

courts, when a later enactment is in conflict with an earlier statute to that extent only the provisions of the later enactment supersede the earlier.

I find no language in such House Bill 675 which purports to take the powers granted to boards of county commissioners to remove non-resident indigents to the counties of their legal residence. I find no language in such House Bill 675, which is in conflict with such grants of power to the county commissioners. I am therefore of the opinion that such grants of power to boards of county commissioners were not repealed by implication by the enactment of such House Bill 675.

Specifically answering your inquiries it is my opinion that :

1. Boards of township trustees have no authority, since the enactment of Sections 3491 and 3491-1 to 3491-13, both inclusive, of the General Code (H. B. 675) to remove a non-resident applicant for poor relief to the county of his legal residence.

2. The enactment of Sections 3391 and 3391-1 to 3391-13, both inclusive, General Code (H. B. 675) did not by implication or otherwise repeal the authority granted to boards of county commissioners and the superintendent of the county home to remove non-resident indigents to the county of their legal residence.

Respectfully,

THOMAS J. HERBERT,
Attorney General.

1164.

PUBLIC SALE—ELEMENTS: NOTICE, OPPORTUNITY TO BID, COMPETITION, CONSENT TO HOLD BID OPEN—BONDS OF PUBLIC INSTITUTIONAL BUILDING AUTHORITY—REQUIRED TO BE SOLD AT PUBLIC SALE—LEGAL NOTICE—SECTIONS 2332-4 ET AL., G. C.—INTERPRETATION, LANGUAGE OR WORD—"MAY"—PERMISSIVE—WHEN PEREMPTORY—STATUTE MANDATORY.

SYLLABUS:

1. *Where power is given to public officers in a statute using the word "may" or equivalent language, whenever the public interest is concerned, such word or language, although permissive in form, is in fact peremptory, and such a statute is mandatory.*

2. *In order to constitute a public sale, at least four essentials must be present, namely, (1) adequate public notice, (2) opportunity to all to come and bid, (3) fair competition among the bidders, and (4) the bids must not be held open, except with the consent of all the bidders.*

3. *Bonds issued by the Public Institutional Building Authority under the provisions of Sections 2332-4, 2332-7 and related sections of the*

General Code, are required to be sold at public sale after proper legal notice thereof.

COLUMBUS, OHIO, September 9, 1939.

The Public Institutional Building Authority, Columbus, Ohio.

GENTLEMEN: I have your recent request for an opinion, which reads as follows:

"The Public Institutional Building Authority by advertisement, copy of which is attached to this letter, requested bids from interested financial houses for a contemplated issue of \$7,500,000 worth of bonds of the Public Institutional Building Authority.

In response to the advertisement attached hereto, six sealed bids were received by the Public Institutional Building Authority, on or before 10:00 A. M., April 19, 1939.

After due consideration of all bids so received, the bid of A. and Company was declared to be the highest and best bid.

The said bid of A. and Company is as follows:

'Pursuant to your solicitation by published notice, we are pleased to hereinafter submit for your consideration a plan and proposal to finance the additional public hospital facilities of the State of Ohio. We hereby offer and agree to purchase and, by the acceptance hereof, you agree to authorize, issue and sell, all subject to the terms hereof, revenue bonds in the principal amount of approximately \$7,500,000 and to be secured by and payable from special funds pledged therefor as hereinafter stated. Such bonds are to be dated May 1, 1939, or such other date as may be mutually agreed upon, and be scheduled to mature in installments, commencing two years from their date and ending twenty-five years from their date, in such annual amounts as will cause the total of the principal and interest becoming due during each of such years to be approximately equal. Both principal and semi-annual interest of such bonds are to be made payable in lawful money of the United States at the office of the State Treasurer, Columbus, Ohio, or, if you so elect, at any time prior to the initiation of the proceedings for such bonds, the principal and interest may be also made payable in the alternative by the trustee selected and designated as hereinafter mentioned. We agree to furnish the definitive bonds for execution and issuance hereunder.

Upon the acceptance of this proposal and the selection by you of the alternative details as hereinafter mentioned, we hereby

agree to retain at our expense the services of C. and C., attorneys of Chicago, Illinois, to confer with you and the Attorney General of Ohio and to draft all legal documents and proceedings of the Authority, and to supervise, conduct and direct all proceedings as may be deemed necessary incident to the financing and the issuance of such bonds, it being understood that forms of all such documents and legal proceedings are to be submitted to the Attorney General by the Authority for approval thereof before action is taken thereon.

Our preliminary investigation during the time permitted has disclosed various possible methods of securing the payment of the principal and interest of the bonds. It is to be recognized that in no event are any of the proceedings or bonds to pledge the general faith and credit of the State of Ohio or any political subdivision of the State, but are to be secured only by an undertaking of the Authority to apply a sufficient amount of its annual income from sources hereinafter referred to so as to meet the interest, principal and sinking fund requirements of the bonds, with a margin of ten per cent during the first six years. It appears to us that all of the income of the Authority is to be received from payments made by the Department of Public Welfare of the State of Ohio for the use and occupancy of the buildings to be acquired or constructed in whole or in part from the proceeds of the bonds. The agreement or agreements to be entered into between the Authority and the Department of Public Welfare may contain any one of the three following undertakings on the part of the Department of Welfare to pay to the Authority the specified annual amounts required to service the bonds:

(a) The obligation and pledge of the Department to pay the amounts solely and only from biennial appropriations to the Department for that purpose.

(b) The continuing obligation and pledge of the Department to pay the amounts from the annual income of the Department received from individuals and from various political subdivisions of the State for the account of patients, and any deficiency in such income to be made up from biennial appropriations.

(c) The continuing obligation and pledge of the Department to pay the minimum annual sum of \$450,000.00 from the first of all available sources of income whatsoever.

The purchase price hereby offered and agreed to be paid for the bonds secured under alternative (a) above is to be such that the interest cost of the proceeds of said bonds will be 3.4898 per cent per annum computed on the average of the final maturities

of the bonds according to standard tables of bond values. The price to be paid for bonds secured under alternative (b) above is to be such that the interest cost computed as aforesaid will be 2.9898 percent per annum; and for bonds secured as indicated under alternative (c) above is to be 2.4898 percent per annum computed as aforesaid. The coupon interest rate or rates of said bonds are to be not less than two percent (2%) per annum, nor more than three and three-quarters percent (3¾%) per annum, and we hereby undertake to advise the Authority prior to the time of the initiation of the bond proceedings the exact coupon interest rate or rates to be specified in such proceedings.

This proposal for the purchase of said bonds is made subject to the unqualified approving opinion of said C. and C. upon the validity of said bonds and the security and source of funds being available for the payment of such bonds, including interest thereon, and also subject to our determination that, based upon the reports and records of experienced payments to the Department of Welfare from the sources pledged under the alternatives hereinabove mentioned, sufficient funds will be available to assure payment of principal, interest and sinking fund requirements of the bonds.

At the option of the Authority to be exercised prior to the initiation of the proceedings, the bonds may be secured by a trust agreement entered into with an Ohio bank as trustee.

This proposal is made with the expectation that the transaction should be fully consummated not later than May 15, 1939, and consequently by reason of uncertain economic conditions, we must reserve the privilege upon notice to the Secretary of the Authority at any time to terminate this agreement should war be declared involving any of the major countries, and at any time after said last mentioned date to withdraw from our undertakings hereunder should there be any other unexpected developments adversely affecting the bond and financial markets. Your acceptance of this proposal will constitute same a contract in accordance with the foregoing terms, and such acceptance will be evidenced by endorsement hereon of the signatures of the Chairman and Secretary of the Authority."

The Resolution of the Public Institutional Building Authority accepting the bid of A. and Company reads as follows:

"WHEREAS, The Public Institutional Building Authority of Ohio has advertised for bids for bonds to extend the existing facilities of this state for care of patients afflicted with mental diseases in the sum of \$7,500,000.00 and for a plan of financing the additional hospital facilities of the State of Ohio; and

"WHEREAS, In pursuance of said advertisements bids have been received and carefully considered, now, therefore,

Be it Resolved by the Public Institutional Building Authority of Ohio, That it is hereby determined that the bid of A. and Company and Associates is hereby determined to be the highest and best bid for said bonds, said bonds to mature in installments commencing two (2) years from their date and ending twenty-five (25) years from their date, to be dated as may be mutually agreed upon by the parties and the maturities of said bonds to be in such annual amounts as will cause the total of the principal and the interest becoming due during each of said years to be approximately equal, said bonds to be payable at the office of the State Treasurer, Columbus, Ohio, or at such other place as may be mutually agreed upon; said bonds to be issued by the Public Institutional Building Authority or by such other authority as may be provided for in the Legislation to be enacted. The price to be paid for such bonds is to be 2.4898 per centum per annum computed as set forth in said bid.

Be It Further Resolved, That said bonds be, and they are hereby awarded to A. and Company and Associates, subject to the conditions of their bid, but also subject to the following conditions:

1. The successful bidder is to prepare the necessary legislation to enable the lawful issuance of said bonds, which legislation shall be satisfactory to the Attorney General and to the Department of Welfare of the State of Ohio.

2. That said legislation shall be passed by the General Assembly and approved by the Governor.

3. That after the effective date of such legislation it shall be judicially determined that said legislation is valid and that the bonds issued thereunder are valid bonds.

Said bonds shall be delivered promptly after final adjudication that said bonds are valid upon payment of the purchase price therefor, together with accrued interest thereon.

Be It Further Resolved, That notice of said award be given to A. and Company and Associates."

The Public Institutional Building Authority proceeding under Alternate (c) of the A. and Company Bid by resolution authorized the issuance of bonds in the sum of \$7,500,000 and entered into an agreement with the Department of Public Welfare for the use of the buildings to be erected with the proceeds of the bonds. Subsequently, suit was filed in the Supreme Court of Ohio questioning the validity of the bonds authorized to be

issued under the terms of alternate (c) of the plan of A. and Company.

The Supreme Court in deciding the case at 135 O. S., p. 604, held invalid the bonds which were authorized under the said alternate (c) of the A. and Company plan.

A. and Company and Associates have advised this Authority they are ready and willing to accept bonds to be issued under alternate (b) of their said bid at the interest rate therein specified.

The Public Institutional Building Authority requests your opinion on the following points:

First—Can the Public Institutional Building Authority legally proceed to issue bonds under alternates (b) to the said A. and Company and Associates without readvertising for new bids?

Second—Will a sale of the bonds to A. and Company on the terms specified under alternate (b) of their bid and under the facts above recited, constitute a public sale of the bonds of this Authority, or must the bonds be readvertised for bids in order to constitute a public sale?"

The advertisement attached to your letter reads:

“PROPOSALS REQUESTED.

The Public Institutional Building Authority of Ohio created pursuant to the terms of the Ohio General Code, Sections 2332-1 to 2332-13, inclusive (Senate Bill No. 467, Laws 1938) has made a survey of the existing facilities of this state for the care of patients affected with mental and other diseases. This survey discloses an urgent need for raising approximately \$7,500,000.00 to extend these facilities by constructing or acquiring and equipping additional public hospitals to provide more adequate and more favorable facilities for the care of such patients and to do so more economically than is now possible.

The Public Institutional Building Authority of Ohio, therefore, requests interested financial houses to submit proposals at the office of the Secretary of this Authority, 21 West Broad Street, Columbus, Ohio, prior to 10 A. M., April 10, 1939, embodying complete, comprehensive and detailed plans for financing the construction or acquisition of said hospital buildings.

Each proposal shall constitute an offer on the part of the bidder to furnish funds in a maximum amount, stated in the proposal, to enable the Public Institutional Building Authority to construct or acquire and equip such additional hospital buildings, and shall set forth in detail the plan of financing and describe fully all leases, deeds, securities or other documents inci-

dent thereto. All proceedings or other action to be taken by the Public Institutional Building Authority, or by an officer or agency of the State of Ohio, or approvals by State Officers of any action, proceeding or document, shall be fully set forth. Tentative drafts of documents may be attached to the proposal for the purpose of illustrating the plan.

There are no limitations upon the plan of financing, except that it shall not involve a pledge of the general faith and credit of the State of Ohio, or of any political subdivision of the State, for the repayment of the funds advanced for the construction or acquisition of the building, proposed to be financed by said plan, or for the payment of interest upon such funds.

The obligation of the bidder to advance the funds specified in the plan may be made subject to such conditions as the bidder may specify, including the approval of his attorneys of the validity of the plan and of all documents, deeds, leases or securities contemplated thereby. The bidder shall agree to employ, at his own expense, such attorneys whose names shall be set forth in the proposal, who will draft all documents and legal proceedings of every nature contemplated by the plan, and supervise and conduct all steps and proceedings necessary to establish to their satisfaction and to the satisfaction of the Attorney General of Ohio the legality of the plan and of all documents, deeds, leases or securities contemplated thereby.

No fiscal agency fee or compensation of any character shall be paid to any bidder. All proposals shall be prepared and submitted by bidders at their expense.

The Public Institutional Building Authority shall be the sole and final judge of the feasibility and practicability of any proposal, and whether it is in the public interests, and the Authority reserves the right to reject any and all proposals. If any proposal is accepted by resolution of the Authority it shall constitute a legal and binding contract between the Authority and the bidder. Copies of the act creating the Public Institutional Building Authority and other pertinent data may be obtained at the office of the Secretary of the Authority.

Dated at Columbus, Ohio, this 4th day of April, 1939.

THE PUBLIC INSTITUTIONAL BUILDING AUTHORITY

By William S. Konold, Chairman.

(Signed)

The above advertisement was supplemented by the following notice:

“Pursuant to an advertisement of The Public Institutional Building Authority of Ohio in the Cleveland Plain Dealer of

April 6, requesting proposals to be submitted for the financing of additional facilities for acquiring and equipping public hospitals, said proposals were to be submitted prior to 10 A. M., April 10, 1939. Prospective bidders are hereby notified that the time for the filing of such proposals has been extended to 10 A. M., April 19, 1939. All other terms and conditions of the former advertisement prevail.

Dated at Columbus, Ohio, April 7, 1939.

THE PUBLIC INSTITUTIONAL BUILDING AUTHORITY

By Wm. S. Konold, Chairman."

In addition to these advertisements transmitted with your letter, you have furnished me with photostatic copies of what you refer to as the six bids.

It is unnecessary to set forth or even to outline the contents of each of the six bids in question. Suffice it to say, no two of them are alike in either the plans of financing outlined in such bids, or the terms and conditions of the securities proposed to be issued. In their diversity they range from the frank statement contained in one, to the effect that:

"We are interested in the project with which you are connected, both from a standpoint of the needs of the State and from our need of investments. Under the law, as it stands at the present time, it will be useless for us to make you a specific offer I presume your meeting on April 19th is for the purpose of going into the legal phases of the matter and, while we are unable at the present time to give you a specific bid, we will be represented at your meeting, and in the event that the law is so amended as to make it possible for us to purchase these bonds we shall be glad to submit a definite offer for the same.",

to the demand contained in another that the debt due Hamilton County for Longview Hospital "must be taken care of so that the State can obtain a clear title to the Longview Hospital."

All contain conditions of one kind or another as, for example:

"(8) This bid is made in good faith but due to the many obvious uncertainties herein involved must be made subject to the non-occurrence of any event of any character whatsoever which shall in our opinion adversely affect the market value of these bonds.",

which is followed by the statement that the conditions outlined in the proposal "are expressed in 'highlights' in accordance with our understanding of your desires."

In another it is provided:

“If because of any change in political, economic or market conditions of any nature, which, in the judgment of the undersigned renders it impractical or unfeasible to market the bonds, this agreement and all obligations hereunder may be terminated by the undersigned without any liability on their part, or extended from time to time, the aggregate of such extensions not to exceed ninety days, without the consent of the Authority,
* * *”

Your first question is much broader than your second question and, since the answer to the second question is dispositive of both, this opinion is written upon the assumption that the act creating the Public Institutional Building Authority (referred to in such act and herein referred to as the “Authority”) and prescribing its powers and duties is, in some respects, constitutional. That is to say, it will be assumed in this opinion that it is possible that the Authority may exercise some of the powers conferred upon it so as to conform to and be within the provisions of the first branch of the syllabus of the case to which you refer in your letter, viz., *State ex rel Public Institutional Building Authority v. Griffith, Secretary of State*, 135 O. S., 604 (1939), which reads:

“The debt limitation prescribed by Sections 1 and 3 of Article VIII of the Ohio Constitution does not apply to an indebtedness incurred in the procurement of property or erection of buildings or structures for the use of the state, to be paid for wholly out of revenues or income arising from the use or operation of the particular property for the procurement or construction of which the indebtedness is incurred. (*Kasch v. Miller, Supt. Pub. Works*, 104 O. S., 281, approved and followed.)”

This assumption is, of course, consistent with the long established practice of this office to regard all acts of the General Assembly as constitutional unless an act be so palpably unconstitutional that the Attorney General believes it to be his constitutional duty to have the act so declared by the courts.

A resolution of your second question first requires a determination as to whether or not bonds issued by the Authority must be sold at *public sale* or whether a private sale of such bonds may be made under the law.

Section 2332-4, General Code, authorizes the Authority among other things, to issue bonds. This section, at the times of the notice and reception of proposals with which we are here concerned, read as follows:

“The authority is created for the purpose of constructing and improving buildings and other facilities for and in connection with any state institution as herein defined, in cooperation with any federal agency or otherwise. In furtherance of such purpose and duties, the authority shall have the following express powers, in addition to the general powers hereinabove mentioned, to-wit :

* * * * *

(4) To borrow money from a federal agency or otherwise, make and issue negotiable notes, bonds and other evidences of indebtedness or obligations (hereinafter called ‘bonds’), *of the authority* and to secure the payment of such bonds or any part thereof by pledge or deed of trust of all or any of its revenues, rentals and receipts; and to make such agreements with the purchasers or holders of such bonds, or with others in connection with any such bonds, whether issued or to be issued, as the authority shall deem advisable; and in general to provide for the security for said bonds and the rights of the holders thereof.

(5) Without limitation of the foregoing, to borrow money and accept grants from, and enter into contracts or other transactions with any federal agency as provided for in this act.

(6) To pledge, hypothecate or otherwise encumber all or any of the revenues, rentals or receipts of the authority as security for all or any of the obligations of the authority.

* * * * *

This section was amended by the 93rd General Assembly in Amended Senate Bill 313, which was passed as an emergency measure and became effective on June 1, 1939. By the amendment the words “of the authority”, above italicized, were deleted from subparagraph 4 and in lieu thereof the words “in the name of the State of Ohio” were inserted. Certain other changes were made which are not necessary here to be noted.

Section 2332-7 provides how the bonds authorized in Section 2332-4 shall be issued and sold. This section read :

“The bonds of the authority hereinabove referred to and authorized to be issued, shall be authorized by resolution of the board and shall be of such series, bear such date or dates, mature at such time or times, not exceeding twenty-five years from their respective dates, bear interest at such rate or rates, not exceeding the annual rate provided in section 2293-8 of the General Code, payable semi-annually, be in such denominations, be in such form, either coupon or fully registered without coupons,

carry such registration, exchange-ability and interchangeability privileges, be payable in such medium of payment and at such place or places, be subject to such terms of redemption at such prices, not exceeding one hundred five per centum of the principal amount thereof, and be entitled to such priorities in the revenues, rentals or receipts of such authority as such resolution or resolutions may provide. *The bonds shall be signed by such officers as the authority shall determine, and coupon bonds shall have attached thereto interest coupons bearing the facsimile signature of the treasurer of the authority, all as may be prescribed in such resolution or resolutions. Any such bonds may be issued and delivered notwithstanding that one or more of the officers signing such bonds, or the treasurer whose facsimile signature shall be upon the coupons or any thereof shall have ceased to be such officer or officers at the time when such bonds shall actually be delivered. The total amount of bonds issued by the authority, shall not exceed seven million five hundred thousand dollars.*

Said bonds may be sold at public sale for such price or prices as the authority shall determine, provided that the interest cost to maturity of the money received for any issue of said bonds shall not exceed the annual rate provided in section 2293-8 of the General Code. Pending the preparation of the definite bonds, interim receipts may be issued to the purchaser of such bonds and may contain such terms and conditions as the authority may determine.

Any resolution or resolutions authorizing any bonds may contain provisions which shall be part of the contract with the holders thereof as to (a) pledging the full faith and credit of the authority (but not of the state of Ohio) for such obligations, or restricting the same to all or any of the revenues, rentals or receipts of the authority from all or any building or facility; (b) the construction, improvement, operation, extension, enlargement, maintenance and repair of any building or buildings, facility or facilities, and the duties of the authority with reference thereto; (c) the terms and provisions of the bonds; (d) limitations on the purposes to which the proceeds of the bonds then or thereafter to be issued; (e) the rate of rentals, rates and other charges for use of the buildings or facilities to be constructed, improved, repaired or maintained by the application of the proceeds of such bonds, including limitations upon the power of the authority to modify the action of the authority pursuant to which any rentals, rates or other charges are payable; (f) the setting aside of reserves or sinking funds and the regulation and disposition thereof; (g) limitations on the issuance of additional bonds; (h) the terms and provisions of

any deed of trust or indenture securing the bonds or under which the same may be issued; and (i) any other or additional agreements with the holders of the bonds.

The authority may enter into any deeds of trust, indentures or other agreements with any bank, or trust company, or other person or persons in the United States having power to enter into the same, as security for such bonds and may assign and pledge all or any of the revenues, rentals or receipts of the authority thereunder. Such deed of trust, indenture, or other agreement may contain such provisions as may be customary in such instruments, or as the authority may authorize, including (but without limitation) provisions as to (1) the construction, improvement, operation, maintenance, and repair of any building or facility, and the duties of the authority with reference thereto; (2) the application of funds and the safeguarding of funds on hand or on deposit; (3) the rights and remedies of said trustee and the holders of the bonds (which may include restrictions upon the individual right of action of such bondholders); and (4) the terms and provisions of the bonds or the resolutions authorizing the issuance of the same.

Such bonds shall be lawful investments of banks, savings banks, trust companies, trustees and of the trustees of the sinking fund of municipalities and counties, and shall be acceptable as security for the deposit of public moneys."

This section was also amended in Senate Bill No. 313, the two clauses above italicized being respectively made to read as follows:

"The bonds shall be signed by the chairman of the authority, countersigned by the governor of Ohio under the great seal of the state, attested by the secretary of state and coupon bonds shall have attached thereto interest coupons bearing the facsimile signature of the treasurer of state as exofficio treasurer of the authority. Any such bonds may be issued and delivered notwithstanding that one or more of the officers signing such bonds, or the treasurer whose facsimile signature shall be upon the coupons or any thereof, shall have ceased to be such officer or officers at the time when such bonds shall actually be delivered. All such bonds shall be, and are hereby declared to have all the qualities and incidents of negotiable instruments under the negotiable instruments law of the state and such bonds shall be exempt from all taxation, state or municipal. The total amount of bonds issued by the authority shall not exceed ten million dollars."

"Such bonds shall be lawful investments of banks, savings

banks, insurance companies, trust companies, trustees, and of the trustees of the sinking funds of municipalities, school districts, counties and the commissioners of the sinking fund of Ohio, the industrial commission of Ohio, the state teachers' retirement system, the public employes retirement system, state public school employes' retirement system and shall also be acceptable as security for the deposits of public moneys."

It will be observed that the language of the above section, providing for the sale of any bonds issued by the Authority, reads that said "bonds may be sold at public sale for such price or prices as the authority shall determine."

While from a cursory reading of this language it might be thought that the Legislature intended that the authority might sell its bonds in any manner, including a public sale, my conclusion is to the contrary for at least two reasons: First, it is well settled that where the Legislature authorizes an act to be done in a specified manner, the inclusion of that method excludes all other methods. As stated in the first branch of the syllabus in the case of *Frisbie Co. v. East Cleveland*, 98 O. S., 266, (1918):

"Where a statute prescribes the mode of exercise of the power therein conferred upon a municipal body, the mode specified is likewise the measure of the power granted, and a contract made in disregard of the express requirements of such statute is not binding or obligatory upon the municipality."

It is of course obvious that the same rule applies to statutory officers, boards or commissions.

Second, it has been the law since long before our nation was founded that in cases of this kind the word "may" is required to be read "must". Mr. Justice Swayne, in the case of *Board of Supervisors of Rock Island County v. United States*, 4 Wall., 435, 18 L. Ed., 419 (1867), stresses the antiquity and soundness of this rule in the following language, citing among others the case of *State ex rel. v. Chase, Governor*, 5 O. S., 528 (1856):

"We cannot concur in this view of the subject. Great stress is laid by the learned counsel upon the language 'may, if deemed advisable,' which accompanies the grant of power and, as he contends, qualifies it to the extent assumed in his argument.

In *King v. Inhab. of Derby, Skin.*, 370, there was an indictment against 'divers inhabitants' for refusing to meet and make a rate to pay 'the constables' tax.' The defendants moved to quash the indictment, 'because they are not compellable, but the statute only says that they may, so that they have their elec-

tion, and no coercion shall be.' The court held that 'may', in the case of a public officer, is tantamount to 'shall', and if he does not do it, he shall be punished upon an information, and though he may be commanded by a writ, this is but an aggravation of his contempt.'

In *Rex and Regina v. Barlow*, 2 Salk., 609, there was an indictment upon the same statute, and the same objection was taken. The court said: 'When a statute directs the doing of a thing for the sake of justice or the public good, the word *may* is the same as the word *shall*; thus, 23 Hen. VI., says "the sheriff may take bail." This is construed he shall, for he is compellable to do so.'

These are the earliest and the leading cases upon the subject. They have been followed in numerous English and American adjudications. *The rule they lay down is the settled law of both countries.*

* * * * *

The conclusion to be deduced from the authorities is, that where power is given to public officers, in the language of the act before us, or in equivalent language—*whenever the public interest or individual rights call for its exercise—the language used, though permissive in form, is in fact peremptory.* * * *
(Italics ours.)

One of the comparatively recent pronouncements of the Supreme Court of Ohio, showing that this principle is still adhered to in our state, is *Stanton v. Frankel Bros. Realty Company*, 117 O. S., 345 (1927). In that case, Chief Justice Marshall said as follows at page 355:

"* * * It is a settled rule of law that the word 'may' will be construed as 'shall' in a certain class of cases. In *Lessee of Swazey's Heirs v. Blackman*, 8 Ohio, 5, it was held, at page 18:

"'May' means "must", in all those cases where the public are interested, or where a matter of public policy, and not merely of private right, is involved.'

In Columbus, Springfield & Cincinnati Rd. Co. v. Mowatt, 35 Ohio St., 284, it was declared:

"Where authority is conferred to perform an act which the public interest demands, *may* is generally regarded as imperative. * * *'"

It is apparent that the issuance of bonds of the kind here involved vitally concerns the public interest and, under the authorities last above

quoted, the word "may", although permissive in form, is in fact peremptory, and the bonds of the authority must, under the law, be sold at public sale.

Having thus decided that the measure of the authority's powers and duties is that prescribed by legislative grant and that the act under consideration requires that the bonds of the Authority be sold at public sale, it is necessary to determine whether or not the notices and proceedings of the Authority meet the necessary test.

The essence of a public sale is free competition among the bidders. As early as 1835 it was said by the Supreme Court of Pennsylvania, in the case of *Robins against Bellas*, 4 Watts, 255:

"* * * The sixth section of the act of the 26th of March 1814 expressly enacts, that the trustees of an insolvent debtor shall collect the debts and sell and convey all the real and personal estate of such debtor *at public sale*. In directing the sale to be public, the legislature doubtless intended to provide, as far as legislative enactments could do, against collusion and fraud; and this intention can best be effected by holding that a sale made in a manner different from the one pointed out by the act is void. *A public sale admits of a fair competition among creditors and others interested in the sale.* * * *"

(Last emphasis the writer's.)

In the case of *In re: Nevada-Utah Mines and Smelters Corp.*, 198 Fed., 497 (1912), Judge Learned Hand said at page 499:

"* * * What, then, is a public sale? I think it is no more than this: That all persons shall have the right to come in and bid, that the bids shall not be held open, except with the bidders' consent, and that notice shall be given publicly at which all bids are invited * * *."

To be a public sale, at least four essentials must be present, namely: (1) adequate public notice, (2) opportunity to all to come and bid, (3) fair competition among the bidders, and (4) the bids must not be held open, except with consent of all the bidders. It appears that the first three essentials are here lacking; and, even if a lawful notice of the proposed sale of bonds had been given, to sell the bonds to A. and Company, without readvertising, would be tantamount to holding the bids open. Quite obviously, the element of free competition is lacking in the situation described by you. No one bidder knew what any of the other bidders was bidding upon, hence there was no competition; and for this reason alone, even if the other requirements were present, there was no public sale.

But a more cogent reason exists for my conclusion. The advertisement which you have submitted to me does not give notice of the sale of bonds but does something entirely different. What the notice does is to request interested financial houses to submit to the Authority proposals "embodying complete, comprehensive and detailed plans for financing the construction or acquisition of said hospital buildings." This was no notice of a sale of bonds. There was no definite plan for the sale of bonds adopted by the Authority and there were no competitive bids offering to buy bonds pursuant to a proper notice of the sale thereof.

Before bonds may be issued under the law, including Section 2332-7, *supra*, they must be authorized by resolution of the Authority, and such resolution must strictly conform to and meet the conditions and requirements contained in such section. It does not appear that the Authority ever passed such a resolution and legislated any bonds into existence. Until such bonds are legally *in esse*, they cannot be sold at public sale as required by law, and for this, as well as the other reasons above given, it necessarily follows that the Authority can make no valid contract at this time under alternate (b) of the so-called bid above set forth.

In specific answer to your second question, it is my opinion, and you are advised, that :

A sale without advertisement by the Public Institutional Building Authority of the bonds proposed to be issued by it under authority of Sections 2332-4, 2332-7 and related sections, to A. and Company, on the terms specified under alternate (b) of the bid submitted by such company, would not constitute a public sale of such bonds, which bonds may only be sold at public sale after proper legal notice thereof.

Respectfully,

THOMAS J. HERBERT,
Attorney General.

1165.

ARTICLES OF INCORPORATION—UNIONE PUBLIESE DI-
MUTUO SOCCORSO.

COLUMBUS, OHIO, September 9, 1939.

HON. EARL GRIFFITH, *Secretary of State, Columbus, Ohio.*

DEAR SIR: You have submitted for my approval the proposed articles of incorporation of the Unione Publiese di Mutuo Soccorso.

Upon examination, I find the purpose clause thereof not to be inconsistent with the Constitution and Laws of the United States or the