

above set forth, funds produced by a tax levy, made by township trustees upon all the taxable property of the township, under the provisions of the third paragraph of Section 1222, General Code, cannot be transferred and used in the construction of a county system road.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

454.

OHIO UNIVERSITY—PROPOSED CONTRACT FOR AUDITORIUM APPROVED.

*SYLLABUS:*

*Proposed entering into of contract for construction of auditorium at the Ohio University at estimated cost of approximately \$285,000, to be paid from funds in the sum of \$160,000 appropriated by the 86th. General Assembly and in the sum of \$130,000 donated through the efforts of the alumni of the university, which latter sum is to be placed in the hands and under the exclusive control of the Auditor of State, good and sufficient security for such sum being given to the auditor by the banks in which said sum is on deposit, approved.*

COLUMBUS, OHIO, May 5, 1927.

HON. GEORGE F. SCHLESINGER, *Director of Highways and Public Works, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of your recent request for my opinion upon the following:

“The 86th General Assembly, 1925, in Am. H. B. 517, appropriated \$160,000 for an Auditorium at Ohio University, Athens. Prior to this appropriation the Alumni of the University raised, through subscription, an approximate net amount of \$130,000 to be used in the construction of the same building.

These funds approximating \$290,000 were intended to be and are to be used for the construction of the Auditorium, which, when complete, will become the property of the State.

A large proportion of the subscribed funds are on deposit in Athens banks or are in Government bonds, and the remainder of them are secured by subscription notes. The deposited funds and bonds are drawing approximately 4 per cent. interest per annum.

Drawings and specifications have been prepared for the construction work. Bids thereon were received April 2nd, 1927, which show a total construction cost, including architectural services, of approximately \$285,000.

An opinion is asked on the following questions:

(1) Can legal contracts be entered into on which payments may be made from both the appropriated and the subscribed funds?

Note: It is desired to make the payments during the first part of the

construction from the appropriated funds, to be followed by payments from the subscribed funds so that the subscribed funds may be increased by the interest earned on them.

(2) If contracts can be entered into how should they be worded as to the appropriated and subscribed funds?

(3) If contracts can be entered into what certification should Ohio University and the depositories of the funds give the State that the funds are in hand to meet payments on the contracts, and what guarantee that such funds will be kept intact for and used for the making of such payments only?

Note: It has been suggested that the funds be certified and guaranteed to the Auditor of State and the Director of Finance and that payments from them be made on order of the Auditor of State only.

The construction work can be immediately proceeded with on approval of contracts. The University desires to have the work started at the earliest possible date."

The right of Ohio University through its president and trustees to accept donations of money is given in Section 7936 of the General Code, which provides in part as follows:

"\* . \* . \* ; and the president and trustees of the Ohio University shall have power to receive and hold in trust, for the use and benefit of the university, any grant or devise of land, and any donation or bequest of money or personal property, to be applied to the general or special use of the university; all donations or bequests of money, together with other donations and bequests converted into money, shall be paid to the state treasurer, *unless otherwise directed in the donation or bequest*, and the sums so deposited shall be added to the irreducible trust funds held by the state for educational purposes, and interest thereon shall be paid semi-annually to the treasurer of said university upon the requisition of the state auditor."

I assume from your letter and from the statements of the President of the University and the State Architect that the donors of the funds in question have directed that such funds be used for the purpose of supplementing the moneys appropriated by the 86th General Assembly to the building of an auditorium at Ohio University.

Your questions numbers 1 and 2 may be answered together.

The requirements of law generally with reference to entering into contracts for the construction or repair of buildings for the use of the state or any institution supported in whole or in part by the state, the aggregate cost of which exceeds three thousand dollars, are set forth in Sections 2314 to 2332, inclusive, of the General Code. In addition, various appropriation acts appropriating money for the construction of public buildings often contain provisions relative to the making of the contract and the expenditure of the funds for the construction of the building for which the money is appropriated. Section 2288-2, General Code, is also pertinent.

Contracts of this nature were the subject of recent consideration by this department. Your attention is directed to Opinion No. 344, rendered under date of April 19, 1927, to your department, the sixth paragraph of the syllabus of which reads as follows:

"A contract is legally entered into when the requirements of law

leading up to the same have been complied with and when the approval of such contract by the attorney general has been obtained and such approval has been indorsed on the contract."

Assuming that the statutory requirements will be complied with in every other respect, I shall confine the first part of this discussion to the question as to whether or not payments from separate funds such as described in your letter will affect the legality of the proposed contract.

The only requirements of law that might affect this phase are contained in Sections 2288-2, 2323, of the General Code, and Section 12 of Amended House Bill No. 517, 86th General Assembly, 1925.

Section 2288-2, General Code, reads:

"It shall be unlawful for any officer, board or commission of the state to enter into any contract, agreement or obligation involving the expenditure of money, or pass any resolution or order for the expenditure of money, unless the director of finance shall first certify that there is a balance in the appropriation pursuant to which such obligation is required to be paid, not otherwise obligated to pay precedent obligations."

Section 2323, General Code reads:

"No contract shall be entered into pursuant to Section 2317 at a price in excess of the entire estimate thereof. Nor shall the entire cost of the construction, improvement, alteration, addition or installation including changes and estimates of expenses for architects or engineers, exceed in aggregate the amount authorized by law for the same."

Section 12 of Amended House Bill No. 517, 86th General Assembly, 1925, in part reads:

"\* \* \* The appropriations made herein for buildings or structures, including remodeling and repairs, shall be for a complete operating unit ready for use and occupancy except furnishings, and shall include complete heating, lighting, ventilating and plumbing systems, when such systems are authorized or necessary, unless otherwise specifically provided in the item of appropriation."

By virtue of Section 2288-2, *supra*, no contract for a public improvement to be constructed by the expenditure of state funds can be lawfully entered into unless the director of finance shall first certify that there is a balance in the appropriation not otherwise appropriated to pay precedent obligations.

Section 2323, *supra*, provides that no contract of this nature may be entered into if the entire cost of construction exceeds in the aggregate the amount authorized by law for the same. In view of the fact that it may be presumed that the 86th General Assembly knew that the appropriation of \$160,000 was to be supplemented by a subscription fund raised by the alumni of the university and that both funds were to be used in the construction of an auditorium, it must be said that the entire cost of construction was authorized by law.

The money for the state's share of building an auditorium at Ohio University was, as above stated, appropriated by the 86th General Assembly in Amended House Bill No. 517. Section 12, *supra*, of said bill provides in substance that

the moneys appropriated in such bill shall be for a complete operating unit. While a violation of this section might not make it unlawful *to enter into a contract*, as would a violation of Section 2288-2 or Section 2323, *supra*, yet if the proper officials of the state were not assured that Section 12, *supra*, would be complied with, such non-assurance would be sufficient to warrant the Attorney General, under Section 2319, General Code, to refuse to certify his approval on the contract and without such certificate of approval the state could not legally enter into said contract. Such a violation would also seem sufficient to warrant the Auditor of State, under Section 243, General Code, to refuse to issue warrants on the Treasurer of State for payment from the appropriated funds. As was said in a recent opinion of this department, being Opinion No. 413 and dated April 29, 1927,—"An appropriation act is a law of equal dignity during its existence with all other laws of the state." Certainly a complete operating unit as required by Section 12, *supra*, cannot be definitely assured unless a sum certain sufficient to cover the cost of the entire building is placed to the absolute disposal and under the absolute control of a proper officer of the state.

I am informed by the President of Ohio University that, subject to certain conditions, the Auditor of State has expressed a willingness to act as trustee for the subscribed funds. These conditions are that the Athens banks where the subscribed funds are on deposit give security, by collateral or bond, to the Auditor of State for the several funds on deposit, and that said funds be placed at the absolute disposal of the Auditor of State and drawn only upon checks signed by him. I am further informed that the trustees now having control of these funds are ready and willing to comply with these conditions.

Since the Auditor of State is the chief accounting and disbursing officer of the state, he would seem to be the logical state official in whom to center the control of these funds. If the proper security is given to said auditor for these funds and the absolute control of same, the state will then be assured that Section 12, *supra*, will be complied with. A certification by the Auditor of State to this effect should accompany the contracts and other necessary documents or some other proper showing should be made when the contract and other documents are submitted to the Attorney General for his approval.

Specifically answering your question, I am of the opinion that if the conditions outlined in this opinion be complied with, legal contracts may be entered into on which payments may be made from both the appropriated and the subscribed funds.

I note that the officials of Ohio University desire to make the payments during the first part of the construction from the appropriated funds in order to take advantage of the larger percentum of interest earned on the subscribed funds. I know of no reason why this should not be done. However, this decision rests with the Auditor of State.

In your second question you inquire as to how the contracts should be worded as to the appropriated and subscribed funds. From a conversation with the State Architect, I understand that you have particular reference to the wording in Article 9 of what is known as the State Form of Construction Contract. If payments on a contract are to be made from both funds, I would suggest the following wording in Article 9:

"Said estimates to call for payments in accordance with the state law governing public buildings, provided, however, that nothing in this contract shall be construed to create an obligation or incur a liability against the state in excess of the appropriation made in Amended House Bill No. 517, passed March 27, 1925, approved April 16, 1925,

filed with the Secretary of State April 16, 1925. said appropriation being made under the heading of Additions and Betterments, G 2, Auditorium, to Ohio University, in the amount of one hundred sixty thousand dollars (\$160,000.00), it being understood and agreed that the contractor must depend upon the proper administration of a fund donated by private individuals, and now under the control of the Auditor of State for the payment of the balance of said contract price."

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

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455.

MORTGAGE SECURING INSTALLMENT LOAN—WHEN STATUTE OF LIMITATIONS SET OUT IN SECTION 8546, GENERAL CODE, BEGINS TO RUN.

*SYLLABUS:*

1. *The twenty-one year period of limitations set out in Section 8546-2, General Code, begins to run in the case of a mortgage securing an installment loan from the last due date of the loan as the same may be computed from the terms of the mortgage as it appears on record.*

2. *The same rule applies where such installment mortgage contains a provision for acceleration of the due date of the loan in case of default in one or more of the installment payments, where the mortgagee does not upon such default proceed to enforce the terms of the mortgage but permits the mortgagor to continue to make the regular payments after such default.*

COLUMBUS, OHIO, May 6, 1927.

*Department of Commerce, Division of Building and Loan Associations, Columbus, Ohio.*

GENTLEMEN:—Receipt is acknowledged of your communication dated May 4th, 1927, reading as follows:

"Section 8546-2 of the General Code of Ohio relates to the refileing of a mortgage 'remaining unsatisfied or unreleased of record for more than twenty-one years after the last due date of the principal sum or any part thereof, secured thereby, as shown in the record of such mortgage.'

In the case of installment loans in a building and loan association the principal sum due under the mortgage is reduced at certain intervals annually or semi-annually at which times interest is thereafter charged upon the reduced amount of the principal due.

Will you please advise just which date is to be used as a basis for determining the beginning of the twenty-one year period under this section?

Please advise also whether or not, in case of failure to make the prescribed payment or payments on the loan as required under the terms of the mortgage and no action is taken to enforce the terms of the mortgage contract providing that the loan thereupon becomes due and payable in full, and the company permits the borrower thereafter to continue to make the