out in the statute by letting the contract on bids advertised *not* according to law.

I am of the opinion that a mayor or a councilman in a city may not lawfully enter into a contract with a board of education for the furnishing of coal for use in the school buildings of its district in an amount exceeding $50.00, and letting the contract to the lowest and best bidder after advertisement therefor, and the receipt of bids from several dealers in coal does not change the situation.

Respectfully,
THOMAS J. HERBERT,
Attorney General.

1012.

PUBLIC INSTITUTIONAL BUILDING AUTHORITY—SALARY AND COMPENSATION OF OFFICERS AND EMPLOYES—STATE EX REL. BUILDING AUTHORITY V. GRIFFITH, 135 O. S. 604, DID NOT HOLD ACT UNCONSTITUTIONAL IN ENTIRETY—SECTIONS 2332 TO 2332-13, G. C.

SYLLABUS:

1. The Supreme Court of Ohio did not, in the case of State ex rel. Building Authority v. Griffith, 135 O. S., 604 (1939), hold the Public Institutional Building Act (Sections 2332-1 to 2332-13, inclusive, of the General Code) unconstitutional in its entirety.

2. Such decision of the Supreme Court does not prevent payment of the salary and compensation of the officers and employes of the Public Institutional Building Authority employed under Sections 2332-2 and 2332-3 of the General Code.

COLUMBUS, OHIO, August 10, 1939.

HON. H. D. DEFENBACHER, *Acting Director, Department of Finance, Columbus, Ohio.*

DEAR SIR: This will acknowledge receipt of your request of July 27, 1939, for my opinion, as follows:

> "The Public Institutional Building Authority was created under Sections 2332-1 to 2332-13 of the General Code of Ohio, effective July 11, 1938. Said sections were amended and supplemented by Senate Bill 313, effective May 28, 1939.
>
> The Public Institutional Building Authority was created for the purpose of providing for construction, equipment and improvement of buildings for the use of benevolent, penal and reformatory state institutions.

It is provided that the Authority shall have the power and capacity of suing and being sued, contracting and being contracted with and it shall be an instrumentality of the state of Ohio, perform the duties and functions for and exercise the powers specified in the act of its creation.

In Sections 2332-2 and 2332-3 is provided the Executive Secretary of the Authority be paid a specified salary and the Board of the Authority may select and determine the number of employes of the Authority and their respective compensation and duties.

Suit was brought in the Supreme Court of Ohio contesting the legality of certain bonds issued by the Authority pursuant to power to issue such bonds vested in the Authority. The Supreme Court in passing upon the question in the case of State of Ohio, ex rel. Public Institutional Building Authority, vs. Griffith, 135 O. S., 604, held sections 2332-3a and 2332-4, also 2332-5 of the General Code to be void in so far as they authorize the transfer of income producing property of the state to the Authority and the use of such revenues to service bonds issued by the Authority.

I hereby request your opinion on the following point:

Does the decision of the Supreme Court above referred to prevent payment of the salary and compensation of the officers and employes of the Authority employed under Sections 2332-2 and 2332-3 of the General Code?"

As you suggest in your letter, the Public Institutional Building Authority (hereinafter referred to as the "Authority") was created in an act passed as an emergency measure, filed in the office of the Secretary of State on July 11, 1938, and codified as Sections 2332-1 to 2332-13, inclusive, of the General Code.

This act, as originally enacted, was amended in certain respects and supplemented by the 93rd General Assembly in Amended Senate Bill 313, also passed as an emergency and approved by the Governor on May 29, 1939. From the context of your letter it would seem that your request is premised on the law as it now exists.

The syllabus of the case of State ex rel. vs. Griffith, Secretary of State, 135 O. S., 604, referred to in your letter, which was decided by the Supreme Court on July 5, 1939, reads as follows:

"1. 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. of Public Works,* 104 Ohio St., 281, approved and followed.)

2. Where additions or improvements are made to property owned by the state, and the whole or a part of the revenue arising from the use of the combined existing property and such additions or improvements is pledged by the state or its authorized board or agency as the sole and exclusive source of payment of the construction cost of such additions or improvements, an indebtedness is incurred by the state within the contemplation of the state constitutional debt limitations.

3. Bonds issued pursuant to and based upon a resolution of the Public Institutional Building Authority of the state, authorizing the issuance of its revenue bonds for the construction of any buildings or additions to buildings on income-producing state property, payable from rentals derived from such state property, and a contract between the building authority and the Department of Public Welfare whereby the promises of the latter to pay to the former rentals sufficient to service such bonds solely from income or revenue derived from the operation of such buildings and properties, old as well as new, create an indebtedness of the state within the meaning of the debt limitations of the Constitution and are therefore void."

In the opinion of Judge Hart it was said as follows at page 623:

"* * * With these possibilities existent in this scheme of financing, the court holds that the obligation of the welfare department in connection therewith creates an indebtedness on the part of the state and is in contravention of Sections 1 and 3 of Article VIII of the Constitution. *The court also holds that Sections 2332-3a, 2332-4 and 2332-5 of the General Code, are unconstitutional and void in so far as they authorize the transfer of income-producing property of the state to the authority, the rentals from which are to service the bonds issued by the authority."* (Italic the writer's.)

It will be observed that neither in the syllabus, in which the points of law decided by the Supreme Court of Ohio are stated (Rule VI of the Court), nor in the opinion of the judge who wrote the opinion, is it held or said that the entire act under consideration is unconstitutional. In the opinion of Judge Hart it was said that it was the "scheme of financing" then before the court that was unconstitutional (because the

obligation of the Welfare Department created a debt on the part of the State), as well as Sections 2332-3a, 2332-4 and 2332-5, General Code, *"in so far as they authorize the transfer of income-producing property of the state"* to the Authority. Nothing in either the syllabus, or in the opinion, wipes out of existence the Authority duly created by the Legislature, or denies the legislative power to create an agency of the kind here involved.

It may be suggested that the provisions of Section 2332-13, General Code, are here dispositive. This section reads as follows:

> "The provisions of this act (G. C., §§ 2332-1 to 2332-13) shall be severable, and if any of the same shall be held unconstitutional, such decision shall not affect the provisions of any of the remaining provisions of this act."

Such, however, is not the case. A saving clause of this kind is not absolute, but is merely an aid to interpretation and not an inexorable command. It cannot operate to save provisions which clearly would not have been inserted except upon the supposition that the entire act was valid. See 11 Am. Jur., 846, et seq. A clear exposition of the principle here applicable is contained in the opinion of Mr. Justice Sutherland in the case of Carter vs. Carter Coal Company, et al., 298 U. S., 238; 80 L. Ed., 1160 (1935). In this opinion it was said as follows at page 312:

> "In the absence of such a provision (that is, a saving clause of the character above quoted), the presumption is that the legislature intends an act to be effective as an entirety—that is to say, the rule is against the mutilation of a statute; and if any provision be unconstitutional, the presumption is that the remaining provisions fall with it. The effect of the statute is to reverse this presumption in favor of inseparability, and create the opposite one of separability. Under the non-statutory rule, the burden is upon the supporter of the legislation to show the separability of the provisions involved. Under the statutory rule, the burden is shifted to the assailant to show their inseparability. But under either rule, the determination, in the end, is reached by applying the same test—namely, What was the intent of the lawmakers?
>
> Under the statutory rule, the presumption must be overcome by considerations which establish 'the clear probability that the invalid part being eliminated the legislature would not have been satisfied with what remains,' * * *. Whether the provisions of a statute are so interwoven that one being held invalid the others must fall, presents a question of statutory construction and of legislative intent, to the determination of which the statutory

provision becomes an aid. 'But it is an aid merely; not an inexorable command.' Dorehy v. Kansas, 264, U. S., 286, 290, 68 L. Ed., 686, 689, 44 S. Ct., 323. The presumption in favor of separability does not authorize the court to give the statute 'an effect altogether different from that sought by the measure viewed as a whole.' Railroad Retirement Bd. v. Alton R. Co., 295 U. S., 330, 362, 79 L. Ed., 1468, 55 S. Ct., 758.

The statutory aid to construction in no way alters the rule that in order to hold one part of a statute unconstitutional and uphold another part as separable, they must not be mutually dependent upon one another. * * *."

Properly to apply the principles laid down in the Carter case to the act here under consideration does not require a detailed resume of these sections in this opinion. Suffice it to say, as provided in Section 2332-4, the Authority is created "for the purpose of constructing and improving buildings and other facilities for and in connection with any state institution", as defined in the act, in cooperation with any Federal agency or otherwise. It is authorized, *inter alia,* to borrow money from a Federal agency, or otherwise; and further, without limitation of the express powers contained in such section "to borrow money and accept grants from, and enter into contracts or other transactions with any other Federal agency as provided for" in the act. This section also provides:

"Provided, however, the authority shall have no power to acquire by lease or purchase any lands not owned, leased or operated by the state of Ohio.

Provided, however, that the authority shall have no power at any time, or in any manner, to pledge the credit or taxing power of the state, nor shall any of the bonds or other obligations issued hereunder be deemed to be indebtedness of the state.

Title to all property of whatsoever character and any interest therein, acquired by and through the exercise of the powers hereinbefore in this section granted to the authority, shall be taken in the name of the state of Ohio, subject, however, to the right, title and interest of the authority therein, as hereinafter specified with respect to lands now belonging to the state.

And provided, however, that all buildings, constructions, improvements and repairs as authorized by this act shall be done by free labor and by direct contract and only in cooperation with the federal government public works administration program and similar federal agencies."

While it might be that the courts will hold the proviso first above quoted, to the effect that the Authority "shall have no power to acquire

by lease or purchase any lands *not* owned, leased or operated by the state of Ohio", prohibits the purchase of real estate from others than the State, another and different construction of this proviso may be adopted. It will be noted that the same section provides that title "to all property of *whatsoever character*" acquired through the exercise of the powers granted in the act shall be taken in the name of the State of Ohio. Certainly unless otherwise limited, the language "of whatsoever character" is broad enough to include lands. To carry out one of the main purposes for which the Authority was created, namely, the construction of buildings, the Authority obviously must have lands upon which such buildings may be constructed. It seems to me that the proviso in question should be construed as a prohibition against the Authority's acquiring an interest in land, the remaining interest in which land is owned by a private corporation, association or individual, or, in other words, that this proviso is simply a recognition of the limitation contained in Article VIII, Section 4, of the Constitution forbidding the lending of the credit of the state and prohibiting the state from becoming a joint owner, or stockholder, in any company or association formed for any purpose whatever.

In this connection, it will be noticed that Section 2332-5 provides that before constructing or improving any building "on any site at the time belonging to the State, the Authority shall," et cetera. By inference this would seems to be a clear implication that buildings may be constructed on a site acquired by the Authority from others than the state of Ohio. As stated in 37 O. Jur., 552, a statute often speaks as plainly by inference as in any other manner, and it is the rule that that which is clearly implied from the express terms of the statute is as much a part thereof and is as effectual as that which is expressed. Moreover, Section 2332-5, General Code, provides how the Authority may, by investigation, determination, the making and recordation of a map and other information, produce an instrument "which shall have the effect of a lease by the state to the authority", the last paragraph of Section 2332-5 further providing that:

> "In all conveyances taken by the authority in the name of the state there shall be provided for and created an estate in the authority for a term therein set forth, not exceeding twenty-five years, subject to such limitations as may be therein mentioned."

It is not reasonable to suppose that after providing in detail just how the Authority might obtain a leasehold interest in lands of the state for a term of not exceeding twenty-five years, the Legislature also provided that in addition the State of Ohio should make a conveyance *to the State of Ohio* of lands determined to be taken and used as provided by law by the Authority. Such a construction produces not merely an absurdity but the legal impossibility of an owner conveying to itself. It

is hardly possible that such a result was intended, but that, on the other hand, the Legislature, in the paragraph last above quoted, was making provision with reference to the procurement of land from others than the state.

While upon these grounds, as well as for the reason that such a construction would accord with the fundamental rule that it is the duty of courts so to construe an act as to make it constitutional if the language thereof will permit, this would seem to be the logical and correct interpretation of the act, it is unnecessary for the purposes of this opinion to discover the true meaning of the proviso in question, for two reasons: First, you will note that by the terms of sub-paragraph 5 of Section 2332-4, the Authority is authorized to accept grants from any Federal agency, and, second, both in the third branch of the syllabus in the Griffith case and in the opinion at page 623 the language of the court was limited to bonds issued for the construction of buildings "on income-producing state property."

In any event, without definitely passing upon the possible methods in which the Authority may operate in a constitutional manner, since the Supreme Court, as above pointed out, has not held the act unconstitutional in its entirety; since it has been the consistent practice of this office to regard all acts of the Legislature as constitutional excepting only where an act is so flagrantly unconstitutional that the Attorney General deems it his constitutional duty to have the act so declared by the courts; and since under the doctrine quoted from the opinion in the Carter case, supra, the presumption is that this act is severable and the burden is on those who assail the act to show that it is not severable, it is my opinion that the Griffith case does not prevent payment of the salary and compensation of the officers and employes of the Authority.

In reaching this conclusion, I am not unmindful of the case of State, ex rel. v. Donahey, Auditor of State, 100 O. S., 104 (1919), in which the second branch of the syllabus reads:

> "The major purpose for which a board has been created having failed by reason of a repeal of the law creating the purpose, the board will not be continued for the performance of a minor, incidental function."

This case is plainly distinguishable form the situation here for the reason that under the facts in that case there was a repeal of an act of the Legislature by an amendment to the Constitution duly adopted by the people.

For the above reasons, it is my opinion, and you are accordingly advised that:

1. The Supreme Court of Ohio did not, in the case of State ex rel. Building Authority v. Griffith, 135 O. S., 604 (1939), hold the Public

Institutional Building Act (Sections 2332-1 to 2332-13, inclusive, of the General Code) unconstitutional in its entirety.

2. Such decision of the Supreme Court does not prevent payment of the salary and compensation of the officers and employes of the Public Institutional Building Authority employed under Sections 2332-2 and 2332-3 of the General Code.

Respectfully,
THOMAS J. HERBERT,
Attorney General.

1013.

TRANSPORTATION—SCHOOL BUS—BOARD COUNTY COMMISSIONERS — COUNTY CHILDREN'S HOME — NO AUTHORITY TO EXPEND FUNDS TO TRANSPORT SUCH CHILDREN TO SCHOOL—DUTY BOARD OF EDUCATION IN SCHOOL DISTRICT TO EDUCATE SUCH CHILDREN—PROVIDE TRANSPORTATION.

SYLLABUS:

1. No legal authority exists for a board of county commissioners or the managing officers of a county children's home to purchase a school bus for the transportation of the children in the said county home to school, or to expend any funds whatever for the purpose of transporting such children to school.

2. It is the duty of a board of education in a school district in which is located a county children's home to either maintain a school for the instruction of the children in said children's home, at or near the home, or to provide for their admission into the public schools of the district, and to provide transportation for those pupils to the school to which they are assigned, the same as would other children similarly situated be entitled to transportation.

COLUMBUS, OHIO, August 10, 1939.

HON. D. H. JACKMAN, *Prosecuting Attorney, London, Ohio.*

DEAR SIR: This will acknowledge receipt of your request for my opinion, which reads as follows:

> "The managing officers of our Madison County Children's Home and the Deercreek Township Board of Education have presented a problem for solution which I think requires the assistance of your office.
>
> The Children's Home is located in the Deercreek Township Rural School District and it is anticipated that some sixty chil-