and *Myers* vs. *Rose Institute,* 92 O. S. 238—arose under the Constitution prior to the 1912 amendment. One such case—*Jones* vs. *Conn,* 116 O. S. 1—arose under the Constitution subsequently to the 1912 amendment but before the amendment of 1930.

In *Little* vs. *Seminary, supra,* when the Constitution authorized the legislature to exempt "institutions of purely public charity" and a statute exempted all moneys and credits appropriated solely to sustain and belonging exclusively to institutions of purely public charity, the court held that the endowment funds of a seminary were exempt from taxation.

In *Myers* vs. *Rose Institute,* 92 O. S. 238, at a time when the Constitution still authorized the exemption of "institutions of purely public charity," but the exemption statute had been changed to read "property belonging to institutions of public charity only, shall be exempt from taxation," the court held the endowment funds of a publicly charitable institution to be tax exempt.

When, in 1927, the next case involving endowment funds, came up, namely, *Jones* vs. *Conn,* 116 O. S. 1, article XII, section 2 of the Constitution had, by the amendment of 1912, been changed so that the phrase *"institutions used exclusively for charitable purposes"* was substituted for the phrase "institutions of purely public charity." In this case it appeared that a certain testator had left a fortune for the establishment of a home and school for orphan children, and the question was whether certain personal property such as money, credits and investments was subject to taxation during the period before the institution was constructed and was ready to and did receive children. The court held it taxable, saying in the syllabus:

> "Under Section 2 of Article XII of the Constitution of Ohio, in its present form, the personal property belonging to an institution of public charity is exempt from taxation only when used exclusively for charitable purposes, and, if such personal property is invested for financial purposes during the period before the charity was being dispensed by the institution, it is not exempt from taxation during such period."

I do not believe that, by this decision, the court intended to hold that, because of the changing of the wording of the Constitution from "institutions of purely

public charity" to "institutions used exclusively for charitable purposes," all of the endowment funds of the charitable institutions of the state became subject to taxation. It was merely a holding that "property only can be exempt from taxation which is used actually in the dispensing of the charity" and that, in that case, there was no actual dispensation of charity during the particular time in question.

From the fact that real estate of a charitable institution leased with a view to profit could not be exempted from taxation under the 1912 amendment because it was not being used exclusively for charitable purposes (see *Rose Institute* vs. *Myers,* 92 O. S. 252, 271), it cannot be maintained, by analogy, that no endowment fund could be exempted under it. It must be remembered that, in Ohio, even prior to said 1912 amendment, a distinction was made in the matter of tax exemption between real property used to produce an income, and endowment funds. Thus, in *Rose Institute* vs. *Myers,* 92 O. S. 252, when the Constitution still authorized the legislature to exempt "institutions of purely public charity" and the statute exempted "property belonging to institutions of public charity only," it was held that real estate owned by a publicly charitable institution, but which it rented for commercial and residence purposes, was not exempt from taxation even though the income arising therefrom was devoted wholly to the purposes of the charity. This was placed upon the ground that property belonging to such institutions could not be exempted unless the property itself was used by the institution for the purposes of charity. At the same time, however, in *Myers* vs. *Rose Institute,* 92 O. S. 238, the Supreme Court, under the same provisions, held that the endowment funds of a publicly charitable institution were exempt from taxation. That same distinction is evidenced by the following quotation from *Gymnasium* vs. *Edmondson,* 13 N. P. (N. S.) 489:

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

One might, off hand, think that there was incongruity in thus making such a different holding as to realty and as to endowment funds. The reason for such difference, however, is clearly brought out in the following statement from the opinion in *Jones* vs. *Conn, supra,* explaining the split of authority in the county in reference to endowment funds:

> *"When it comes to an endowment fund, some courts* hold that the fund is exempt from taxation, even though it is commercially invested; the theory being that the only usefulness of an endowment fund is to produce an income with which to sustain the charity. *Other courts* deny the exemption of endowment funds because they are not exclusively used for charitable purposes; the theory being that securities and personal property that are invested are being put to a commercial and not to a charitable use." (Italics the writer's.)

True, the 1912 amendment *expressly* required property to be *used exclusively* for charitable purposes in order to be exempt from taxation. However, the necessity of being used exclusively for charitable purposes in order to receive exemption was not a new requirement imposed for the first time by the 1912 amendment. It was, by *judicial construction,* declared necessary even under the previous wording of the constitution which authorized the exemption of "institutions of purely public charity." Thus, the supreme court said of *Rose Institute* vs. *Myers,* 92 O. S. 252, a case which arose under the constitution prior to the 1912 amendment, it

"held that the real estate belonging to an institution of purely public charity is exempt from taxation only when *used exclusively* for charitable purposes." See *Jones* vs. *Conn,* 116 O. S. 1, 13-14. Hence, when, under article XII, section 2, prior to the 1912 amendment, the Supreme Court ruled, first, that property in order to be exempt had to be used exclusively for charitable purposes and, second, that ordinary endowment funds were exempt, it must be concluded that, when funds of a charitable institution are being used for ordinary endowment purposes, they are being used exclusively for charitable purposes.

In view of the traditional lenient attitude of Ohio with reference to endowment funds of charitable institutions; in view of the fact that even before the 1912 amendment the Supreme Court held that property of a charitable institution, in order to be exempt, had to be *used exclusively for charitable purposes* and that ordinary endowment funds of such an institution were exempt from taxation; and in view of the fact that the main reason for changing article XII, section 2 in 1912 was to authorize the exemption of property of institutions of charity not purely public, such as the great charitable homes belonging to lodges, I do not believe that the amendment of 1912 was intended to eradicate the distinction previously made between realty and endowment funds and to make all endowment funds thereafter taxable. That amendment was intended as a benefaction to charities. To interpret it as destroying exemption of their endowment funds would make it other than a benefaction, for a great portion of the property of many charities, especially colleges, is in the form of endowment. *Jones* vs. *Conn, supra,* must be limited strictly to the situation where the funds are invested for financial purposes during the period before the charity is being dispensed by the institution.

If then, as has been concluded, there was nothing in the phrase *"institutions used exclusively for charitable purposes"* of the 1912 amendment to destroy the exemption of ordinary endowment funds, it would seem to follow that there is nothing in the almost identical phrase *"an institution used exclusively for charitable purposes"* of section 5406, General Code, to preclude the exemption of ordinary endowment funds of a charitable institution when the income therefrom is being presently used in the present operation of such an institution already established.

If, as I understand, some of the donors of the endowment funds in question have reserved to themselves the right, during their lives, to the income from such funds, it would seem, if such donors are still living, that that portion of the funds would not be exempt from taxation inasmuch as the beneficial ownership being, during that period of time, in such donors, the deposits representing such funds would not now belong to, and be in the exclusive use of, the institution within the meaning of section 5407, General Code.

In view of the above considerations, I am of the opinion that all of the deposits in question are exempt from taxation except that portion the income from which is reserved during their lives to the donors of the funds.

Respectfully,
GILBERT BETTMAN,
Attorney General.