2656.

MUNICIPALITY—CONTRACT FOR PURCHASE OF BUILDING—PARTIAL DOWN PAYMENTS AND MORTGAGES DISCUSSED—SPECIFIC CONTRACT ILLEGAL.

SYLLABUS:

1. *A city may not legally enter into a contract to purchase a building for the sum of* $100,000, $20,000 *of which is payable upon the execution of the contract and* $80,000 *is payable at the end of two years, upon the filing of a certificate of the fiscal officer that* $20,000 *is in the treasury, unappropriated for any other purpose or is in process of collection.*

2. *A city may not, by contract for the purchase of a building incur an obligation to pay a balance in two years from date with interest thereon at* 6% *per annum.*

3. *A city may not by contract for the purchase of a building legally assume a note and mortgage on said building for the balance of the purchase price payable in two years from date.*

COLUMBUS, OHIO, October 1, 1928.

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

GENTLEMEN:—This will acknowledge receipt of your recent communication which reads:

> "May a city legally agree to purchase a building for $100,000.00, certify that funds are in the treasury, or in process of collection, to the amount of $20,000.00, pay said amount to the fee owner, and assume a two year, 6% mortgage, for the balance, without certifying that funds are in the treasury, or in process of collection, and that an appropriation is available?"

Section 13 of Article XVIII of the Ohio Constitution reads as follows:

> "Laws may be passed to limit the power of municipalities to levy taxes and incur debts for local purposes, and may require reports from municipalities as to their financial condition and transactions, in such form as may be provided by law, and may provide for the examination of the vouchers, books and accounts of all municipal authorities, or of public undertakings conducted by such authorities."

This section clearly authorizes the Legislature to limit the authority of municipalities to exercise the powers of local self-government in the respects therein specified, including the power to incur debts.

Under authority of this constitutional provision the Legislature, during its last session, passed General Code Section 5625-33 in place of former General Code Section 5660. This section now contains the following provisions:

> "No subdivision or taxing unit shall:
> * * *
>
> (b) Make any expenditure of money unless it has been appropriated as provided in this act.
>
> (c) Make any expenditure of money except by a proper warrant drawn against an appropriate fund which shall show upon its face the appropriation in pursuance of which such expenditure is made and the fund against which the warrant is drawn.

(d) Make any contract or give any order involving the expenditure of money unless there is attached thereto a certificate of the fiscal officer of the subdivision that the amount required to meet the same (or in the case of a continuing contract to be performed in whole, or in part, in an ensuing fiscal year, the amount required to meet the same in the fiscal year in which the contract is made), has been lawfully appropriated for such purpose and is in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances. Every such contract made without such a certificate shall be void and no warrant shall be issued in payment of any amount due thereon. * * *"

General Code Section 5625-36, as enacted by the 87th General Assembly (112 O. L. 408), reads as follows:

"In the case of contracts or leases running beyond the termination of the fiscal year in which they are made, the fiscal officer shall make a certification for the amount required to meet the obligation of such contract or lease maturing in such year. In all such contracts or leases the amount of the obligation remaining unfulfilled at the end of a fiscal year, and which will become payable during the next fiscal year, shall be included in the annual appropriation measure for such next year as a fixed charge.

The certificate required by Sections 33 and 34 of this act as to money in the treasury shall not be required for the making of contracts on which payments are to be made from the earnings of a publicly operated water works or public utility, but in the case of any such contract, made without such certification, no payment shall be made on account thereof, and no claim or demand thereon shall be recoverable except out of such earnings."

In my opinion the proposed contract described in your letter is not such a contract as is intended by the term "continuing contract" in the parenthetical clause in section (d) of General Code Section 5625-33 or by "contracts * * * running beyond the termination of the fiscal year in which they are made" appearing in above quoted Section 5625-36.

I am therefore of the opinion that the proposed contract is subject to the prohibition contained in General Code Section 5625-33 and cannot legally be made.

I am of the further opinion that the proposed agreement to assume the existing mortgage on the property would not comply with the provisions of the statutes prescribing the manner of incurring the indebtedness. Since the right thus given the Legislature to limit the power of municipalities to incur indebtedness has been exercised to the extent of prescribing in definite detail the manner in which indebtedness shall be incurred, by the issuance of bonds, notes and certificates of indebtedness, it follows that municipalities are without authority to incur indebtedness in any other manner. The importance of this principle very clearly appears upon consideration of the proposed plan for the purchase of the building as set forth in your letter. If such a procedure were permitted, the sections of the statute requiring the submission to a vote of the people of the question of purchase of buildings involving an expenditure in excess of a specified amount would be nullified.

In the same way, the statutes requiring the submission to a vote of the people of the question of the issuance of bonds or the incurring of an indebtedness above the limitations prescribed by statute would also be circumvented.

In addition to the above, it is noted that the city intends to assume a mortgage and incidentally the payment of the note secured thereby, bearing interest at the rate of six per cent. It is at once obvious that such a procedure would defeat the provisions of the General Code requiring bonds, unless sold to the trustees of the Sinking

Fund, the Teachers Retirement Board or the Industrial Commission, to be sold to the highest bidder after being advertised once a week for three consecutive weeks as required by Section 2293-28, General Code.

Answering your question specifically, it is my opinion that, for the reasons above set forth, a city may not legally enter into a contract to purchase a building, other than a contract on which payments are to be made from the earnings of a publicly operated water works or public utility, without having sufficient funds in the treasury or in process of collection to pay the purchase price of such building, in accordance with the provisions of Sections 5625-33 and 5625-36 of the General Code. I am further of the opinion that in the case submitted by you the city may not legally agree to purchase a building for the sum of $100,000, $20,000 of which is to be paid at the time of sale and the balance to be paid at some future date, the city agreeing to assume a mortgage on the property in question, which was given to secure a note drawing interest at six per cent.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2657.

SENTENCE—COURT HAS NO JURISDICTION TO VACATE SENTENCE FOR FELONY AFTER PART EXECUTION.

SYLLABUS:

Where a person has been convicted of a felony and sentenced to imprisonment in one of the penal institutions of this state, and such sentence has been executed in part, the trial court is without jurisdiction, either after or during term, to vacate the judgment imposing the sentence and cause the prisoner to be discharged. In such a case, where the prisoner is confined in the Ohio State Reformatory, the superintendent of such institution is justified in refusing to honor the order of the court discharging the prisoner.

COLUMBUS, OHIO, October 1, 1928.

HON. JOHN E. HARPER, *Director, Department of Public Welfare, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication, which reads:

> "Under date of June 21st, Arthur McPharson and Cal Troutman were sentenced to the Ohio State Reformatory from the Common Pleas Court of Huron County for automobile stealing, 1 to 20 years.
>
> On July 11th the committing court issued an order to the Superintendent of the Ohio State Reformatory vacating the judgment under which these boys were sentenced to the Reformatory. The Court stated that it was his wish to suspend the sentences and allow these boys to return to their homes in Pennsylvania. There is apparently no question that they committed the crime for which they were sentenced. The Superintendent of the Reformatory refused to honor the order and advised the Court that in his opinion, based upon the laws applicable in these cases and considering opinions of the Attorney General, no authority of law exists in trial courts of Ohio to order the release of prisoners under such circumstances and that such prisoners could be released only by executive clemency or through action of the Ohio Board of Clemency under the parole laws of the state.