with the act of the legislature above referred to and with other statutory provisions relating to leases of this kind. I am, accordingly, approving this lease and I am herewith returning the same with my approval endorsed thereon and upon the duplicate and triplicate copies which are likewise herewith enclosed.

Respectfully,

HERBERT S. DUFFY,
Attorney General.

2899.

UNIVERSITIES IN OHIO—RECEIVING STATE AID—DORMITORIES—MONEYS NOT REQUIRED TO BE PAID INTO STATE TREASURY—MEANING OF WORDS "PUBLIC MONEYS" USED IN SECTION 2296-1 G. C.—BANKS—POWER TO PLEDGE ASSETS.

SYLLABUS:

1. *Moneys received by universities in Ohio, receiving state aid, in connection with the operation of dormitories, as well as for the purpose of constructing dormitories, under Section* 7923-1, *General Code, and for the payment of indebtedness incurred for such purpose, are not required by Sections* 24 *and* 24-4, *General Code, to be paid into the state treasury. Opinions of the Attorney General for* 1915, *Vol. I, page* 35, *affirmed in part.*

2. *Such dormitory funds held by the treasurers of such universities, although public moneys in the generally accepted sense, are not "public moneys" within the meaning of the term as used in the Uniform Depository Act, Sections* 2296-1, *et seq., General Code, requiring such moneys to be deposited by the state and subdivisions thereof in accordance therewith.*

COLUMBUS, OHIO, August 31, 1938.

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

DEAR SIR: This is to acknowledge receipt of two letters of recent date in which you request my opinion upon various matters therein set forth. In view of the fact that the questions in these two communications relate to the same subject matter, they will be considered together. Your letters read as follows:

"Under authority of Amended Senate Bill No. 492, passed at the last session of the Legislature and approved by the Governor on July 11, 1938, the Board of Trustees desires to enter into contract with the Public Works Administration for two projects:—(1) a Men's Dormitory, to cost approximately $870,000, $478,500 to be secured by the University from a sale of bonds authorized under Amended Senate Bill No. 492, and 45% of the cost—or $391,500—to be received as a grant from the Public Works Administration.

(2) The Board has also decided to proceed with the construction of Dormitories for Women, at an estimated cost of $522,000. From the sale of bonds, the University will supply $287,100 and the Public Works Administration grant will be 45%—or $234,900.

The question now arises as to the depository of these funds when they are received from the sale of bonds and from the United States Government.

All University funds are in the office of the Treasurer of State, except those received from the Residence Halls, Athletics, and like enterprises. In 1934-35, a similar grant was received from the P. W. A. and those funds were deposited with the University Treasurer and so expended under the title of 'United States Government PWA Construction fund.'

We anticipate some difficulty if these funds are deposited with the State Treasurer because in that case it would seem that a legislative appropriation would be necessary before the money could be withdrawn by warrants issued by the Auditor of State. There is a Depository Trust Fund in the Office of the Treasurer of State but we understand it is only for the purpose of receiving contingent receipts and not an account to be checked against by warrants issued by the Auditor of State. The University has been utilizing that fund ever since its inception, but funds withdrawn are withdrawn simply by a withdrawal slip prescribed and furnished by the Director of Finance.

In addition to the receipts from the sale of bonds and the PWA grant, there will of course have to be a fund set up from which payments are to be made on bonds and interest as they fall due. This will be built up of course from dormitory receipts.

It would seem better therefore if these funds could be deposited with the University Treasurer.

Under the direction of the Board of Trustees, I am there-

fore requesting advice of the Attorney General on this point."

"On December 7, 1931, the Board of Trustees felt that it should have some collateral or guarantee from the bank which had been selected as the depository for the funds held by the Treasurer of the University.

At that time the Board was advised that there was no statute which would cover such funds. Therefore an agreement was worked out with the Ohio National Bank, the depository, whereby they assigned certain first mortgage real estate loans to the University. Copies of these actions and form of resolution, etc., are attached hereto.

Since that time the bank has withdrawn many of these mortgages. At the time when this matter was agreed upon there was some doubt as to the real validity of these mortgages as a protection to the Board of Trustees in case of failure of the depository. For that reason we have not insisted upon additional mortgages being substituted for those that were withdrawn.

In April of 1937, the Legislature passed an Act referring to a situation somewhat similar to this, under the title 'Uniform Depository Act,' and the question now arises as to whether or not this account of the University Treasurer falls under that act, whether the bank can be declared a depository by the State Board of Deposit, and just what procedure should be followed by the Board of Trustees in order to protect its liability and the liability of its Treasurer.

Advice from the Attorney General on this question will be deeply appreciated."

Comment will first be made as to the moneys which may be legally retained by the Treasurer of the University as distinguished from moneys which under the law are required to be deposited with the Treasurer of State. In an opinion of this office appearing in Opinions of the Attorney General for 1915, Vol. I, page 35, it was held as set forth in the syllabus:

"Deposits by students of colleges, universities and normal schools, against which supplies and broken apparatus are charged, are not to be paid into the state treasury weekly, under Section 24, General Code.

If students are charged for supplies for services, as the same are furnished, the sum so received should be paid into the state treasury weekly, under Section 24, General Code.

Receipts from dining service and room rent in dormitories are not for the use of any university, college or normal school as such, or for the use of the state, but for the use and maintenance of the dormitory, and are, therefore, not to be paid weekly into the state treasury.

Athletic fees and receipts from class plays and from entertainments, assumed to be student activities, are not for the use of the institution or the state and should not be paid into the state treasury."

The first branch of the syllabus of the foregoing opinion is no longer declarative of the Law of Ohio in view of the provisions of Section 24-4, General Code, which was enacted in 1933. This section reads as follows:

"Every state officer, state institution, department, board, commission, college or university, receiving fees or advances of money, or who, under the provisions of Section 24 of the General Code, collect or receive fees, advances, or money, shall deposit all such receipts to the credit of the state depository trust fund, herein created, when such receipts may be subject to refund or return to the sender; or when such receipts have not yet accrued to the state. Such deposits shall be made within 48 hours of their receipt, in case of offices, institutions, departments, boards and commissions located at Columbus, and within six days, in case such office, institution, department, board of commission is not located at Columbus."

It is at once apparent that under the foregoing section every state university "receiving state aid" which receives fees or advances of money, shall deposit such receipts to the credit of the state depository trust fund "when such receipts may be subject to refund or return to the sender." I understand that deposits by students referred to in the first branch of the foregoing syllabus have been deposited in such trust fund in the office of the Treasurer of State since the effective date of this last quoted section of the General Code.

With respect to receipts derived from the operation of dormitories, however, it is likewise apparent that Section 24-4, supra, has no application since such receipts are not "subject to refund or return to the sender." It is therefore my judgment that such Section 24-4, supra, has no application to the rule of law laid down in the last two paragraphs of the syllabus of the 1915 opinion, supra, and such opinion to that extent is still declarative of the law of Ohio.

With respect to moneys received by the University for the purpose of constructing dormitories under authority of Section 7923-1, General Code, as amended by Senate Bill No. 492, effective October 11, 1938, whether received from the sale of notes or other written instruments evidencing indebtedness, or from the federal government, or otherwise, a consideration of the first paragraph of such Section 7923-1 clearly discloses that these funds are in the same category as dormitory receipts considered in the 1915 opinion, supra, in so far as the matter of their custody is concerned. Such Section 7923-1 provides in part as follows:

> "That the boards of trustees of Kent state university, Bowling Green state university, Ohio university, Miami university and Ohio state university are hereby authorized to construct, equip, maintain and operate upon sites within the campuses of the above universities respectively as their respective boards may designate therefor, buildings to be used as dormitories for students and members of the faculty and servants of said state universities, and to pay for same out of any funds in their possession derived from the operation of any dormitories under their control, or out of funds borrowed therefor, or out of funds appropriated therefor by the general assembly of Ohio, or out of funds or property received by gift, grant, legacy, devise, or otherwise, for such purpose, and to borrow funds for such purposes upon such terms as said boards may deem proper, and to issue notes or other written instruments evidencing such indebtedness, which notes or other written instruments shall be negotiable, provided, however,. that such indebtedness shall not be a claim against or a lien upon any property of the state of Ohio or any property of or under the control of said boards of trustees excepting such part of the receipts of the operation of any dormitories under their control as the said boards of trustees may respectively pledge to secure the payment of any such indebtedness.
> * * * * * * * * *"

The General Assembly has here authorized Ohio State University to construct, equip, maintain and operate dormitories and to pay for same out of any funds in the possession of the University derived from the operation of dormitories or derived from the issuance of notes or evidences of indebtedness or out of funds received by gift,

grant, legacy or otherwise for such purpose, or "out of funds appropriated therefor by the general assembly of Ohio." Manifestly, since Section 24-4, supra, has no application to such dormitory funds, the funds here under consideration must either be held by the Treasurer of the University or deposited in the state treasury, in which event no part of such funds could be expended for the purposes provided in Section 7923-1, supra, except pursuant to legislative appropriation, in view of Article II, Section 22 of the Constitution, providing that "No money shall be drawn from the treasury, except pursuant to a specific appropriation, made by law." The inclusion of the phrase, therefore, in the above quoted language of Section 7923-1 "or out of funds appropriated therefore by the general assembly of Ohio" unmistakably evinces a legislative intent that dormitory construction funds derived from the issuance of notes therein authorized or from grant from the federal government are not subject to legislative appropriation and necessarily not payable into the treasury of the state. To hold otherwise would give no effect to the authority to expend funds appropriated by the legislature for the purposes named in the section. It is established that wherever possible the courts will give effect to all language used by the legislature and will avoid a construction which results in reading out of a statute any portion thereof. *Stanton* vs. *Realty Co.*, 117 O. S. 345.

It might be here noted that the intention of the legislature to leave beyond the purview of Sections 24 and 24-4, General Code, funds received from the sale of such bonds or notes as well as by grant, was for the purpose of enabling the universities mentioned therein to avail themselves of federal aid under the Federal Emergency Administration of Public Works. The terms and conditions of such grants are set forth in the bulletin of that administration of February 15, 1937. On page 5 of such pamphlet it may be noted that the federal government requires the recipient of federal grants therein referred to to establish construction accounts in a bank or banks which are members of the Federal Deposit Insurance Corporation, the pertinent language reading as follows:

> "No intermediate grant requisition will be honored if the Applicant shall not have deposited in the Construction Account (hereinafter described) such sums as may have been required in the Offer to be so deposited in addition to the funds made or to be made available by the Government."
>
> "A separate account or accounts (herein collectively referred to as the 'Construction Account') will be set up in a bank or banks which are members of the Federal Deposit Insurance Corporation. The advance grant payment, the

intermediate grant payments, the proceeds from the sale of the Bonds (exclusive of accrued interest), Applicant's Funds, the final grant payment and any other moneys which shall be required in addition to the foregoing to pay the cost of constructing the Project will be deposited in the Construction Account promptly upon the receipt thereof. All accrued interest paid by the Government at the time of delivery of any Bonds will be paid into a separate account (herein referred to as the 'Bond Fund'). Payments for the construction of the Project will be made only from the Construction Account."

It is my opinion that funds derived by a university for the construction of a dormitory under authority of Section 7923-1, General Code, from the sale of notes or bonds or from the federal government should not be paid into the state treasury, but should be held by the treasurer of such university.

In your second letter, supra, the question is raised as to the applicability of the Uniform Depository Act, Sections 2296-1 to 2296-25, both inclusive, General Code, to dormitory funds held by the Treasurer of the University. Section 2296-1, General Code, being the definitive section of such act, provides in so far as pertinent as follows:

"This act shall be known as 'the uniform depository act.' As used in this act:

(a) 'Public moneys' means all moneys in the treasury of the state, or any subdivisions thereof, or coming lawfully into the possession or custody of the treasurer of state, or of the treasurer of any such subdivision. 'Public moneys of the state' includes all such moneys coming lawfully into the possession of the treasurer of state; and 'public moneys of a subdivision' includes all such moneys coming lawfully into the possession of the treasurer of the subdivision.

(b) 'Subdivision' means any county, school district, municipal corporation (excepting a municipal corporation or a County which has adopted a charter under the provisions of article XVIII or article I of the Constitution of Ohio having special provisions respecting the deposit of the public moneys of such municipal corporation or county), township, special taxing or assesment district or other district or local authority electing or appointing a treasurer in this state. In the case of a school district, special taxing or assessment district or other local authority for which a treasurer, elected or appointed primarily as the

treasurer of a subdivision, is authorized or required by or pursuant to law to act as ex-officio treasurer, the subdivision for which such a treasurer has been primarily elected or appointed shall be considered to be the 'subdivision' for all the purposes of this act."

In view of the fact that a state university is clearly neither a "subdivision" nor a "local authority," no further discussion is necessary to support the conclusion that funds held by the treasurer of such university and not lawfully in the possession or custody of the Treasurer of State, are not "public moneys" within the meaning of the term as defined in the Uniform Depository Act and accordingly such act contains no provision with respect to their deposit. Nor do I find that the General Assembly has elsewhere enacted any provisions with respect to the deposit or safekeeping of such funds.

In your second letter, supra, you refer to the fact that in the past funds deposited in a national bank by the Treasurer of the University have been secured by the hypothecation of certain assets of the bank. You state that there has been some doubt as to the authority for such hypothecation of collateral as a protection in the event of the failure of the bank. Since you inquire as to what procedure should be followed by your board of trustees in order to protect these funds which apparently will be in a substantial amount, it is necessary to consider the question of whether or not state or national banks in Ohio may in the absence of statute hypothecate their assets to secure the deposit of public funds. Although, as hereinabove pointed out, these funds are not public moneys within the meaning of the Uniform Depository Act, they are nevertheless unquestionably public moneys within the generally accepted sense of the term and are subject to audit as such by the Auditor of State. See Section 286, General Code.

Since the 1930 amendment of the National Banking Act, national banks have the same power as state banks to give security for the safekeeping of public money. This act of June 25, 1930, Chapter 604, 46 Stat. at L. 809 (12 U. S. C. A. Sec. 90), added to Section 45 of the National Banking Act of 1864 the following provision:

"Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State."

The question of the power of banks organized and existing under the laws of Ohio to pledge their assets to secure either public or private deposits in the absence of statute has not been passed upon by the Supreme Court. In other jurisdictions there is a great conflict of authority upon this point, as stated in 9 C. J. S., 337, 338:

> "There is a diversity of judicial opinion as to the right of a bank to pledge its assets as security for some of its depositors to the exclusion of others, which diversity is due, not alone to the difference of economic views, but also to difference in the statutes involved.
>
> Under one view, the power to pledge assets to secure deposits is not a power necessary to deposit banking; unless authorized to do so by law, banks do not have authority to pledge their assets as security for deposits, and where the deposit is of public funds such power cannot be based on any attribute of sovereignty on the part of the pledgee, but must be based on an express or implied legislative grant.
>
> .Under another view, a bank cannot pledge its assets to secure general deposits of private moneys, but is entitled to pledge its assets as security for deposits of public money.
>
> Under still another view, a bank is held empowered to pledge its assets as security for deposits of private funds; and in at least one jurisdiction this power has been assumed without any consideration of the subject, in the determination of a case involving the rights of the parties under a contract therefor."

See also Banks and Banking by Zollman, Vol. 5, Chap. 91, pages 265, et seq.

The only adjudicated case which I have discovered touching upon this point in Ohio is the case of *State, ex rel.* vs. *Republic Steel Corp.*, 29 O. N. P. (N. S.) 359, the third branch of the syllabus reading as follows:

> "A bank has no implied power to pledge assets to secure deposits, nor has it been given express power to do so except to secure public funds. The pledging was therefore unauthorized, and though done in good faith in an effort to avoid a failure, constituted a preference and was against public policy."

Although the court was there concerned with the authority to

pledge assets to secure private funds, this same rule was laid down in the body of the opinion with respect to public funds and the reasoning in support thereof is worthy of consideration. The language of the court at page 363 is as follows:

> "There is no express power conferred by the General Code of Ohio, authorizing a bank to pledge to general depositors its assets as security for deposits. The Legislature of Ohio has provided, however, that a bank may pledge certain of its assets to secure public funds, thereby recognizing banks had no implied power to do so. It would seem if banks had implied power to pledge assets to secure any deposits, there would be greater reason why it should be for public rather than private funds. The implied powers of a bank are limited to such acts which are necessary or usual and incidental to banking business, and any other power must be expressly authorized by statute. Legislative authority to pledge assets to secure public funds is indicative of the legislative opinion that, the act of pledging assets to secure deposit of public as well as private funds is not necessary or usual and incidental to banking business, and that express authority must be conferred by Legislature to pledge its assets as to both private and public funds."

The position that express authority must be conferred by the legislature to authorize banks in Ohio to pledge their assets to secure the deposit of public funds is further supported by an application of the doctrine of expressio unius est exclusio alterius. The General Assembly has seen fit to provide that banks shall secure the deposit of public funds when made by the Treasurer of State or by the treasurer of any local subdivision or other local authority as provided in the Uniform Depository Act. The General Assembly has also seen fit to require security for certain county funds deposited by probate courts, juvenile courts, sheriffs, recorders, etc., and hence authorized banks to hypothecate their assets to secure such deposits in and by the provisions of Section 2288-1c, General Code. Clearly, it may be contended that where the General Assembly has seen fit to authorize such hypothecation of securities to secure public funds, it has made express provision therefor.

Pertinent to a determination of this question in my judgment is the position taken by the Supreme Court of the United States in its decision of the case of *City of Marion, Ill.* vs. *Sneeden,* 291 U. S. 262, 78 L. Ed. 787, the headnotes of which are as follows:

> "1. Power of a national bank to pledge its assets to secure a deposit of funds of a municipality is not implied from a general grant of powers 'necessary to carry on the business of banking . . . by receiving deposits.'
>
> 2. Banks and other corporations organized under the law of Illinois have only such powers as are conferred by statute either expressly or by implication.
>
> 3. Only those powers are conferred by implication on banks and other corporations which are reasonably necessary to carry out the powers expressly granted.
>
> 4. The receiver of an insolvent national bank which was without power to pledge its assets to secure a deposit of municipal funds is not bound to make restitution of the deposit as a condition of recovering such assets from the pledgee in order that they may be administered for the benefit of the general creditors of the bank."

It is my judgment that the following language of the court, speaking through Mr. Justice Brandeis, is particularly analogous to the question of the power of Ohio banks to pledge their assets to secure public deposits in the absence of statute:

> "No Illinois statute confers in express terms upon banks organized under its laws either the general power to pledge assets to secure a deposit; or the general power to pledge assets to secure public deposits. A statute confers in terms the power to pledge assets to secure deposits of the States but there is none which so confers the power to pledge assets to secure public deposits of a political subdivision of the State. No reported decision rendered by any Illinois court since the enactment of the General Banking Law of 1887 holds that the alleged power exists as one incidental to the business of deposit banking. Nor is there any evidence that in Illinois such power is necessary in the conduct of the business of deposit banking."

In Ohio, as in Illinois, no statute confers in express terms upon banks organized under the Ohio law either the general power to pledge assets to secure a deposit, or the general power to pledge assets to secure public deposits. In Illinois power was conferred to secure deposits of the state but not of a political subdivision of the state. whereas in Ohio the statutes confer the power to secure deposits of the state and its subdivisions but do not confer such authority with

respect to deposits of state universities. Like in the Sneeden case, supra, there is no authority in Ohio to the effect that such power is necessary in the conduct of the business of deposit banking; but, on the contrary, we have a Common Pleas Court decision in Ohio to the opposite effect.

In view of the foregoing, I am constrained to conclude that the General Assembly has not conferred upon banks organized and existing under the laws of Ohio the power to pledge assets to secure deposits of public funds generally, but having made specific provision for certain specified deposits, the measure of authority so conferred would probably be held to be the limit of such authority.

It is very probable that in the enactment of the banking laws prescribing the powers of state banks as well as in the enactment of the Uniform Depository Act, a situation such as that with which I am here confronted involving the deposit by state universities of substantial sums was not presented or considered by the General Assembly. The remedy, however, to correct this situation lies with the legislature.

In conclusion, I may say that your Treasurer should, of course, endeavor in so far as is possible to protect deposits of this nature by attempting to secure the hypothecation of collateral in the absence of an express adjudication of this question of power hereinabove discussed by a court of competent jurisdiction in this state.

Respectfully,

HERBERT S. DUFFY,

Attorney General.

2900.

DEPARTMENT OF HIGHWAYS—INTERPRETATION AND APPLICATION OF PHRASES "TOTAL ESTIMATED COST OF OPERATION" AND "ESTIMATED TO COST"—WHERE ANOTHER AGENCY FURNISHES LABOR, MATERIALS AND EQUIPMENT ON PROJECT OVER WHICH STATE HIGHWAY DEPARTMENT HAS NO DIRECT CONTROL—STATUS—SECTION 1197 G. C.

SYLLABUS:

The reference to "total estimated cost of operation" and "estimated to cost" in Section 1197, General Code, is only directed to operations carried on by the Department of Highways; that where work is per-