

(2) Where the chattel mortgage is presented with an assignment already made thereon, may the fee be charged for filing of the original mortgage and in addition thereto six cents for each party to the assignment.

Section 8572, General Code, *supra*, provides the fees to be charged upon the filing of an original instrument. The assignment is not a part of the original instrument, but is placed thereon after the execution of the original instrument and it becomes the duty of the county recorder after indexing the original parties to said instrument also to index the parties to the assignment. It is noted that the twenty-five cents named in said section is the fee for recording the affidavit, credit or statement added to an instrument between the time of its record and refile. It is clear, however, that although the assignment is written upon the chattel mortgage at the time of filing the same, nevertheless the county recorder has the duty of indexing said assignment and making the entries in regard thereto, for which duty there is prescribed a fee of six cents for each party thereto.

Specifically answering your questions it is my opinion that:

(1) Where an assignment of a chattel mortgage is made after the original mortgage has been filed, it is the duty of the county recorder to charge a fee of six cents for each party to the assignment for indexing such assignment.

(2) Where a chattel mortgage is presented with an assignment already made, it is the duty of the county recorder to charge the amount provided for the filing of the original mortgage and in addition thereto, six cents for each party to the assignment.

Respectfully,
EDWARD C. TURNER,
Attorney General.

3038.

LEASE—WITH PURCHASE OPTION—APPROVAL OF 99 YEAR LEASE
BY PRESIDENT AND TRUSTEES OF OHIO UNIVERSITY FOR
STADIUM—ATHLETIC PURPOSES.

SYLLABUS:

The President and Trustees of Ohio University have the authority to enter into a ninety-nine year lease, with purchase option, for property to be used for the athletic purposes of Ohio University.

COLUMBUS, OHIO, December 19, 1928.

HON. ELMER B. BRYAN, *President, Ohio University, Athens, Ohio.*

DEAR SIR:—This will acknowledge your recent communication as follows:

“I am handing you herewith a proposed plan whereby land and the construction of a stadium thereon for the use of Ohio University is to be financed by Athens banks without any cost to the State.

The plan, as you will observe, is to issue bonds which will be matured, as indicated, from funds to be derived from athletic and other activities of the University.

To insure good faith on the part of the University in carrying this arrangement to a successful conclusion, the signatures of the officers of the Board of Trustees of Ohio University to this agreement are necessary.

I am advised that some such plan as herein indicated has been followed by other educational institutions.

I have the honor to request your opinion on the legal phases of the proposition."

I shall not attempt to copy herein in full the documents which you transmitted with your letter. The plan may be summarized briefly.

The land upon which the proposed stadium is to be erected is to be acquired by the Bank of Athens National Banking Association, as trustee, under an agreement and declaration of trust. The declaration of trust is between the bank and the holders and owners of land trust certificates issued pursuant to such trust. These land trust certificates are to be disposed of to the public and in this method means are to be provided for financing the construction of the stadium.

Fifteen hundred land trust certificates are to be issued, which I assume are to be marketed at the price of One Hundred Dollars (\$100.00) each, and in order to pay the interest thereon, a lease is to be entered into between the bank, as trustee, and the President and Board of Trustees of Ohio University. The lease is a very voluminous document, but may be described as in the general form of an ordinary ninety-nine year lease, by the terms of which the lessee agrees to pay the sum of Nine Thousand Dollars (\$9,000.00) for the first two years and Twelve Thousand Dollars (\$12,000.00) each year thereafter. The usual covenants with respect to taxes, charges of any kind, insurance, etc., are set forth. There are also provisions authorizing the application of amounts over and above the interest requirement to the acquisition of land trust certificates. In the event that all of the land trust certificates are acquired by the trustee, then a conveyance in fee is to be made to the University. There is also a provision for an option to purchase.

The obligation on the part of the President and Board of Trustees of Ohio University, by virtue of the terms of the lease, is unqualified, in that there is no expression therein contained as to the source of the revenue from which the payment of the rentals is to be made. That is to say, while I assume it is anticipated that the payment of the rentals therein will largely be made from athletic revenues, yet the obligation is unqualified in this respect.

The lease is to be executed by the President and Trustees of the Ohio University. Inasmuch as the corporate name is "The President and Trustees of Ohio University" I believe this should be used in the execution of the lease. This name is found in the original act of incorporation in 2 O. L., page 193, to which reference will hereafter be made. For the purpose of convenience, the corporation will hereafter be referred to as the University.

In view of these circumstances, it becomes necessary to ascertain whether the University has the power to enter into a lease of this character. A preliminary question is whether this is a proper purpose for the expenditure of university funds.

The ordinary rule is that any incorporated college or university has the implied power to take, receive, hold and convey property for the purpose of carrying out the objects of the corporation. As will be seen in the subsequent discussion herein, the University has express authority to do these things, and so far as the question as to whether the erection of a stadium is a university project is concerned, I am of the opinion that there can be little doubt. In the past there might have been some doubt on this point, but the modern development of institutions of

higher learning has resulted in an almost universal recognition of the importance of the physical development of the students as a proper and necessary adjunct to mental training. As a result, organized athletics of many kinds are recognized and form, in fact, part of the required work in most of our institutions. I accordingly have no hesitancy in saying that the acquisition of an athletic field, with modern equipment therefor, is a proper university purpose.

The serious question presented is whether the University has the authority to carry out this purpose in the method now proposed. In order to determine the authority of the corporation, it is necessary to examine the legislative history with reference thereto. Ohio University had its origin at a time which antedated considerably the formation of the State itself. Its location is within that part of what is now the State of Ohio, which was originally purchased from the Federal Government by the Ohio Company in the year 1787. By the terms of the original contract with the Board of Treasury of the United States of America, it was expressly provided that the conveyance of the lands was made "reserving and excepting two corporate townships for the purposes of a university, to be laid off in the manner hereinbefore mentioned, and to be applied in such manner to that object as the Legislature of the State wherein the said townships shall fall, or be situated, shall or may think proper or direct."

This deed and the exception hereinabove noted, established a trust with relation to the two townships and in pursuance thereof the Legislature of the Northwest territory, acting as trustees for the proper application of the townships, passed an act in 1802, establishing a University in the town of Athens by the name and style of The American Western University. This act of incorporation was apparently never carried into effect, but it contains substantially the same provisions as those in the subsequent act of the Legislature of Ohio. It may be noticed, however, that Section 18 of that act was as follows:

"Sec. 18. That the Legislature of the territory or the Legislature of the state within which the said University is or may be founded, may grant any further and greater powers to, or alter, limit or restrain any of the powers by this act vested in the said corporation, as shall be judged necessary to promote the best interest and prosperity of the said University, with all necessary powers and authority for the better aid, preservation and government thereof."

On February 4, 1804, the Legislature of Ohio passed the act of incorporation to which reference has heretofore been made. For the purpose of this discussion I am quoting the title of the act and Sections 1, 2, 10, 11, 14, 16 and 17, as follows:

"An Act—Establishing an University in the Town of Athens."

"Sec. 1. Be it enacted by the General Assembly of the State of Ohio, That there shall be an University instituted and established in the town of Athens, in the ninth township of the fourteenth range of townships, within the limits of the tract of land purchased by the Ohio Company of Associates, by the name and style of the 'Ohio University,' for the instruction of youth in all the various branches of liberal arts and sciences, for the promotion of good education, virtue, religion and morality, and for conferring all the degrees and literary honors granted in similar institutions.

Sec. 2. That there shall be and forever remain in the said University, a body politic and corporate, by the name and style of 'The President and Trustees of the Ohio University;' which body politic and corporate shall

consist of the governor of the state, (for the time being) the president, and not more than fifteen nor less than ten trustees, to be appointed as herein-after is provided.

Sec. 10. That the said corporation may have and keep one common seal, which they may change or renew at pleasure; and that all deeds or instruments of writing, signed and delivered by the treasurer, and sealed with the corporation seal, by order of the president and trustees, shall, when made in their corporate name, be considered in law as the deed and act of the corporation; and the said corporation shall be capable of suing and being sued, pleading and being impleaded, in any action, real, personal or mixed, and the same to prosecute and defend to final judgment and execution, by the name of 'The President and Trustees of the Ohio University:' Provided, That when any suit shall be commenced against the said corporation, the process shall be by summons, and the service made by the officer leaving an attested copy of such process with the treasurer of the said corporation, at least twenty days before the return day of such process; and the said corporation shall be capable of having, holding and taking, in fee simple, or any less estate, by gift, grant, devise or otherwise, any lands or other estate, real or personal.

Sec. 11. That the two townships numbered eight and nine, in the fourteenth range of townships within the grant of land made by Congress to the Ohio Company of Associates, be and they are hereby vested in the corporation, by this act created, in trust, for the sole use, benefit and support of the said University, forever.

Sec. 14. That the clear annual rents, issues and profits, of all the estate, real and personal, of which the said corporation shall be seized or possessed, in their corporate capacity, shall be appropriated to the endowments of the said University, in such manner as shall most effectually promote the end of the institution: Provided nevertheless, That any donation which shall hereafter be made and received for particular purposes, relative to the design of this institution, shall be applied in conformity to the intention of the donor or donors.

Sec. 16. That the said corporation shall have full power, from time to time, to contract for, and cause to be erected, such building or buildings as they shall deem necessary, for the accommodation of the president, professors, tutors, pupils, and servants, of said University; as also, to procure the necessary books and apparatus, for the use of said University, and shall cause payment therefor to be made out of the funds of the University, and shall reserve such lot or lots in said town of Athens, as they may deem necessary for the purposes aforesaid, and for the erection of buildings for the use of the town and county.

Sec. 17. That the lands in the two townships, appropriated and vested as aforesaid, with the buildings which are or may be erected thereon, shall forever be exempted from all state taxes."

It is to be noted that clearly a corporation is created with perpetual life. The corporation is given title to the two townships in trust for the benefit and support of the University. By Section 10 the corporation is capable of suing and being sued, and is also capable of having, holding and taking "in fee simple, or any less estate, by gift, grant, devise or otherwise, any lands or other estate, real or personal."

I have not quoted other provisions of the act which set forth the means whereby the University was empowered to evaluate the lands in the townships and to enter into leases for a term of ninety years, renewable forever at six percentum of the valuation. It was assumed that the annual rents so accruing would be made available to the University and would be sufficient to carry on its enterprises.

Giving consideration only to the original act of incorporation, the conclusion must be reached that the corporation was fully authorized to acquire in any manner deemed proper, any property useful to its purposes. It remains to be determined, however, whether that authority has been or could be in any way modified by subsequent legislation. An interesting question is involved in the determination of the right to the Legislature subsequently to restrict the rights originally granted by the act of incorporation. You will observe from the portion of the original act passed by the territorial legislature that the specific right to alter and amend the charter thereby granted was reserved. No similar provision, however, is found in the act of 1804, and it may well be argued that a situation exists coming directly within the principle announced by the Supreme Court of the United States in the case of *Dartmouth College vs. Woodward*, 4 Wheaton, page 518. In that case it was announced that a special charter granted without reservation constituted a contract with the State, which the Legislature was thereafter powerless to modify against the consent of the holder of the charter. In view of my conclusions, however, a consideration of this phase of the question is unnecessary.

An examination of the various special acts of the Legislature dealing with Ohio University leads to the conclusion that the policy of the State in extending aid to that institution by direct appropriation is of comparatively recent origin. As heretofore stated, it was presumed that the income from the lands in the two townships would be sufficient to maintain the institution. Because of inherent difficulties in connection with the reappraisal provision of the original incorporation act, the income of the University from the lands of which it was trustee was insufficient to maintain it in a prosperous condition. Its financial condition reached a crisis in 1845 and for a period of three years thereafter the collegiate work was actually suspended, but the academic department was continued in a small way. The unsatisfactory condition was alleviated to a certain extent subsequently by amendatory legislation authorizing the taking of title in fee simple of the land upon revaluation thereof. This change was of course done with the consent of the University and so the question was not raised as to the right of the State against the will of the corporation, to make substantial change in the original charter.

I am indebted for much of the historical matter which has been mentioned to the work entitled "Legal History of the Ohio University" by William E. Peters of the Athens Bar, and also to the analysis of the history of the University contained in the case of *Armstrong vs. Treasurer of Athens County*, 10 Ohio, 235.

No direct appropriation for the benefit of the University was made until the year 1875, although many special acts relative to the University were passed in the meantime, with the object of increasing the revenue by indirect means. It is interesting to note that in 16 O. L., an act was passed authorizing a lottery for the benefit of Ohio University. It does not appear, however, that this venture was carried forward to conclusion.

Since 1875 the University has with great regularity been the recipient of direct appropriation by the State, and, in fact, for a considerable period of time, commencing in 1896, a specific levy for the support of the University was put upon the taxable property of the State. The extent to which the institution has received state aid is indicated by the appropriation made by the 87th General Assembly,

which, for the biennium ending December 31, 1928, appropriated a total of \$1,297,917.50 for the general purposes of the University. In addition thereto there was also appropriated by that Legislature the student fees received by the University and paid into the state treasury, together with the endowment moneys due the University on account of rents and taxes in the two University townships. These endowment moneys, by provisions of the statutes, are made payable upon receipt into the state treasury. The provision governing the payment of moneys into the state treasury is found in Section 24 of the General Code, which is as follows:

"On or before Monday of each week every state officer, state institution, department, board, commission, college, normal school or university receiving state aid shall pay to the treasurer of state all moneys, checks and drafts received for the state, or for the use of any such state officer, state institution, department, board, commission, college, normal school or university receiving state aid, during the preceding week, from taxes, assessments, licenses, premiums, fees, penalties, fines, costs, sales, rentals or otherwise, and file with the auditor of state a detailed verified statement of such receipts. Where tuitions and fees are paid to the officer or officers of any college normal school or university receiving state aid, said officer or officers shall retain a sufficient amount of said tuition fund and fees to enable said officer or officers to make refunds of tuition and fees incident to conducting of said tuition fund and fees. At the end of each term of any college, normal school or university receiving state aid the officer or officers having in charge said tuition fund and fees shall make and file with the auditor of state an itemized statement of all tuitions and fees received and disposition of the same."

Section 24a, General Code, is also pertinent and it is as follows:

"All sections and parts of sections of the General Code which provide for the custody, management and control of moneys arising from the payment to any state officer, state institution, department, board, commission, college, normal school or university receiving state aid of any fees, taxes, assessments, licenses, premiums, penalties, fines, costs, sales, rentals or other charges or indebtedness and which are inconsistent with the provisions of Section 24 of the General Code, as herein amended, are, to the extent of such inconsistency, hereby repealed."

While, as I have before indicated, in theory there may be doubt as to the right of the State to impose conditions of this nature upon the University, there is no practical purpose served in passing upon this point, since the University has become practically dependent upon state aid for the continuance of its activities and the will of the Legislature could effectually be enforced by the simple expedient of withholding state aid until the University should agree to the terms and conditions imposed. Indicative of this is Section 7931-1, General Code, which was enacted as part of the reorganization bill and is found in 109 O. L., page 105. This section changed the method of selection of the trustees of the corporation, and in order to effectuate the change, provided in the last sentence thereof as follows:

" * * * No moneys appropriated for the use or support of the Ohio University shall be withdrawn from the state treasury for such use until 'The President and Trustees of the Ohio University', as constituted when

this section takes effect, shall consent to the provisions hereof and file duplicate certificates of such consent in the offices of the secretary of state and the auditor of state."

It accordingly follows that it is incumbent upon the University to comply with such terms and conditions as the Legislature sees fit to impose or else lose the benefit of state aid. Consequently, as a matter of practice, the University has complied with the provisions of Section 24, *supra*, and paid over ordinary receipts into the State Treasury, and these receipts have been in turn reappropriated by the various legislatures with additional funds derived from general taxation.

In view of this conclusion, it becomes necessary to determine whether the Legislature has in any way restricted the right of the University to acquire property which, as I pointed out in the first part of this opinion, it originally had by virtue of the act of incorporation.

The provisions of the General Code dealing specifically with Ohio University are few in number. Section 7923 is a mere announcement of policy with respect to state aid institutions of learning and is not helpful in the present matter. Sections 7930 and 7930-1, General Code, deal with matters of tuition. Section 7931, General Code, makes the expenditure of moneys derived from tax levies for the support of state aid universities subject to the inspection of the State Bureau of Public Accounting. Section 7931-1, General Code, is the section to which I have previously referred.

Sections 7932 to 7938, inclusive, of the General Code, are provisions dealing with the lease or sale of the lands in the two townships held in trust by the University and prescribe the terms for the administration of the trust. It is to be noted that Section 7936, General Code, requires the Treasurer of the University annually to deposit the moneys received from the sale of these lands with the State Treasurer, who is required to hold such moneys as a part of the irreducible trust funds held by the State for educational purposes and pay the interest thereon to the University. This payment is accomplished by appropriation as I have heretofore indicated. Section 7936, being in conflict with the provisions of Section 24, General Code, is superseded by the latter section and accordingly these moneys must be paid in weekly.

These are all of the provisions of the Code referring specifically to Ohio University. There are, however, other sections of general nature which may or may not have application. Thus the provisions of Section 2314, *et seq.*, General Code, dealing with details incident to the construction of public buildings are applicable to "any institutions supported in whole or in part by the state."

In an opinion of this office found in the Annual Report of the Attorney General for 1913, Vol. II, at page 1016, the Attorney General had under consideration the question of the application of Section 2314, as it then read, to the installation of an electric light plant at Ohio University, although the statute at that time by its terms did not include buildings for the use of institutions supported in whole or in part by the state, but only referred to state institutions or buildings or additions thereto. The conclusion was reached that the statute was applicable to the improvement in question. It was therein assumed that Ohio University was a State institution and the buildings thereon public buildings within the provisions of Section 2314. While there may be some doubt as to the application of the Section where the construction is to be made from funds not appropriated by the Legislature, yet a discussion of this point would not be profitable, in view of the fact that it has no direct bearing upon your question.

Section 274, General Code, established the Bureau of Inspection and Supervision of Public Offices and apparently extends the authority of the Bureau with respect to inspection and supervision to every state educational institution, which may be construed to include Ohio University. The sections dealing with the Bureau, however, have no direct bearing upon the question, since they deal merely with the establishment of proper systems of accounting and the periodical inspection of such accounts.

Aside from these provisions of law I find nothing which has any bearing upon the question of the limitation of the power of the corporate body, known as "The President and Trustees of Ohio University." Such being the case, I am of the opinion that the corporation has the right, as granted to it by the original act of incorporation, to acquire real property for university purposes in any manner, which in the judgment of its managing body, is deemed proper. In so holding, I am not unmindful of the fact, that the University may have no source from which payment can be made. As I have heretofore pointed out, probably practically all of the revenue for ordinary expenses and for capital expenses is derived from the Legislature by appropriation. The act of the corporation in entering into a lease of the character which you suggest, would not in any way be any binding obligation upon the State of Ohio. In fact, the appropriation of the 87th General Assembly, to which I have referred, contains no item from which any payment of rentals, such as would be incurred by the execution of the lease in question, could be paid. Yet the fact that there may be no funds available from which to pay these rentals has no bearing whatsoever upon the power of the corporation to enter into the lease. Under the circumstances, it may well be that the lessor would have little security so far as the rentals are concerned, but this fact does not establish the lack of power of the lessee to enter into the lease.

While, as I have before stated, most of the receipts of the University are now required by law to be paid over to the State Treasury and therefore require appropriation by the Legislature before they may be expended by the corporation, yet this is not true with respect to all of the receipts.

In an opinion of this department, found in Opinions, Attorney General, 1915, Vol. I, page 35, the application of Section 24 of the General Code to various receipts of State aid universities was under consideration. The syllabus of that opinion is as follows:

"Deposits by students of colleges, universities and normal schools, against which supplies and broken apparatus are charged, are not to be paid into the state treasury weekly, under Section 24, General Code.

If students are charged for supplies for services, as the same are furnished, the sums so received should be paid into the state treasury weekly, under Section 24, General Code.

Receipts from dining service and room rent in dormitories are not for the use of any university, college or normal school as such, or for the use of the state, but for the use and maintenance of the dormitory, and are, therefore, not to be paid weekly into the state treasury.

Athletic fees and receipts from class plays and from entertainments, assumed to be student activities, are not for the use of the institution or the state and should not be paid into the state treasury."

You will particularly observe that in my former opinion I held that athletic fees need not be paid into the State Treasury. It is, of course, assumed it is the purpose of the University to pay the rentals assumed in the lease largely, if not

entirely, from athletic receipts. These moneys need not be paid into the state treasury and hence need no appropriation by the Legislature. It follows that the receipts from athletic events may be applied directly by the corporation to the payment of the rentals and it is possible that there are other miscellaneous funds of the character suggested in my previous opinion which may be available for this purpose.

However, this may be, the question of the ability to pay the rentals is not the yardstick by which the power to execute the lease must be measured. Feeling as I do that the corporation was originally granted the right to acquire property for university purposes in any manner it chooses, and in view of the further fact that there has apparently been no attempt on the part of the Legislature to restrict or qualify this power, the conclusion must be reached that the authority still persists. Whether, in view of the obligation imposed upon the University, the execution of the lease is desirable, is a matter primarily for the exercise of the judgment of the managing body.

Accordingly, by way of specific answer to your inquiry, I am of the opinion that the President and Trustees of Ohio University have the authority to enter into a ninety-nine year lease, with purchase option, for property to be used for the athletic purposes of the University.

Respectfully,
EDWARD C. TURNER,
Attorney General.

3039.

VILLAGE—ACQUISITION OF FIRE EQUIPMENT BY CONDITIONAL SALE FROM VOLUNTEER FIRE ASSOCIATION—VOID—EXPENDITURES OVER \$500.00 REQUIRE COMPETITIVE BIDDING AFTER ADVERTISEMENT.

SYLLABUS:

1. *Where a village enters into an arrangement with a company owning a fire truck and equipment, whereby the village agrees to pay \$300.00 cash on delivery and \$100.00 per month thereafter until the sum of \$5,700.00, with interest, is paid, at which time the lessor agrees to bargain and sell and transfer title to the equipment to the village, such an arrangement is a contract of sale.*

2. *Under such circumstances, such a contract cannot be entered into except in pursuance to competitive bidding after advertisement, as set forth in Section 4221 of the General Code, and no funds may be legally expended for such purpose where said statute has not been complied with.*

COLUMBUS, OHIO, December 19, 1928.

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

GENTLEMEN:—Acknowledgment is made of your recent communication which reads:

“A volunteer fire company or association was organized in the village of M. by a group of citizens, selected a person to act as chief and to represent the association in all financial and other matters. The fire company is not incorporated; was not organized by village officers and its members do not receive any compensation from the village; neither is the so-called chief appointed by the mayor.