

entirely, from athletic receipts. These moneys need not be paid into the state treasury and hence need no appropriation by the Legislature. It follows that the receipts from athletic events may be applied directly by the corporation to the payment of the rentals and it is possible that there are other miscellaneous funds of the character suggested in my previous opinion which may be available for this purpose.

However, this may be, the question of the ability to pay the rentals is not the yardstick by which the power to execute the lease must be measured. Feeling as I do that the corporation was originally granted the right to acquire property for university purposes in any manner it chooses, and in view of the further fact that there has apparently been no attempt on the part of the Legislature to restrict or qualify this power, the conclusion must be reached that the authority still persists. Whether, in view of the obligation imposed upon the University, the execution of the lease is desirable, is a matter primarily for the exercise of the judgment of the managing body.

Accordingly, by way of specific answer to your inquiry, I am of the opinion that the President and Trustees of Ohio University have the authority to enter into a ninety-nine year lease, with purchase option, for property to be used for the athletic purposes of the University.

Respectfully,
EDWARD C. TURNER,
Attorney General.

3039.

VILLAGE—ACQUISITION OF FIRE EQUIPMENT BY CONDITIONAL SALE FROM VOLUNTEER FIRE ASSOCIATION—VOID—EXPENDITURES OVER \$500.00 REQUIRE COMPETITIVE BIDDING AFTER ADVERTISEMENT.

SYLLABUS:

1. *Where a village enters into an arrangement with a company owning a fire truck and equipment, whereby the village agrees to pay \$300.00 cash on delivery and \$100.00 per month thereafter until the sum of \$5,700.00, with interest, is paid, at which time the lessor agrees to bargain and sell and transfer title to the equipment to the village, such an arrangement is a contract of sale.*

2. *Under such circumstances, such a contract cannot be entered into except in pursuance to competitive bidding after advertisement, as set forth in Section 4221 of the General Code, and no funds may be legally expended for such purpose where said statute has not been complied with.*

COLUMBUS, OHIO, December 19, 1928.

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

GENTLEMEN:—Acknowledgment is made of your recent communication which reads:

“A volunteer fire company or association was organized in the village of M. by a group of citizens, selected a person to act as chief and to represent the association in all financial and other matters. The fire company is not incorporated; was not organized by village officers and its members do not receive any compensation from the village; neither is the so-called chief appointed by the mayor.

The fire company through its chief and without advertising for bids entered into an agreement with The H. F. A. Company of Anderson, Ind., for the use of a fire engine and equipment at the rate of \$100 per month. The agreement further provides that if the village eventually buys the equipment the amounts paid to the H. F. A. Company by the fire company will be deducted from the purchase price to be paid by the village. Copy of this agreement is enclosed herewith.

The village through its mayor and clerk entered into a so-called provisional lease agreement with the Fire Company to furnish fire protection to the village for which services the village was to pay \$300.00 cash on delivery, presumably of the fire equipment to the Fire Company, and \$100.00 per month thereafter until the sum of \$5,700.00 with interest at the rate of 5½% per annum be fully paid. Thereafter the lessor, the fire company, will bargain and sell, transfer and assign to the village the fire apparatus. Copy of this agreement is enclosed.

The lease agreement is supported by an agreement between council and the fire company, copy of which is enclosed.

At the general election in November, 1928, the question of an additional tax levy of 2½ mills for the four year period and for the purpose of purchasing fire protection equipment received favorable vote of the electors. It was originally understood that payments would be made to the fire company as per agreement from the proceeds of this tax levy.

Section 4221, G. C., provides that bids must be advertised for when any village expenditure exceeds \$500.00.

Question 1. May a municipal corporation legally enter into an agreement to pay for fire protection in the manner outlined?

Question 2. May the proceeds of a levy of taxes for the purpose of purchasing fire equipment be legally used to pay for fire protection and the acquisition of equipment in the manner outlined?"

The copy of the lease to which you refer between the M. fire company and the village of M. provides in substance that the municipality shall pay \$300.00 in cash on delivery of certain fire fighting equipment and \$100.00 per month thereafter until the principal sum of \$5,700.00, with interest at the rate of 5½% per annum, is fully paid; and further provides that if the municipality shall fully make all payments, the lessor shall bargain and sell, transfer and assign the fire truck mentioned, with all equipment, etc., to the village. While it is not expressly so stated, it is assumed that said transfer is to be made without the payment of any further consideration. Said lease appears to have been executed in pursuance to an ordinance of council.

In analyzing the provisions of the so-called lease, it will be apparent that it is not a lease but rather a conditional sale. In this connection your attention is directed to an opinion of the Attorney General, found in Opinions of the Attorney General for the year 1922, at page 499, wherein it was held, as disclosed by the syllabus:

"A contract purporting to have been entered into by a road machinery company with township trustees which is in form a lease, but which is in substance and practical operation a contract of sale, in that at the end of the third year of the lease the township trustees have the option of purchasing the machinery for a trivial sum in addition to the three years rental which they already will have paid in yearly installments under the contract, is not authorized by the terms of Section 3373, G. C., or otherwise; and such purported contract, because of its obvious tendency to destroy the principle

of competitive bidding in the purchase of road machinery as required by said Section 3373, is void as being contrary to public policy."

The instrument under consideration in said opinion was very similar to the instrument now under consideration. It may be further noted that in Section 3373 of the General Code, which was under consideration in said opinion, there is express authority for township trustees to purchase and lease road machinery. Notwithstanding the express provisions therein contained relative to the authority to lease, the then Attorney General concluded that the instrument was a contract of sale and against public policy and void.

Applying the principles announced in said opinion to the case under consideration, the conclusion must be reached that the instrument to which you refer is not a lease but a sale, and the purpose of the same is to circumvent the law with respect to awarding contracts.

Your attention is further directed to the unreported case of *Joseph A. Shriver vs. Village of Manchester, et al.*, decided by the Court of Appeals of the Fourth District on October 5, 1923, the holding in which is familiar to your department. In that case a very similar arrangement was under consideration, and the court held that the proposed arrangement was a circumvention of the law and a violation of Section 4221 of the General Code.

It is a well known principle of law that public officials may not do indirectly that which the law expressly inhibits.

Section 4389 of the General Code, relating to village fire departments, provides:

"In each village having or hereafter establishing a fire department, the head thereof shall be a fire chief, appointed by the mayor for a term of two years, and shall be an elector of the corporation."

Section 4391 of the General Code provides:

"The council may purchase for its own use or for the use of such companies, necessary fire engines, either steam or hand, hose carriages and hose, and all such other apparatus and instruments as is deemed necessary for the extinguishment of fires, and establish lines of fire alarm telegraph within the limits of the corporation."

Section 4393 of the General Code provides:

"The council may establish all necessary regulations to guard against the occurrence of fires, protect the property and lives of the citizens against damages and accidents resulting therefrom and for such purpose may establish and maintain a fire department, provide for the establishment and organization of fire engine and hose companies, establish the hours of labor of the members of its fire department, but after the first day of January, nineteen hundred and eleven, council shall not require any fireman to be on duty continuously more than six days in every seven, and provide such by-laws and regulations for their government as is deemed necessary and proper."

From the provisions of Section 4389, supra, it appears that the fire chief shall be appointed by the mayor, and the appointment of the chief of the organization,

which you mention, was not in accord with the provisions of said section. However, it is believed unnecessary to discuss the status of the fire company for the reason that the contract, whether with the fire company or with the manufacturer of the equipment, would be governed by the same laws.

Section 4221, General Code, pertinent to consider herein, provides:

"All contracts made by the council of a village shall be executed in the name of the village and signed on behalf of the village by the mayor and clerk. When any expenditure other than the compensation of persons employed therein, exceeds five hundred dollars, such contracts shall be in writing and made with the lowest and best bidder after advertising for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the village. The bids shall be opened at twelve o'clock noon on the last day for filing them, by the clerk of the village and publicly read by him."

It has been judicially determined in many recent cases that the sections of the statute, requiring competitive bidding and published advertisement, must be strictly complied with. See *Ludwig Hommel & Co. vs. Incorporated Village of Woodsville*, 115 O. S. 675.

It is very doubtful whether a municipality may lease fire equipment. The express statutory power to purchase does not necessarily include the power to lease. However, in view of Section 4221, supra, a village may not enter into contracts involving an expenditure of more than \$500.00, unless it is made in pursuance to proper advertising and competitive bidding. As hereinbefore indicated, it is my opinion that the contract under consideration is a contract of purchase and not a contract of lease, and the same is void for the reason that Section 4221, supra, has not been complied with.

The foregoing conclusion has been reached without considering the so-called Home Rule provisions of the Ohio Constitution. In so far as it has come to my attention, the Supreme Court of Ohio has not specifically passed upon the question as to whether a non-chartered municipality may, by a special ordinance of council, take such action as will set aside a general statute governing the specific method and manner of entering into contracts. Without attempting to refer to the numerous and conflicting decisions as to the power of municipalities under Section 3 of Article XVIII, Constitution of Ohio, it is suggested that your department should be guided by the provisions of the general law in such matters, unless and until the Supreme Court has specifically held such statutes are not applicable.

Therefore, in specific answer to your inquiry, you are advised that:

1. Where a village enters into an arrangement with a company owning a fire truck and equipment whereby the village agrees to pay \$300.00 cash on delivery and \$100.00 per month thereafter until the sum of \$5,700.00, with interest, is paid, at which time the lesser agrees to bargain and sell and transfer title to the equipment to the village, such an arrangement is a contract of sale.

2. Under such circumstances, such a contract cannot be entered into except in pursuance to competitive bidding after advertisement, as set forth in Section 4221 of the General Code, and no funds may be legally expended for such purpose where said statute has not been complied with.

Respectfully,
EDWARD C. TURNER,
Attorney General.