

1. A juvenile court has no authority to make a permanent order of separation of a child from its parents, or, in the case of an illegitimate child, from its mother, and follow the same with a temporary commitment to the Division of Charities.

2. Where a temporary commitment is made of a dependent child to the Division of Charities, such child should be kept in readiness for return to the parent or guardian upon order of the court.

Respectfully,

GILBERT BETTMAN,

Attorney General.

4884.

COUNTY TUBERCULOSIS HOSPITAL—EXPENDITURE OF PROCEEDS OF BONDS—FINANCIAL ADMINISTRATION OF CONSTRUCTION FUND—TUBERCULOSIS HOSPITAL NOT A PUBLIC UTILITY—OFFICES COMPATIBLE—CLERK OF COUNTY. COMMISSIONERS ACTING AS DEPUTY AUDITOR WITHOUT COMPENSATION.

SYLLABUS:

1. *A clerk of the board of county commissioners appointed under Section 2409, General Code, may be lawfully appointed as a deputy auditor without compensation to assist the auditor in the performance of his duties as clerk of a building commission appointed in connection with the construction of a county tuberculosis hospital, providing it is physically possible for such person to perform the duties of both positions.*

2. *The full amount of the proceeds of an issue of bonds or notes may be expended for the purpose for which such issue was authorized, notwithstanding the fact that interest maturing previous to the receipt of taxes is not capitalized as authorized by Section 2293-11, General Code.*

3. *With the exception of the item of expenses of the building commission referred to in Section 2333, General Code, the commissioners have no control of the construction fund other than as members of the building commission.*

4. *The cost of acquiring real estate in connection with the construction of a county tuberculosis hospital may be considered by the court of common pleas in computing the maximum amount of compensation which may be received by the building commissioners under Section 2334, General Code.*

5. *When bonds are authorized for the purpose of acquiring a site and constructing a building, the authorization of such bonds is deemed an appropriation of the proceeds of the same for the purpose for which such bonds were issued.*

6. *In the event of a purchase of a site from the proceeds of an issue of bonds for an amount less than allocated to such purpose, the saving thus effected may not be used for the construction of the building.*

7. *In the construction of a county tuberculosis hospital, the building commission is not limited in its expenditures for such hospital by the amount of bonds authorized for such purpose but may expend funds in excess of such amount providing the cost of the improvement is not substantially increased over and above the amount approved by the electors.*

8. *A contract with an architect for public work which provides for the architect's compensation to be computed upon a percentage basis of the cost of the improvement is not thereby invalid.*

9. *The building commission has no authority to expend a portion of the proceeds of an issue of bonds for the construction of a tuberculosis hospital for such items as coffee, groceries, drugs, dinners or motor vehicles.*

10. *A medical superintendent and nurses for a county tuberculosis hospital may not be paid from the proceeds of bonds authorized for the construction of such hospital.*

11. *A tuberculosis hospital is not a public utility within the meaning of the term as used in Section 2293-11, General Code.*

12. *A contract for extra work in connection with the construction of a tuberculosis hospital must have the certificate of the fiscal officer attached thereto as provided in Section 5625-33, General Code.*

13. *There is no mandatory duty imposed upon the building commission to expend the entire proceeds of an issue of bonds for the construction of a tuberculosis hospital.*

COLUMBUS, OHIO, January 9, 1933.

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

GENTLEMEN:—Your request for my opinion reads as follows:

“On the _____ of _____ 1929 the Lorain county commissioners decided to submit to the voters of Lorain County the proposition of buying a site, erecting and equipping a tuberculosis hospital for Lorain County, and issuing bonds in the sum of \$425,000.00. In the preliminary resolution the county commissioners divided the proposition into three distinct projects: \$65,000.00 for a site, \$320,000.00 for the building and \$40,000.00 for the equipment; they submitted these figures to the county auditor, the fiscal officer, for an estimate of the life of the various parts of the project; the auditor, basing his estimate on the figures, submitted to the county commissioners the life of the project as follows: site 30 years, building 25 years and equipment 10 years and a basic period of 24 years for the entire project. It was submitted to the electors in a lump sum of \$425,000, but the different periods of time and the amounts to be expended was used among the voters as to the amounts that would be expended upon each part of the project. The same was carried by the sufficient number of votes, and an application was made to the court of common pleas who appointed four members of a building commission. The compensation of these members appointed by the court was not to exceed 2½% of the cost of the project. The fees subsequently allowed have been on this basis; the building commission then proceeded to employ an architect on a percentage basis. The commission also employed the clerk of the board of county commissioners, at no additional compensation. The county auditor also appointed this clerk as a deputy auditor, at no additional compensation. As deputy auditor he signed the minutes as such.

The county commissioners then passed the note resolution, notes to be dated April 1, 1930 and the bonds to be an approximate date of July 1, 1930, and to be paid off in twenty annual installments of equal amounts. In this resolution a tax was levied for the life of the notes to pay the interest thereon and for the purpose of paying an amount equal to what would be required if the bonds had been issued as contemplated. The resolution also provided for interest at not to exceed

6% per annum; the bonds to be retired semi-annually. The notes were issued not to run for a longer period than two years from date; the same were duly advertised and sold at a rate of interest of 4½ per cent. The full amount of \$425,000.00 was realized from the sale, together with interest accrued and a premium of \$187.00. No amount additional was placed in the issue to take care of interest before the first interest bearing period of April 1, 1931. Out of the proceeds from the sale of said bonds there was placed substantially the sum of \$39,000.00 in round figures to take care of the interest of April 1, 1931. After the first interest bearing period and the first tax collection made, and an unexpended balance in the sinking fund was transferred to this bond payment fund, thus permitting all but about \$4000.00 to be again transferred to the construction fund. This bond payment fund is now overdrawn by about \$6000.00 in round figures.

The building commission, after approving the estimated cost of the building, advertised for bids. The county commissioners in the meantime purchased two parcels of land at a total cost of \$15,525.00, making a total saving, if the original estimate had been carried out, of \$49,475.00; the architect's estimate for the building was \$275,000.00, or \$45,000.00 less than originally planned. If these figures had been adhered to, there would have been a total saving of \$104,475.00, from what was originally contemplated to be expended; this large saving became apparent to the building commission and it attempted to erect a nurses' home at a cost of about \$20,000.00 and passed a resolution directing the auditor to advertise for bids, which the auditor, Mr. Welty refused to do. They then sought by mandamus to compel him to do so, and on the merits the court dismissed the petition. On this nurses' home, the architect was to be compensated on a percentage basis, as on the original project. The prosecutor represented the auditor in this act; the building commission being represented by two of its members, Mr. Smythe and Mr. Calhoun.

The project then went forward and six months prior to the completion of the building, the county commissioners, acting as trustees, employed a medical superintendent, but no specific duties could be performed by him. This employment was not made in pursuance of the civil service laws and was not even a provisional appointment. He came on and the building commission began to make purchases by piece meal, many of which were under \$200.00 and at private contract; some by posting notices on the bulletin board and others by advertisement in the newspapers. About 42 written contracts were entered into, being about equally divided between bulletin board advertisements and newspapers, or 21 each; the cost of each advertisement was between \$50.00 and \$60.00. It is apparent that the many contracts were so let to avoid advertisement in the newspapers and so as to give the building commission much latitude.

Notwithstanding the mandamus proceeding already referred to, the building commission again attempted to build the nurses' home at the same estimated cost of \$20,000.00. An injunction proceeding was commenced by a taxpayer, after requesting the prosecutor to commence it and an application for a preliminary injunction was made but continued from time to time, until the building commission rescinded its action and abandoned such project. This action was commenced by the commission about October, 1931, and the injunction proceeding insti-

tuted about October 16, 1931. The action dismissing it was about January 1, 1932.

After this action was taken, the commission then had prepared certain plans for beautifying the grounds, which was not made a part of the original plan; they also prepared plans for plant material; and several other changes made which, together with the fees of architects and other expenses, would nearly eat up the amount which had already been saved by the abandonment of the nurses' home. It hired two different architects in the beautifying of the grounds. Two members of the commission refused to build the nurses' home, but they both voted to pay for these extra improvements.

In the second suit to prohibit the building of the nurses' home, it set up the fact that both the architect and the commission would be paid on a percentage basis and that same was illegal; it also set up the fact that the nurses' home was not needed, that it was not a part of the project voted for, and that the statute under which they were acting was unconstitutional.

After the abandonment of the nurses' home, or during the pendency of the proceeding, the building commission disbursed all but about \$6000.00 of the \$425,000.00, and certified the cost to the commissioners as follows: site \$34,712.00, building \$332,658.00, equipment and fixtures \$57,630.00, total \$425,000.00; as against the original plan of: site \$65,000.00, building \$320,000.00, and equipment \$40,000.00, thus making the building cost \$12,658.00 more than originally planned, the equipment \$17,630.00 more than originally planned, and the site \$40,288.00 less than originally planned. After this certification the county commissioners in February, 1932, passed its bond resolution in the sum of \$403,750.00, or \$21,250.00 less than the original amount of the note issue, on a certification by the auditor that there was in the bond retirement fund from the collection of taxes that amount collected on the 1930 duplicate. It will be noted that about two years had run since the notes were issued, and this allowed only for 1/20 of the bond issue, which the original resolution proposed to pay each year; the bonds, however, in the original resolution were to bear the date of July 1, 1930, and at least one year and nine months had elapsed as to them and two years as to the notes.

In the certification the commission certifies that the building is about completed, but as there is still \$6000.00 in round figures, it is apparent that they contemplated spending it, although no contracts have been let for such expenditures.

The bond payment fund being short, we set it up in full as it is on the records of the county auditor:

4-28-1930 From sale of notes.....	\$39,851.73
5-5-1930 Feb. Dist. Taxes.....	21,415.85
9-8-1930 From sinking fund.....	4,563.74
10-1-1930 Aug. Dist. taxes	19,818.80
3-3-1932 Sale bonds, Principal	403,750.00
Premium	1,052.00
Accrued interest	134.58

\$490,586.70

Disbursed,	
4-4-1931 Coupons redeemed	\$3,375.00
4-7-1931 Coupons redeemed	15,750.00
Transferred to Con. Acct.	33,468.75
10-1-1931 Coupons redeemed	2,250.00
10-5-1931 Coupons redeemed	7,312.50
4-2-1932 Notes and Interest	434,562.50
	496,718.75
Overdraft	\$ 6,132.05

The construction account shows about this sum unincumbered, which would about take up this overdraft.

It will be noted that there is a difference between the rate of interest on the notes and the bonds, making $1\frac{1}{2}\%$ more on bonds, and no levy has been made to make up this deficit, as the original resolution on which the notes were issued was only for the interest, which was $4\frac{1}{2}\%$ and an amount equal to what would be required if bonds had been issued at the time to take them up as they fell due, which would be $\frac{1}{20}$ of the issue, or for two years would be \$42,500.00 in addition to the interest, if the date of the notes was used and \$37,187.50 if the date approximate of the bonds was used, at any rate a substantial difference is apparent. The bond issue only takes into consideration one year's payment of the sum of \$21,250.00, the one-twentieth of the amount of the notes and bonds issued for the residue, to wit \$403,750.00. The reason the bond account shows that there is only a deficit of \$6,132.05 arises from the fact that \$4,563.74 was transferred from the sinking fund to this fund, and the difference between \$39,851.73 and \$33,468.75, placed in the first place in the bond retirement fund from the sale of notes and a lesser sum transferred again to the construction fund, in trying to correct the error; if this had not been done, a much larger overdraft would exist."

The foregoing communication is followed by twenty-eight questions, upon which you desire my opinion. I shall quote these questions as they are discussed.

"1. Can the clerk of the board of county commissioners, a full time clerk, be appointed a deputy auditor and clerk to the building commission, and act as clerk to the building commission without additional compensation, signing the minutes as deputy auditor in attesting the signatures of the members of the commission?"

It is apparently contemplated that the county auditor shall serve in the capacity of clerk of the building commission. Section 2342, General Code, provides as follows:

"Full and accurate records of all proceedings of the commission shall be kept by the county auditor upon the journal of the county commissioners. He shall carefully preserve in his office all plans, drawings, representations, bills of material, specifications of work and estimates of costs in detail and in the aggregate pertaining to the building."

Section 2563, General Code, provides that "the county auditor may appoint one or more deputies to aid him in the performance of his duties." It appears that the deputy appointed to aid the auditor in the performance of his duties for the building commission was the clerk of the board of county commissioners appointed in place of the county auditor under Section 2409, General Code, which section provides as follows:

"If such board finds it necessary for the clerk to devote his entire time to the discharge of the duties of such position, it may appoint a clerk in place of the county auditor and such necessary assistants to such clerk as the board deems necessary. Such clerk shall perform the duties required by law and by the board."

In view of the fact that the county auditor may act as clerk of the board of county commissioners (Sections 2566 and 2409, General Code) and also as clerk of the building commission (Section 2342, General Code), there is obviously no incompatibility as to conflict of interest in the same person, other than the county auditor, acting as clerk of the board of county commissioners and clerk of the building commission. It is true that the authority under Section 2409, supra, to appoint a clerk of the board of county commissioners in place of the county auditor is predicated upon a finding by the board that it is necessary for the clerk to devote his entire time to the duties of such position. However, it is possible that, although the appointment of a clerk of the board of county commissioners is justified under Section 2409, such clerk might still find it physically possible to serve as clerk of the building commission.

This view is in harmony with an opinion of this office found in Opinions of the Attorney General for 1916, Vol. I, p. 216, which held that a clerk of the board of county commissioners appointed under Section 2409, General Code, may perform for the building commission the duties imposed by Section 2342 upon the county auditor. This opinion was distinguished in an opinion appearing in Opinions of the Attorney General for 1917, Vol. II, p. 1435. This opinion held, however, that the building commission was not authorized to pay to the clerk of the board of county commissioners any compensation for duties performed under Section 2342, General Code, and is therefore not directly controlling here.

It is, accordingly, my opinion that a clerk of the board of county commissioners appointed under Section 2409, General Code, may be lawfully appointed as a deputy auditor without compensation to assist the auditor in the performance of his duties as clerk of a building commission appointed in connection with the construction of a county tuberculosis hospital, providing it is physically possible for such person to perform the duties of both positions.

"2. A deficit occurring by reason of change of rate of interest and the bond issue, by reason of the fact the levy during the life of the notes was based upon a lesser rate, which deficit is augmented by reason of a failure of the officials to levy for the required period of time during the first interest accumulation period, but levied only a lesser period than that required for such purpose, should the auditor continue to certify to funds for the improvement up to the full amount of \$425,000.00 when the same could under section 2293-29, G. C., especially if the plans already adopted do not show the need of future improvements, as shown by such plans?"

I assume that this question is one of whether or not the full amount of the proceeds of an issue of anticipatory notes may be expended for the purpose of

the issue, notwithstanding the fact that inadequate provision has been made to meet the interest requirements of such notes.

Section 2293-11, General Code, authorizes the capitalization of interest to take care of interest maturing previous to the receipt of taxes. The section is, however, purely permissive and it frequently arises that although interest is maturing previous to the receipt of taxes, an amount to take care of such interest is not capitalized, it being a proper expenditure from the bond retirement fund when sufficient funds are on hand for the purpose. It should also be noted that under paragraph e of Section 5625-13, General Code, moneys may be transferred from the general fund to the sinking fund or bond retirement fund to meet the deficiency in either of these funds.

Specifically answering this question, it is my opinion that the full amount of the proceeds of an issue of bonds or notes may be expended for the purpose for which such issue was authorized, notwithstanding the fact that interest maturing previous to the receipt of taxes is not capitalized as authorized by Section 2293-11.

“3. Have the county commissioners any control of the construction fund, other than as members of said building commission?”

Generally speaking, control of the construction fund is vested in the building commission, Section 2341 providing as follows:

“Resolutions for the adoption or alteration of plans or specifications, or award of contracts, hiring of architects, superintendent or other employes and the fixing of their compensation, the approval of bonds, and the allowance of estimates shall be in writing and require for their adoption the votes of five members of the commission, taken by yeas and nays recorded on the journal of the county commissioners. When signed by five members of the commission, the county auditor shall draw his warrant on the county treasury for the payment of all bills and estimates of such commission.”

It must be borne in mind, however, that there are other items of expense which may very properly be included as part of the cost of the improvement and hence payable from the construction fund, which are payable without action of the building commission. Section 2334, General Code, relating to the compensation of the building commissioners provides that such compensation shall be paid from the county treasury on the approval of the Court of Common Pleas. Section 2335, General Code, provides that certain expenses of the building commission shall be paid from the county treasury on the order of the county commissioners and the warrant of the auditor. This question may, therefore, categorically be answered in the affirmative. With the exception, however, of the item of expenses of the building commission referred to in Section 2335, General Code, the commissioners have no control of the construction fund other than as members of the building commission.

“4. Has the building commission the power to piecemeal out the project so that some contracts may be let at private contract, others being advertised on the bulletin board, and still others advertised in the newspapers, or should each division of the project be considered as one improvement, and one advertisement for the site which, of course,

is for the county commissioners, and the other two the building and equipment?"

I find no authority in the General Code for the procedure outlined in this question. Section 2343, General Code, provides in substance that when it becomes necessary for the commissioners of a county to erect or cause to be erected a public building, or an addition thereto, before entering into any contracts, they shall cause to be made detailed plans and specifications to afford bidders all needful information. Section 2352, General Code, provides for advertisements for proposals. Section 2353 provides for the length of notice necessary when the cost of a building does not exceed \$1000 and Section 2354, General Code, provides that when the estimated cost of a public building or of making an addition thereto does not exceed \$200.00, the contract may be privately let without publication of notice. It is my opinion that the building commission is without power to award contracts for the construction of a county tuberculosis hospital without competitive bidding by dividing the cost into items of \$200.00 or less and thereby attempting to invoke the provisions of Section 2354, General Code. Of course, after awarding the main contracts, there may arise certain items of extra work costing \$200.00 or less which may properly be contracted for without advertising, but as I understand your question you do not present such a situation.

"5. The power to purchase the site being in the board of county commissioners, can the building commission members appointed by the court receive compensation on a percentage basis on the cost of the site?"

Section 2334, General Code, provides:

"The persons so appointed shall receive a reasonable compensation for the time actually employed, to be fixed by the court of common pleas and on its approval paid from the county treasury. Their compensation in the aggregate shall not exceed two and one-half per cent of the amount received by the county from taxes raised or from the sale of bonds for the purpose of constructing the building."

In an opinion of my predecessor appearing in Opinions of the Attorney General for 1927, Vol. II, page 1576, the syllabus is as follows:

"Where a building commission has been appointed for the construction of a county tuberculosis hospital pursuant to a vote of the people authorizing a bond issue, and a supplemental appropriation is made by the county commissioners for the purpose of improvement of the site and furnishing of the building, such appropriation may be taken into consideration in fixing the compensation of such building commission, and such commission is authorized to expend the money so appropriated as a part of the building fund for such improvement."

The facts under consideration in the rendition of the foregoing opinion disclosed that a portion of the proceeds of a voted issue of bonds was for the acquisition of a site. The opinion held that the entire proceeds of the bond issue should be considered in computing the maximum compensation provided by Section 2334, *supra*. This is, of course, a maximum limitation, the matter being within the discretion of the common pleas court.

It is, therefore, my opinion that the cost of acquiring real estate in connection with the construction of a county tuberculosis hospital may be considered by the court of common pleas in computing the maximum amount of compensation which may be received by the building commissioners under Section 2334, General Code.

"6. Should the county commissioners make a separate appropriation for the purchase of the site, and if a saving is made thereon, can the residue be transferred to the bond account to care for bonds, or may the building commission use it on the building?"

With respect to appropriating a portion of the proceeds of the bonds for the purchase of a site, Section 5625-33, General Code, provides that "the authorization of a bond issue shall be deemed to be an appropriation of the proceeds of the same for the purpose for which such bonds were issued". It is obvious that no special appropriation of the portion of the proceeds of the bonds allocated to the purchase of real estate need be made.

Section 2293-9, General Code, provides that bonds issued for the acquisition of real estate shall fall in Class (B) and may mature over a period not exceeding thirty years; bonds issued for the construction or improvement of fireproof buildings fall in Class (C) and are limited as to maturity to twenty-five years.

Section 2293-10, General Code, provides in part as follows:

"The amount expended from the proceeds of the bonds for any purpose or purposes falling within any class shall not exceed the amount allotted in said schedule to said class; provided, however, that whenever the bond issuing authority deems such transfer to be necessary for the carrying out of the purpose of the bond issue, then such authority may transfer any unexpended portion of the amount allotted to any class from the class to which it was originally so allotted to any class with a longer maturity and, upon such transfer, the amount expended for any purpose or purposes falling within the class to which such transfer has been authorized may include the amount so transferred; but no transfer may be made from any class to a class with a shorter maturity."

In view of the foregoing section, any saving made in the amount allocated to the acquisition of real estate may not be used for the construction of the building. After the completion of the building and the payment of all obligations incurred, this saving effected in the acquisition of real estate should, under paragraph "b" of Section 5625-13, General Code, be transferred to the sinking fund or bond retirement fund.

"7. As the bond issue was only for \$403,750.00, has the building commission authority to expend more than that amount?"

When anticipatory notes have been authorized and sold in a given amount and bonds are subsequently sold in a lesser amount, the building commission is not necessarily limited in its expenditures to the amount of the bonds. Notes may be issued for a period of two years (Section 2293-25, General Code). If notes are authorized, to use a specific illustration, on July 1, 1929, to mature July 1, 1931, bonds authorized to retire the notes on July 1, 1931, maturing semi-annually, the date of first maturity under Section 2293-12 being March 1, 1932, should be in a lesser amount than the amount of notes, for the reason that during the time the notes were outstanding sufficient taxes would have been

collected to retire three semi-annual maturities of the bonds. This would present a situation whereby the amount properly expended would exceed the amount of bonds actually issued. If, however, the reduction is occasioned by effecting a saving in the amounts allocated to longer maturities under Sections 2293-9 and 2293-10, the expenditures would not thereby exceed the amount of the bonds. It should also be borne in mind that in the event there should be other available funds on hand to defray part of the cost of constructing a county tuberculosis hospital, there is no inhibition against transferring such funds to the hospital construction fund, thereby enabling the county to expend more than the amount derived from the sale of bonds, providing the cost would not thereby be substantially increased.

In *State, ex rel. vs. Andrews*, 105 O. S. 489, the court had under consideration the provisions of Section 2333, et seq. The language of the court at p. 497 is as follows:

"The legislature provided that the contracts let must be within the limits of the estimates adopted, and a construction of the provisions of the statutes clearly indicates a limitation of the estimate within the amount expendable for the given purpose, and the amount expendable for such purpose is *substantially limited to that approved by the electorate* of the political subdivision."

See also the 1927 opinion of this office referred to above.

Specifically answering your question, it is my opinion that in the construction of a county tuberculosis hospital the building commission is not limited in its expenditures for such hospital by the amount of bonds authorized for such purpose but may expend funds in excess of such amount providing the cost of the improvement is not substantially increased over and above the amount approved by the electors.

"8. Must the levies made during the life of the notes be applied exclusively to the retirements of the notes and interest thereon and an amount equal to what would be required for the redemption of bonds had they been issued, requiring a lesser amount of bonds to be issued, or may it be used to retire bonds subsequently issued if an income is received from such levy after the notes have been retired? Or may such levy be used to take up any overdraft that may exist on the retirement of the notes?"

I presume that you mean to ask in the foregoing question whether or not in the event a tax distribution period intervenes between the time of the issuance of notes and the time of the issuance of bonds, the amount of the bonds to be issued should be reduced or whether moneys thus appearing in the bond retirement fund should be held and invested for retirement of bonds instead of being used to partially retire the notes. This question is answered in my discussion of your question number 7, *supra*.

"9. May a levy be subsequently made to take up the deficit, and in addition thereto an additional levy equal to the amount required to meet the bonds falling due and the interest thereon?"

"27. Should not the county commissioners place in their budget,

and should not the budget commission, under the facts as they existed have levied for an amount sufficient to pay 18 months interest in the first levy, instead of only one year?"

These questions involve the same principle of law and should be answered together.

Section 2293-36 provides as follows:

"After the issue of any notes or bonds, the taxing authority shall annually include in its budget a sufficient amount to pay the interest on and to retire at maturity such bonds or notes; and shall levy a tax therefor."

The foregoing section has been enacted in compliance with the requirement of Section 11, Article XII of the Constitution. The duty to levy whatever is necessary to meet the interest and principal requirements of bonds is clearly mandatory. *Rabe vs. Board of Education*, 88 O. S. 403, 423; *State, ex rel. vs. Zangerle*, 94 O. S. 447; *State vs. Dean*, 95 O. S. 108. Opinion No. —, rendered —, 1932.

It follows that in the event there is a deficit in the bond retirement fund, the levy to meet the interest and principal requirements of bonds must be increased to the amount necessary to overcome such deficit.

"10. What authority determines the maximum amount that may be expended by the building commission, the building commission or the county commissioners?"

In view of the provisions of Section 2341, *supra*, the authority to determine the maximum amount that may be expended by the building commission for the construction of the hospital is vested in the building commission, since that commission determines upon the matter of the adoption of plans or specifications, the award of contracts, etc. The commission is, of course, limited by the proceeds from the bonds or notes authorized for the purpose unless there are available funds in the general fund which the county commissioners may see fit to transfer to the hospital construction fund as discussed under Question No. 7, *supra*.

"11. Is a contract with an architect, made by public officials, on a percentage basis a legal and binding contract, or is it void as against public policy? Such contract is an inducement to expend public money unnecessarily.

12. Can the members of the commission be paid on a percentage basis? Is it legal for the same reason?"

I shall consider the foregoing two questions together, since they involve the same principle. There is no inhibition in the General Code against employing an architect on the percentage basis. The legislature has expressly recognized the validity of compensating the members of the building commission upon that basis by the enactment of Section 2334, *supra*. The practice of paying architects on a commission basis is recognized in an opinion appearing in Opinions of the Attorney General for 1929, Vol. II, p. 833.

It is accordingly my opinion that a contract with an architect for public

work which provides for the architect's compensation to be computed upon a percentage basis of the cost of the improvement is not thereby invalid.

"13. Has the building commission any authority to buy such articles as coffee, groceries and drugs, as equipment, or is their authority limited to articles of more or less a permanent nature?

14. Has the building commission authority to purchase a truck and an automobile for the use of the superintendent?

20. Had the commission authority to give a dinner to themselves and family and to the employees, at the expense of the commission?

21. Should a finding be made against the members of the commission if the above is answered in the negative?"

The four foregoing questions should be answered together. I am unable to find any authorities holding that coffee, groceries, drugs, dinners, trucks and automobiles are proper items to be considered as equipment of a building and it is accordingly my opinion that the cost of such items may not be paid from the proceeds of an issue of bonds authorized to construct and equip a building.

With respect to the matter of a finding against the members of the commission for these expenditures, Section 286, General Code, relating to reports of examiners of your Bureau, provides in part as follows:

"If the report sets forth that any public money has been illegally expended, or that any public money collected has not been accounted for, or that any public money due has not been collected, or that any public property has been converted or misappropriated, the officer receiving such certified copy of such report, other than the auditing department of the taxing district, may, within ninety days after the receipt of such certified copy of such report, institute or cause to be instituted, and each of said officers is hereby authorized and required so to do, civil actions in the proper court in the name of the political sub-division or taxing district to which such public money is due or such public property belongs, for the recovery of the same and shall prosecute, or cause to be prosecuted the same to final determination."

There is no authority for the expenditure of public money for groceries and dinners for a tuberculosis hospital before the hospital is completed and these expenditures are therefore illegal.

"15. Is the medical superintendent and the nurses under the classified list of employees under the civil service laws, and they not being appointed from such list or been provisionally appointed, should payments to them be listed as illegal?

19. Should question 15 be answered in the affirmative, should a finding for recovery be made, or should it be set up as an illegal payment?"

This office held in an opinion appearing in Opinions of the Attorney General for 1930, Vol. I, p. 711, as disclosed by the syllabus:

"The superintendent of a county tuberculosis hospital, and the other employees of such hospital, are included in the classified service of the State of Ohio."

With respect to the illegality of payments heretofore made to persons appointed in violation of the civil service laws, Section 486-29, General Code, provides as follows:

"The right of any taxpayer to bring an action to restrain the payment of compensation to any person appointed to or holding any office or place of employment in violation of the provisions of this act (G. C. §§ 486-1 to 486-31), shall not be limited or denied by reason of the fact that said office or place of employment shall have been classified as, or determined to be classified as, not subject to competitive examination; provided, however, that any judgment or injunction granted or made in any such action shall be prospective only, and shall not affect payments already made or due to such persons by the proper disbursing officers, in accordance with the civil service rules in force at the times of such payments."

The provisions of the foregoing section to the effect that any judgment or injunction made in an action therein referred to shall be prospective only and shall not affect payments already made or due, clearly indicate that when services have been performed pursuant to illegal appointment, payments for services may not be recovered.

"16. Had the county commissioners as trustees of the hospital any authority to employ a medical superintendent 6 months prior to the time his duties would commence, and pay him a salary during such period?"

Section 3141-2, General Code, provides that the management and control of a tuberculosis hospital shall be vested in a board of trustees appointed by the county commissioners. The section further provides that the board so appointed shall have all the powers conferred by law upon a board of trustees of a district tuberculosis hospital. Section 3151 provides that the board of trustees of a district hospital shall appoint a medical superintendent. In view of Section 3141-2, General Code, such medical superintendent should be appointed by the board of trustees of a county tuberculosis hospital.

It does not follow, however, that a person who may thereafter become medical superintendent, may not be employed during the course of the construction of a hospital to assist the building commission in matters pertaining to the laying out and equipment of the hospital. Such matters may require the advice of a physician, and although his employment as a medical superintendent may be premature, his employment would not necessarily be illegal.

"17. Had the building commission by action taken Oct. 28, 1931, the right to pass a resolution employing persons and fixing their salary at a period already expired; that is to say to employ them from Sept. 9 to Oct. 25, and at a salary of so much?"

In the foregoing question, no statement is made as to whether or not the persons in question actually commenced to perform their services on September

9, and it is therefore impossible to categorically answer this question. Obviously if no services were performed between the dates of September 9 and October 25, there is no authority to compensate the persons in question for such period of time. If the persons referred to in this question as having been employed were a medical superintendent and nurses, any payment of their compensation from the proceeds of the sale of bonds would be absolutely illegal, as would the payment of their compensation from any fund be illegal prior to the rendition of their services.

"18. Is the building commission bound by the several amounts fixed by the county commissioners for the several projects, or may such commission expend it otherwise; that is to say, if the site was estimated at \$55,000.00, and it only cost \$15,525.00, may the saving be used in building and equipment, and a large portion of it used in landscaping, etc.?"

The foregoing question is answered by the discussion of question 6, *supra*. The question must be answered in the negative. Section 2293-10, General Code.

"22. Where two distinct projects were ordered having no connection with each other, such as a sick and invalid building at the county home, and a tuberculosis hospital, and in the resolution a tax levy was made for each; but the taxing authority placed the same in the budget together, but not sufficient to pay both of the requirements, how should the net collection be divided on the distribution of taxes?"

The tax levies to which you refer were, I assume, for the payment of bonds for two separate and distinct projects. The statute requires a separate levy for each bond issue. Section 5625-9, General Code, requires that there be established a special fund for each bond issue, and Section 5625-21, par. 2b, General Code, requires that the annual tax budget shall set forth the amount required from the general property tax in each fund. Under the circumstances, in view of the fact that but one levy was made, it is my opinion that the proceeds of the levy should be apportioned in the same ratio as the requirements of the two issues bear to one another. This, of course, will result in a shortage in each fund which should be made up by a transfer from the general fund, the obligation to pay bonds being prior to all other obligations of the subdivision. *Rabe vs. Board of Education, supra, State, ex rel. vs. Zangerle, supra, and State vs. Dean, supra.*

"23. Is a tuberculosis hospital a public utility within the meaning of section 2293-11 G. C. that the interest paid during the construction may be regarded as a part of the cost of construction?"

The General Code of Ohio has not defined a tuberculosis hospital or for that matter any other kind of a hospital as a public utility. Sections 614-2a, 614-74, 5415, General Code.

I am aware of the holding of the Supreme Court in the case of *State, ex rel. vs. Jackson*, 121 O. S. 186, that aircraft landing fields and terminals are public utilities. In the opinion, the court apparently determined that such fields were public utilities because land could be purchased and condemned therefor, the

court saying "Manifestly no argument is necessary to show that a landing field for aircraft is a public utility. If it were not a public utility, the legislature would have no power to make provision for purchase and condemnation of lands for such purposes."

Of course, a board of county commissioners is authorized to condemn land for a county tuberculosis hospital. Section 2446, General Code, provides that the commissioners may appropriate real estate under the circumstances therein set forth when in their opinion it is necessary to secure such real estate for any lawful structure. Like power is given to a joint board of commissioners in the case of the construction of a district tuberculosis hospital under Section 3149, General Code. Following this theory, in nearly every instance when bonds are issued under the Uniform Bond Act, it could be contended that the project is a public utility. I do not believe that in the enactment of Section 2293-11, providing that the cost of construction by a subdivision of any public utility may include interest payable during construction on bonds issued therefor, the legislature intended to include every public building for which land may be condemned.

Specifically answering this question, it is my opinion that a county tuberculosis hospital is not a public utility within the meaning of the term as used in Section 2293-11, General Code.

"24. Would not a contract for extra work have to be certified by the auditor under 5625-33 G. C. before such contract was made?"

Section 5625-33, General Code, requires that there be attached to every contract involving the expenditure of money a certificate of the fiscal officer of the subdivision that the amount required to meet the same has been lawfully appropriated as therein set forth. The section includes all contracts except current payrolls of regular employes and officers. There being no other exception provided, it follows that a contract for extra work in connection with the construction of a tuberculosis hospital must have the certificate of the fiscal officer attached thereto as provided in Section 5625-33, General Code.

"25. Would not a clause in a contract providing for settlement of a dispute as to amount due by the architect or by arbitration be considered as illegal, same having not been certified to by the auditor before incurring the obligation?"

Section 5625-33, General Code, provides that every contract made without a certificate therein required affixed thereto "shall be void and no warrant shall be issued in payment of any amount due thereon." If no certificate were attached to the contract itself containing the clause in question, of course the entire contract is void. If, however, this certificate were attached to the contract itself, there is no requirement that a supplemental certificate be attached to a clause such as mentioned, providing it does not involve the expenditure of an amount in excess of the total amount of the contract.

"26. The commission being under the impression it must expend the entire bond fund, is not this only the maximum amount they may expend, and should not any remaining part be transferred to the bond account for the redemption of bonds?"

Since the repeal of Section 5654-1, General Code, by the 88th General Assembly, 113 O. L. 670, it is no longer necessary under any circumstances to issue notes in anticipation of the issuance of bonds. Bonds may be issued to cover the estimated cost of a given improvement which often is not the actual cost. In the event the actual cost of an improvement is less than the amount of bonds, the unexpended balance after the payment of all obligations incurred in the acquisition of the improvement shall be transferred to the sinking fund or bond retirement fund under paragraph b of Section 5625-13, General Code. There is no requirement that the cost of the improvement equals the amount of bonds issued therefor.

"28. Do not facts constitute an abuse of discretion of the members of the building commission, in attempting to expend the public money, where it was thwarted in its attempt to build a nurses' home in an amount of \$20,000.00 and by devious ways attempt to expend it in the manner and form enumerated by splitting the various projects into many different parts, advertising in the newspapers by separate advertisements, and placing many on the bulletin board and making still other contracts by private contract? The cost of the advertisement in the newspapers alone was \$1270.18 up to date, while if it had been advertised by simply three advertisements it would not have cost over \$180.00. The commission is delaying its final action simply in an attempt to eat up the entire \$425,000.00 although the purchase of the land required under the law rests with the county commissioners."

This question may not be categorically answered upon the facts set forth. An application of the principles discussed under question No. 4 should be sufficient to enable your bureau to determine whether or not the officials in question have illegally expended public moneys or have been guilty of a gross abuse of discretion.

In conclusion, your attention should be directed to the fact that the Supreme court has recently held that the Uniform Bond Act must be strictly construed. I refer to the case of *State, ex rel. Curren, Director of Law vs. Rees, Director of Finance*, decided November 30, 1932, being case No. 23639. This case is pertinent to the situation hereinabove under consideration. It involved the issuance of bonds by the city of Lakewood for hospital purposes pursuant to vote of the electors at the November, 1929, election. A resolution declaring the necessity of the issue passed pursuant to the provisions of Section 2293-19, General Code, provided that the bonds should mature in twenty-two years. The county auditor calculated the average annual levy on this basis. Thereafter, the taxing authority certified its resolution to the board of elections providing that the bonds shall mature over a period of twenty-five years. The notice of election provided that the bonds should run for twenty-two years and the ballot provided twenty-five years. After being favorably voted upon, bonds were authorized to mature in twenty-two years, the time upon which the average annual levy was calculated. Upon these facts, the court held "that the provisions of the Uniform Bond Act must be strictly and not liberally construed and that the maximum time for these bonds to run cannot be lessened or increased, and * * * that a substantial compliance with the provisions of the so-called Uniform Bond Act is not sufficient and that such discrepancy as exists in the instant case is material and impairs the validity of the proceedings in connection with the bond issue"

It follows under authority of the foregoing case that the commissioners have no authority to authorize bonds to mature over a period of twenty years when the proceedings leading up to the authorization of the bonds apparently contemplated the issuance of bonds to mature over a period of twenty-four years. This discrepancy in the matter of maturities is perhaps even more serious than in the Curren case, because the average annual levy for these county tuberculosis hospital bonds would be in excess of that computed by the county auditor and authorized by the electors instead of the same as that authorized in the Curren case.

Respectfully,

GILBERT BETTMAN,

Attorney General.

4885.

PEDDLER—NECESSITY FOR SECURING A MUNICIPAL LICENSE—
COMPATIBILITY AND INCOMPATIBILITY OF NUMEROUS PUBLIC OFFICES DISCUSSED.

SYLLABUS:

1. *Discussion of licenses required of a merchant who peddles goods, wares and merchandise throughout one or more counties by means of an automobile truck.*
2. *The offices of county commissioner and member of the board of a rural school district are incompatible.*
3. *The office of county commissioner and position of clerk of the board of education of a rural school district are compatible.*
4. *The offices of county commissioner and township clerk are compatible.*
5. *A member of a board of education of a rural school district may also act as clerk of such board.*
6. *The offices of member of the board of education of a rural school and township clerk are compatible.*
7. *A township central committeeman of a political party may occupy the offices of county commissioner, township clerk, and the position of clerk of the board of education of a rural school district at the same time.*
8. *A township central committeeman of a political party may occupy the offices of member of the board of education of a rural school district, township clerk and the position of clerk of a board of education of a rural school district at the same time.*
9. *The offices of village treasurer and county treasurer are incompatible.*
10. *The office of county treasurer and the position of clerk of the board of education of a rural school district are incompatible.*
11. *The office of village treasurer and the position of clerk of the board of education of a rural school district are compatible.*
12. *A village central committeeman of a political party may occupy the office of village treasurer, and the position of clerk of the board of education of a rural school district at the same time.*
13. *A village central committeeman of a political party may occupy the office of county treasurer at the same time.*