issuing them, the conclusion has been reached that the statute, by reason of its own terms, justifies the practice mentioned.

It is, however, respectfully suggested that you consider the advisability of hereafter requiring banks and trust companies to furnish the surety company bonds provided for in the section, in cases where the market value of bonds offered as security is below par, as the statute, in my opinion, confers upon the treasurer of state the right to select either of the two classes of security therein provided for.

Respectfully,
JOHN G. PRICE,
Attorney-General.

2316.

APPROVAL, BONDS OF ERIE COUNTY IN AMOUNT OF $27,500 FOR ROAD IMPROVEMENTS.

COLUMBUS, OHIO, August 11, 1921.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.

2317.

DEPARTMENT OF HIGHWAYS AND PUBLIC WORKS—AUTHORITY TO MAKE CONTRACTS FOR CONSTRUCTION OF BUILDINGS UNDER CONTROL OF ABOVE DEPARTMENT—DIRECTOR OF FINANCE MUST FIRST CERTIFY MONEY AVAILABLE—WHEN TAX LEVY FOR BUILDING FUND OF COLLEGES AND UNIVERSITIES AVAILABLE—HOUSE BILL NO. 325 (109 O. L. 360) CONSTRUED.

1. *Under the provisions of section* 154-40 *G. C., found in H. B.* 249, 109 *O. L.* 118, *the authority to make contracts for the construction of buildings under the control of the state government, or any department, office or institution thereof, is given to the department of highways and public works. This section applies to contracts for the construction of the buildings at Ohio State University for which appropriations are made by H. B.* 325, 109 *O. L.* 360.

2. *Prior to the making by a state officer, board or commission of any contract involving the expenditure of money, the director of finance must, under the provisions of section* 2288-2 *G. C.* (109 *O. L.* 130) *first certify that there is a balance in the appropriation pursuant to which such obligation is required to be paid, not otherwise obligated to pay precedent obligations; but there is no requirement that he certify as to any balance in the fund in the state treasury upon which the appropriation is to operate. Said section merely requires that all contracts, agreements or obligations involving the expenditure of money, be brought within the amount set apart by the legislature for a particular purpose, and such setting apart may antedate the appearance of funds in the state treasury.*

3. *By reason of section* 3 *of H. B.* 325 (109 *O. L.* 360) *the appropriations of the proceeds of the educational building fund tax levy for the year* 1921-1922 *and for the year* 1922-1923 *take effect and are available on and after the first day of September,* 1921, *and for a period of two years thereafter. On said first day of September and during said period, contracts for the construction of necessary buildings at Ohio*

State University may be entered into, to an amount equivalent to that realizable from 72 per cent (the university's share) of said levy for both the year 1921-1922 and the year 1922-1923.

COLUMBUS, OHIO, August 12, 1921.

HON. CARL E. STEEB, *Secretary, Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of your letter of recent date, reading as follows:

> "Referring to section 2281-1 of the General Code and House Bill No. 325 approved May 17, 1921, the opinion of the Attorney-General is requested on the following points: To what extent may contracts be entered into for buildings payable out of the appropriations made in House Bill No. 325? In other words, is the authority of the board of trustees to enter contracts limited to
>
> 1. 72 per cent of the amount in the fund at the time the contract is entered into? or
>
> 2. May the contracts be entered into for an amount estimated to be equal to 72 per cent of the entire proceeds of the special levy for both years, as soon as the appropriation becomes effective, as stated in the first sentence of section 3 of House Bill No. 325? or
>
> 3. May the board of trustees enter into contracts on September 1, 1921, up to 72 per cent of the proceeds of the tax then levied and in process of collection, that is, one year's levy or one-half the total estimated amount of the fund due the Ohio State University?"

House Bill No. 325 is an act passed by the general assembly April 28, 1921, entitled "An act to provide a building fund for the Ohio State University and the universities supported by the state, and for the several state institutions." Section 1 thereof reads, in part:

> "For the purpose of providing a fund for the construction of necessary buildings at Ohio State University, Ohio University and Miami university, there shall be levied for the year 1921-1922 and for the year 1922-1923 on the grand list of taxable property of the state a tax of one hundred and twenty-five thousandths of one mill, which tax levy shall be outside of all tax limits prescribed by law, and which shall be collected in the same manner as other state taxes and the proceeds of which shall constitute the educational building fund of the state."

Sections 2 and 3 of said act are as follows:

> "Section 2. There is hereby appropriated from the moneys raised or coming into the state treasury to the credit of the educational building fund, a sum equal to fourteen per centum of such fund for the uses and purposes of the board of trustees of Ohio University in the erection of necessary buildings and improvements not otherwise provided for; a sum equal to fourteen per centum of such fund for the uses and purposes of the board of trustees of Miami University for like purposes; *and a sum equal to the remainder of the educational building fund, for the uses and purposes of the board of trustees of Ohio State Universty for like purposes.* The sums hereby appropriated

may, in the discretion of the several boards to which they are respectively appropriated, be allotted to building projects covered by specific appropriations for like purposes effective during the fiscal biennium commencing July 1, 1921, or to additional building projects. But no money shall be withdrawn from the treasury in pursuance of the appropriations herein made excepting for the construction of buildings in accordance with the requirements of sections two thousand three hundred and fourteen to two thousand three hundred and thirty-two, both inclusive, of the General Code, so far as the same may be applicable thereto.

Section 3. The appropriations made by section 2 of this act shall take effect and be available on and after the first day of September, 1921, and shall be for the period of two years thereafter. The auditor of state is hereby authorized and directed to transfer from the general revenue fund to the educational building fund any moneys necessary to provide for expenditures in pursuance of such appropriations prior to the first semi-annual settlement of the tax levied by section 1 of this act and to reimburse the general revenue fund accordingly out of the proceeds of such settlement."

There is no section of the code known as section 2281-1 G. C., as indicated by your letter, but it is clear that what you have in mind is section 2288-2 G. C. Said section, as amended by H. B. 249, 109 O. L. 130, reads thus:

"It shall be unlawful for any officer, board or commission of the state to enter into any contract, agreement or obligation involving the expenditure of money, or pass any resolution or order for the expenditure of money, unless the director of finance shall first certify that there is a balance in the appropriation pursuant to which such obligation is required to be paid, not otherwise obligated to pay precedent obligations."

In view of the fact that you speak of the authority of the *Board of Trustees* to enter into contracts, it may be well to point out preliminary to answering your specific questions, that under the provisions of the so-called Reorganization act (H. B. 249, 109 O. L. 105), the authority to make contracts for the construction of buildings under the control of the state government, or any department, office or institution thereof, is expressly given to the department of highways and public works. Section 154-40 G. C.—a part of the act just mentioned—says:

"* * * the department of highways and public works shall have the following powers: * * *

(2) To have general supervision over the erection and construction of public buildings erected for the state government, or any department, office or institution thereof, and over the inspection of all materials previous to their incorporation into such buildings or work.

(3) To make contracts for and supervise the construction and repair of buildings under the control of the state government, or any department, office or institution thereof. * * *.

Purchases for and custody of buildings of educational institutions administered by boards of trustees shall not be subject to the control and jurisdiction of the department of highways and public works."

Section 154-2 G. C., also a part of the reorganization act, says:

"As used in this chapter:

* * * The phrase 'departments, offices and institutions' includes every organized body, office and agency established by the constitution and laws of the state for the exercise of any function of the state government, and every institution or organization which receives any support from the state."

The sections just referred to are taken to mean that boards of trustees of educational institutions supported by the state are no longer to enter into contracts for buildings to be erected at such institutions, that function now being exercised by the department of highways and public works, instead. The word "buildings" as used in the last sentence of section 154-40 G. C., above quoted, is understood to mean existing or completed buildings, as distinguished from buildings merely proposed or in process of construction.

While the particular section of the code known as section 2288-2 G. C. is of recent enactment, the subject matter of that section is practically identical with that contained in former section 2288-1 G. C. (107 O. L. 457), reading as follows:

"It shall be unlawful for any officer, board or commission of the state to enter into any contract, agreement or obligation involving the expenditure of money, or pass any resolution or order for the expenditure of money, unless the auditor of state shall first certify that there is a balance in the appropriation pursuant to which such obligation is required to be paid, not otherwise obligated to pay precedent obligations."

What was accomplished by the supplemental section known as section 2288-2 G. C. (109 O. L. 130) was merely to substitute the words "director of finance" for the words "auditor of state."

In at least two instances heretofore, this department has held that contracts may be entered into by state officers in advance of the actual coming of moneys into the state treasury. An opinion rendered on May 23, 1914, to Hon. James R. Marker, state highway commissioner (Annual Report of Attorney-General for 1914, Vol. I, p. 699), concerned the following situation: Under then existing highway laws, a tax was provided for, of "one-half of one mill on all the taxable property within the state, to be collected as are other taxes due the state and the proceeds of which shall constitute the state highway improvement fund." It was further provided that seventy-five per cent of all moneys paid into the state treasury by reason of said levy should be applied to the maintenance of the state highway department and for the construction and repair of inter-county highways. The question propounded by the state highway commissioner was:

"Would it be proper for this department to contract for the aggregate amount of money that has been levied for the entire calendar year to construct roads, while the last half of such levy is in the process of collection, taking into account the fact that such amount has been levied and placed on the tax list and is due the state from the respective counties. In other words, this department desires to enter into contracts at present, the money to pay same being due the state,

and which will be paid into the state treasury immediately following the August settlement."

The conclusion reached in said opinion, as expressed in the headnote to same, was:

"The state highway commissioner may, after the annual half-mill tax has been levied and in process of collection, enter into contracts for road improvements for the total amount that will become available from the proceeds of such levy for the year without waiting until all of said money is in the treasury. He should exercise great care that contracts are not let for an amount in excess of the sum that will come into the treasury from this source."

In another opinion of this department, rendered June 21, 1915, to Hon. Clinton Cowen, state highway commissioner (Opinions of Attorney-General for 1915, Vol. II, p. 1064), the question of entering into contracts in anticipation of moneys coming into the state treasury was also considered. On page 1065 it is said:

"* * * under the provisions of House Bill 709 the various items carried in that bill were available for contract purposes as soon as the bill became a law, which was on June 4, 1915, unless the fact that certain items in the bill represent moneys that are not yet in the state treasury should be taken to require an opposite conclusion.

It is a matter of common knowledge that it requires a considerable time, even after a contract is let, before the work can be so far prosecuted by the contractor as to require or even warrant the payment of estimates.

The appropriation about which you inquire, as has before been observed, represents a tax that has been levied, placed on the duplicate and is in the process of collection and that will come into the state treasury at the August, 1915, settlement and the legislature has appropriated the same and sought to make it available for contract purposes at the present time. To hold that contracts might not be entered into, where the contractors are to be paid either in whole or in part from this appropriation, would serve no useful purpose and the only result would be to delay the letting of contracts until so late in the working season that little could be accomplished by the contractors before the coming of bad weather would interfere with the work.

Answering you question specifically, it is, therefore, my opinion that you may at the present time enter into contracts in anticipation of the moneys that will come into the state treasury at the August, 1915, settlement. The only precaution to be observed by you in the premises being to so arrange the contracts that it will not be necessary to actually make any payments to the contractors from the appropriation about which you inquire until after the funds represented by such appropriation shall have come into the state treasury."

However, at the time the above mentioned opinions were written, neither section 2288-1 G. C. (107 O. L. 457) nor section 2288-2 G. C. (109 O. L. 130) had made its appearance in our laws, and as your letter calls special attention to section 2288-2 G. C., consideration thereof must now be given.

It will be observed that the limitation imposed by section 2288-2 G. C. is a limitation that has to do with "appropriations", and not with "funds". Prior to the making by a state board or officer of any contract involving the expenditure of money, the director of finance must certify that there is a balance in the *appropriation*—there is no requirement that he certify as to any balance in the *fund* in the state treasury upon which the appropriation is to operate. In this respect, the section does not go as far as section 5660 G. C. and section 3806 G. C., relating to counties and municipal corporations, respectively, which sections read as follows:

> "Section 5660. The commissioners of a county, the trustees of a township and the board of education of a school district, shall not enter in any contract, agreement or obligation involving the expenditure of money, or pass any resolution or order for the appropriation or expenditure of money, unless the auditor or clerk thereof, respectively, first certifies that the money required for the payment of such obligation or appropriation is in the treasury to the credit of the fund from which it is to be drawn, or has been levied and placed on the duplicate, and in process of collection and not appropriated for any other purpose; money to be derived from lawfully authorized bonds sold and in process of delivery shall, for the purpose of this section, be deemed in the treasury and in the appropriate fund. Such certificate shall be filed and forthwith recorded, and the sums so certified shall not thereafter be considered unappropriated until the county, township or board of education, is fully discharged from the contract, agreement or obligation, or as long as the order or resolution is in force."

> "Section 3806. No contract, agreement or other obligation involving the expenditure of money shall be entered into, nor shall any ordinance, resolution or order for the expenditure of money, be passed by the council or by any board or officer of a municipal corporation, unless the auditor or clerk thereof, first certifies to council or to the proper board, as the case may be, that the money required for such contract, agreement or other obligation, or to pay such appropriation or expenditure, is in the treasury to the credit of the fund from which it is to be drawn, and not appropriated for any other purpose, which certificate shall be filed and immediately recorded. The sum so certified shall not thereafter be considered unappropriated until the corporation is discharged from the contract, agreement or obligation, or so long as the ordinance, resolution or order is in force."

Nor does section 2288-1 G. C. contain the "moneys known to be in the treasury" provision found in section 5649-3d G. C., regulating the fiscal affairs of county commissioners, councils of municipal corporations and township trustees. Said section reads thus:

> "Section 5649-3d. At the beginning of each fiscal half year the various boards mentioned in section 5649-3a of this act shall make appropriations for each of the several objects for which money has to be provided, from the moneys known to be in the treasury from the collection of taxes and all other sources of revenue, and all expenditures within the following six months shall be made from and

within such appropriations and balances thereof, but no appropriation shall be made for any purpose not set forth in the annual budget nor for a greater amount for such purpose than the total amount fixed by the budget commissioners, exclusive of receipts and balances."

On the contrary, section 2288-1 G. C. merely requires that all contract claims involving the expenditure of money be brought within the amount set apart by the legislature for a particular purpose, and the setting apart may, and frequently does, antedate the appearance of funds in the state treasury.

This situation was recognized in the decision of the court in State vs. Medberry et al., 7 O. S. 522, where a somewhat detailed exposition is given of the general working of the financial system of the state, particularly in respect of the payment of current expenses and the creation of a debt. At page 530 it is said:

> "But if the general assembly should authorize liabilities to be incurred and make no appropriations to meet them, * * * debts to the amount of these claims against the state would at once be created * * *. On the other hand, if appropriations were made, but the claims authorized to be paid could not be and were not paid, on account of there being no funds, such claims would also become debts."

Notice also the following excerpt from page 541, where Judge Swan, after citing section 22, Article I, constitution of Ohio, to the effect that:

> "No money shall be drawn from the treasury, except in pursuance of a specific appropriation, made by law; and no appropriation shall be made for a longer period than two years",

and other sections of the constitution, says:

> "It results from these constitutional provisions:
> 1. The general assembly at each biennial session determine the amount of the expenditure for the two years of their official term, in all cases not otherwise predetermined by the provisions of the constitution; 2. They must take the responsibility of making the necessary appropriations for this purpose, otherwise no money can be paid; 3. They must assess a tax upon their constituency sufficient in amount to meet the appropriations."

That the legislature understood the appropriations under H. B. 325 antedated the appearance in the state treasury of funds produced by the educational building tax, is clear from the fact that while section 3 of the act says in express words that the appropriations are to be available on and after the first day of September, 1921, the tax levy that is to produce the moneys to be appropriated is, under section 1 of the act, a levy "for the year 1921-1922 and for the year 1922-1923"; in other words, a levy the first moneys produced by which will not make their way into the state treasury until the February, 1922 settlement, and the last of said moneys will come into the state treasury immediately following the August 1923 settlement.

It would seem, therefore, that from and after the first day of September and during the period commencing that day and extending two years there-

after, to-wit until September 1, 1923, section 2288-2 G. C. would be satisfied whenever

> "the director of finance shall first certify, that there is a balance in the *appropriation* pursuant to which such obligation is required to be paid, not otherwise obligated to pay precedent obligations."

In other words, we hold that on or after September 1, 1921, contracts for the construction of necessary buildings at Ohio State University may be entered into, to an amount equivalent to that realizable from the university's share (72 per cent) of the proceeds of the levy (made by section 1 of said act) for *both* the year 1921-1922 *and* the year 1922-1923.

No sound reason is seen for saying that on and after September 1, 1921, a contract could be entered into for an amount up to 72 per cent of the proceeds of the tax then levied and in process of collection (to-wit the tax for the year 1921-1922), but not for a like amount of the proceeds of the tax *to be levied* in the year 1922-1923. Section 3 of H. B. 325 makes it plain that on September 1, 1921, there will be an appropriation of the money—an appropriation of that produced by the levy of 1922-1923, as well as that produced by the levy of 1921-1922, and there is no more difficulty in the concept of appropriating money not yet levied for, than there is in the concept of appropriating money levied for but not yet collected.

It will not, of course, be possible on September 1, 1921, to know what precise sums will be realized for the educational building fund of the state by either the levy for the year 1921-1922, or the year 1922-1923. It will, therefore, be necessary for the director of finance, in performing the duty cast upon him by section 2288-2 G. C. to *estimate,* as best he can, the amount of the appropriations made by H. B. 325.

The method of estimates will also have to be resorted to by the department of highways and public works prior to entering into contracts for the erection of the buildings contemplated by the act in question. The contracts should be so drawn as not to commit the state to make payments to the contractors at times when no moneys, or insufficient moneys, are in the educational building fund. It must be remembered that that fund is to receive the avails of a tax levy for the year 1921-1922, and for the year 1922-1923. This means, as has been said before, that the first moneys produced by said levy will find their way into the state treasury immediately following the February settlement 1922, and the last of said moneys will come into the state treasury, immediately following the August settlement 1923.

It is true that the legislature made provisions in section 3 of H. B. 325 for a temporary transfer of moneys from the general revenue fund to the educational fund, but you will notice that the authority for such transfer goes no farther than this: that the auditor of state is to transfer "any moneys necessary to provide for expenditures * * * prior to the first semi-annual settlement of the tax levied by section 1 of this act and to reimburse the general revenue fund accordingly out of the proceeds of *such* settlement."

The first semi-annual settlement of the tax in question is, as said above, the settlement in February 1922, which means that transfers from the general revenue fund may be had only for a period of about six months following September 1, 1921, and such transfers cannot exceed the amount realizable from the February 1922 settlement.

Respectfully,
JOHN G. PRICE,
Attorney-General.