486.

APPROVAL—BONDS OF MAPLE HEIGHTS CITY SCHOOL DISTRICT, CUYAHOGA COUNTY, OHIO, $6,000.00 (Unlimited).

COLUMBUS, OHIO, April 19, 1937.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.
GENTLEMEN:

RE: Bonds of Maple Heights City School Dist., Cuyahoga County, Ohio, $6,000.00 (Unlimited).

The above purchase of bonds appears to be part of an issue of bonds of the above school district dated April 1, 1930. The transcript relative to this issue was approved by this office in an opinion rendered to your board under date of August 3, 1936, being Opinion No. 5921.

It is accordingly my opinion that these bonds constitute a valid and legal obligation of said school district.

Respectfully,
HERBERT S. DUFFY,
Attorney General.

487.

AUDITOR OF STATE, TREASURER OF STATE, INDEPENDENT OFFICES — ARBITRARY MAXIMUM TRAVELING EXPENSES — TREASURER OF STATE NOT BOUND — AUDITOR DETERMINATION OF LEGALITY OF VOUCHERS.

SYLLABUS:

1. *The offices of Treasurer of State and Auditor of State are independent constitutional offices.*

2. *In matters of administrative policy in the conduct of such offices, neither office is subordinate to nor a check upon the other.*

3. *The establishment of an arbitrary maximum figure for per diem traveling expenses of state employes is a matter of administrative policy and the Treasurer of State in the conduct of his office is not bound by such maximum established by the Auditor of State. Under Section* 243,

General Code, the Auditor's duty is confined to a determination of the legality of such claims and the question of whether there is money in the treasury duly appropriated to pay the same before issuing his warrant therefor.

COLUMBUS, OHIO, April 19, 1937.

HON. CLARENCE H. KNISLEY, *Treasurer of State, Columbus, Ohio.*

DEAR SIR: I have your communication of recent date requesting my opinion on the following question:

> "Since the question of expense accounts has been discussed so much during the past few weeks, I would like to have an opinion from you as to the expenditures of this office.
>
> At times, the maximum travel allowance now allowed, is insufficient, and I feel that since I am responsible for the conduct of this office, accounts should be paid when approved by me.
>
> You may rest assured that I am endeavoring to operate this office as economically as good service and sound business methods will permit, and that no exorbitant expense of any kind will be approved. This request is made only for my own guidance in the operation of the State Treasurer's office."

Article III, Section 1, of the Constitution of the State of Ohio, creates the office of Treasurer of State in the following language:

> "The executive department shall consist of a governor, lieutenant governor, secretary of state, auditor of state, treasurer of state, and an attorney general, who shall be elected on the first Tuesday after the first Monday in November, by the electors of the state, and at the places of voting for members of the general assembly."

The foregoing constitutional mandate has been carried into the General Code as Section 296, which section also provides when the term of the duly elected Treasurer of State should commence. The language of this section is as follows:

> "The treasurer of state shall be elected biennially and shall hold his office for a term of two years and until his successor is elected and qualified. The term of office of the treasurer of state shall commence on the second Monday of January next after his election."

Article III, Section 1 of the Constitution, supra, also creates the office of Auditor of State and this mandate has been similarly carried into the General Code as Section 235 thereof, which reads as follows:

> "The auditor of state shall be elected quadrennially and shall hold his office for a term of four years and until his successor is elected and qualified. The term of office of the auditor of state shall commence on the second Monday of January next after his election."

It is perfectly apparent that the office of Treasurer of State and the office of Auditor of State are each elective, constitutional offices deriving their existence from the Constitution. Both are equal in dignity, independent of one another and each exercises separate and distinct powers and performs entirely separate and distinct functions in separate offices of the state government. Under the Constitution neither of these offices is dependent or subject to any jurisdiction or control of the other. Your question resolves itself, therefore, into a determination of whether or not the General Assembly has placed the office of Treasurer of State under the control or jurisdiction of the office of the Auditor of State in so far as your specific question is concerned, that is to say, your question resolves itself into one of whether or not "the maximum travel allowance," which is an arbitrary amount fixed by the Auditor of, I am advised, $3.50 per day for hotel and meals, may be exceeded by your office when traveling expense accounts in excess of this amount have met your approval on account of such maximum being in your judgment insufficient.

Section 243 of the General Code specifically applies to the case in question. This section reads:

> "The auditor of state shall examine each voucher presented to him, or claim for salary of an officer or employe of the state, or per diem and transportation of the commands of the national guard, or sundry claim allowed and appropriated for by the general assembly, and if he finds it to be a valid claim against the state and legally due, and that there is money in the state treasury duly appropriated to pay it and that all requirements of law have been complied with, he shall issue thereon a warrant on the treasurer of state for the amount found due, and file and preserve the invoice in his office. He shall draw no warrant on the treasurer of state for any claim unless he finds it legal, and that there is money in the treasury which has been duly appropriated to pay it."

If there is any provision of the General Assembly contained in the General Code which might possibly be construed as authorizing the Auditor of State to instruct you in the operation and conduct of your constitutionally created office as to whether or not some arbitrary figure may or may not be exceeded in the allowance of traveling expenses for your office, authority for such power must be found in the foregoing section.

Before construing Section 243, supra, it should be observed that there is no question but that your office is lawfully entitled to be reimbursed from appropriations made to your office for that purpose for all reasonable expenses incurred in traveling on business of the State.

The duty of the Auditor of State set forth in Section 243, supra, to determine that a claim is legal, as well as that there is money in the treasury which has been duly appropriated to pay it, before he may draw his warrant therefor, has been considered and passed upon by the Supreme Court in the recent decision of the case of *State, ex rel.* vs. *Tracy,* 129 O. S., 550. At page 567, the court said:

> "If a voucher representing a valid claim against the state is presented to him concerning which all requirements of law have been complied with, and it is legally due, and there is money in the state treasury which has been duly appropriated to pay it then the law specifically enjoins on him as a duty resulting from his office the issuance of a warrant on the treasurer of state in payment of the claim."

The foregoing principle was followed by this office in an opinion issued February 17 of this year, being Opinion No. 142, rendered to the Auditor, in which the following language is used:

> "Your first concern is the validity of the claims. The duty imposed upon the auditor of state by G. C. 243 to find that there is money in the treasury which has been duly appropriated to pay a voucher presented to him necessarily requires that you give consideration to the purpose for which the pertinent appropriation has been made and that you determine that the voucher is for the payment of a claim within such purpose."

There is no statute which expressly limits or defines any latitude of judgment exercised by you in passing upon the amount or sufficiency of traveling expenses of members of your office. The discretion to determine the reasonableness or unreasonableness of such expenses is in my judgment a matter of implied executive power necessarily vested

in you as an independent constitutionally elected officer of the state government. There is no doubt but that should you, in approving any item or items of expenditure for traveling expenses of your office, be guilty of a gross abuse of the discretion necessarily vested in you, the claim for the payment of such expenses would then and in that event become an illegal claim for which the Auditor would have no authority to issue his warrant, but in the absence of a clear showing of gross abuse of discretion on your part in such matters, I find no provision of law whereby the Auditor may be said to be authorized to substitute his judgment for yours as to what is or what is not a reasonable allowance for traveling expense for your office. It may be observed that the manner in which you exercise your discretion is your responsibility for which you and not the Auditor of State must account to the electors of Ohio.

The fixing of an arbitrary maximum amount of $3.50 to cover hotel and meals when traveling for the state can but be a matter of policy. It clearly may not be said as a matter of law that one claim for hotel and meals of $3.50 is a legal claim and another claim for hotel and meals of $3.55 is an illegal claim. If, in fact, an employe of your office should spend $2.50 for hotel and meals while traveling on business of the state, the claim for $3.50 would be illegal.

If Section 243, supra, were to be construed as authorizing the Auditor of State as a constitutional officer to determine such a matter of policy to be followed in the administration of your office as an independent constitutional office, thereby placing one office subordinate to another, a serious constitutional question would be raised since these offices are under the Constitution independent of one another. Even if such Section 243 were subject to such construction, it is observed that the courts have consistently adhered to the principle that where a statute is subject to two constructions, one of which will render it unconstitutional and the other of which will result in its meeting the provisions of the Constitution, the latter construction will be adopted. *State, ex rel.* vs. *Zangerle,* 103 O. S. 566. It is sufficient to observe here that in a determination of your question I do not find such Section 243 subject to any interpretation other than that hereinabove indicated.

There remains to be considered Section 154-30, General Code, imposing certain duties upon the Auditor of State. This section provides in so far as is pertinent as follows:

> "If any requirement of the department of finance respecting the submission of statements of proposed expenditures, or orders, invoices, claims, vouchers or payrolls is not complied with, or if any statement of proposed expenditure, or any

order, invoice, claim, voucher or payroll is submitted to and disapproved in whole or in part by the department of finance, the department shall have authority to notify the auditor of state thereof, and such auditor shall not issue any warrants on the treasury in payment of such expenditure, claim or voucher."

The reference contained in the foregoing section to requirements or orders of the Department of Finance is to such requirements or orders as may be issued by that department under the provisions of Section 154-28 of the General Code, which section provides in so far as is pertinent as follows:

"The department of finance shall have power to exercise control over the financial transactions of all departments, offices and institutions, excepting the judicial and legislative departments, as follows:

* * * * * * * * *

(4) By requiring orders, invoices, claims, vouchers or payrolls to be submitted to the department, where such submission is prescribed by law or where the governor shall deem such submission necessary, and by approving or disapproving such orders, invoices, claims, vouchers or payrolls. * * *"

The power vested in the Department of Finance as administered by the director thereof in approving claims or vouchers as set forth in the foregoing section, has been determined by the Supreme Court in the case of *State, ex rel.* vs. *Baker,* 112 O. S. 356, the third branch of the syllabus reading as follows:

"By virtue of Section 2288-2, General Code, no public improvement constructed by the expenditure of state funds can lawfully proceed unless the director of finance shall first certify that there is a balance in the appropriation not otherwise appropriated to pay precedent obligations. In the event the money is in fact in the fund, it is the ministerial duty of the director of finance to make the required certificate, and the discharge of this duty may be compelled by mandamus."

The foregoing decision of the Supreme Court clearly determined that in the absence of specific provision of law conferring upon the Director of Finance the power to pass upon the advisability or propriety of an expenditure, his duties are purely ministerial where there is an appropriation for such expenditure and money in fact in the treasury

to meet the same. The language of the court in the Baker case, supra, at page 370, is as follows:

> "Even if the Governor should remove the director of finance for disobedience of an executive order relating to the furnishing of a certificate, as prayed for in this case, the successor would nevertheless be subject to the order of this court, because *it is admitted that the money is in fact in the fund, and the furnishing of the certificate is therefore merely a ministerial duty.* By the provisions of Section 154-40, General Code, power is expressly conferred upon the department of highways and public works in a large number of matters, including the construction of highways. That section contains no limitations making the power thereby conferred subject to the approval of the Governor." (Italics the writer's.)

An earlier expression of the Supreme Court to the same effect is contained in the case of *State, ex rel.* vs. *Herrick,* 107 O. S. 611, the first branch of the syllabus reading as follows:

> "The essential functions of the Department of Finance are those of auditing, accounting, supervising public expenditures and all functions incident thereto, but that department has no control over the policies of the Highway Department under the administrative code."

Under authority of the Baker and Herrick cases, supra, setting forth the powers and duties of the Director of Finance in connection with expenditures of the Highway Department, an administrative department created by the Administrative Code of 1921, it follows *a fortiori* that Section 154-28, supra, confers no power upon the Department of Finance to control questions of policy in the administration of independent constitutional offices.

As hereinbefore suggested, the allowance which may be made for the per diem expenses of the members of your office when traveling on business of the state is a matter for your determination. You alone are charged with the responsibility for the proper administration of your department and this responsibility may not be assumed by the Auditor of State. Actual and necessary expenses consistent with a decent standard of living, and proper regard for the paramount consideration that these expenses are borne by the taxpayers of Ohio, are questions for you to determine and the amounts differ in different cases. No inflexible yardstick can be used to predetermine necessary traveling expenses. You

state in your letter that in approving the amount of traveling expenses which may be allowed to you and your appointees, your judgment will be tempered by an intelligent economy consistent with good service and sound business methods. Under such circumstances, the conclusion is inescapable that whether or not per diem traveling expenses of your office exceed any fixed maximum established by some other office can have nothing whatsoever to do with the legality of the claims, and it is the mandatory duty of the Auditor of State to issue warrants in payment thereof in the absence of a clear showing of gross abuse of discretion on your part in approving them.

Respectfully,

HERBERT S. DUFFY,

Attorney General.

488.

CHILDREN—DIVORCED PARENTS—CUSTODY—RESIDENCE OF CHILDREN DURING MINORITY—CHANGE OF LEGAL RESIDENCE.

SYLLABUS:

1. *Where the care, custody and control of minor children are given to a mother under decree of divorce, such children have the legal residence of their mother during minority, even though such children actually live in a county other than the legal settlement of their mother.*

2. *A minor child has no power to change his legal settlement.*

COLUMBUS, OHIO, April 20, 1937

HON. LESTER W. DONALDSON, *Prosecuting Attorney, Painesville, Ohio.*

DEAR SIR: I am in receipt of your recent communication which reads as follows:

> "We would appreciate your opinion upon the following matter: Mr. and Mrs. S. were divorced in Geauga County, Ohio, and Mrs. S, to whom the decree was granted, was given the custody by the court of four minor children, A, B, C and D. After the divorce decree the father remained in Geauga County for a short time and with him remained two of the four children A and B. The father then moved to Lake County and on