

Note from the Attorney General's Office:

1939 Op. Att'y Gen. No. 39-1267 was overruled by
2004 Op. Att'y Gen. No. 2004-012.

1. Where proceedings for the annexation of adjacent or contiguous territory to a municipal corporation are instituted by the municipal corporation and the board of county commissioners approve such annexation, it is unnecessary for council to pass an ordinance accepting such annexation as provided in Section 3550, General Code, in order to make same effective.

2. Where proceedings for the annexation of territory adjacent or contiguous to a municipal corporation are had, it is the duty of the county auditor to apportion the indebtedness of the township of which such annexed territory is a part between the township and municipal corporation and also to divide the funds of such township between it and the municipal corporation as provided in Section 3557-1, General Code. It is the duty of the auditor to make such apportionment and division without any proceedings in the probate court.

3. It is necessary for the council of the municipal corporation to pass a resolution or ordinance accepting such apportionment and division in order to make the annexation valid.

Respectfully,

THOMAS J. HERBERT,

Attorney General.

1267.

BOARD OF EDUCATION—MAY NOT PURCHASE SITE FOR SCHOOL BUILDINGS OR OTHER SCHOOL PURPOSES UNDER INSTALLMENT AGREEMENT—NO AUTHORITY TO MORTGAGE PROPERTY OR PURCHASE MORTGAGED PROPERTY, ASSUME THE MORTGAGE AND AGREE TO MAKE FUTURE PAYMENTS—MAY NOT LEASE PROPERTY, WHICH IS IN FACT A PURCHASE, UNDER GUISE OF A LEASE.

SYLLABUS:

1. *Whatever is prohibited by law to be done directly can not legally be effected by an attempt to accomplish the desired purpose indirectly.*

2. *A board of education may not lawfully purchase a site for school buildings or other school purposes upon an agreement to pay for the property in installments payable over a period of years.*

3. *No authority exists for a board of education to encumber property which it owns by a mortgage or to purchase property encumbered by a mortgage by the terms of which agreement of purchase the board of education assumes the mortgage and agrees to pay the same in the future as payments thereon become due.*

4. *A board of education may not lawfully lease property for any purpose in such manner and upon such terms that the transaction when*

viewed in its proper light is in fact a purchase of the property under the guise of a lease.

COLUMBUS, OHIO, October 4, 1939.

HON. MANNING D. WEBSTER, *Prosecuting Attorney, Pomeroy, Ohio.*

DEAR SIR: I am in receipt of your request for my opinion, which reads as follows:

"I will appreciate you rendering this office your opinion on the following:

One of the rural boards of education in this county desires to purchase a farm consisting of approximately 120 acres, to be operated by said board in connection with the teaching of agriculture in the schools of said district. There is not sufficient money on hand to pay for this land and the board has an offer whereby they can secure title to this land by executing a mortgage payable in yearly installments for twenty years; or, as an alternative, the board can lease the land in question for the term of twenty years paying a yearly rental which would be approximately the same as the mortgage payment and on the expiration of said twenty years they would secure title to the property.

May said rural board acquire and operate said farm for the aforesaid purpose and by either of the methods I have outlined?"

The power to incur indebtedness by the State or a political subdivision thereof, is legislative except in so far as it may be limited by constitutional provisions. It is the universal rule that public corporations have no power whatever to incur indebtedness except such as is delegated to them by the legislature of the State, either expressly or by clear implication. Such delegated corporate powers are strictly construed by the courts. Numerous decisions of courts in this jurisdiction as well as others illustrate the rule that political subdivisions even though they possess certain home rule powers, are rigidly restricted as to their faculty to raise and expend money, to the purposes and in the manner specified and through the officers and channels authorized by the law.

Treadwell v. Commissioners, 11 O. S., 183; Commissioners, v. State, 78 O. S., 287; Allord v. Board of Education, 101 O. S., 469; State ex rel. v. Andrews, 105 O. S., 489; Abbott on Public Securities, pp. 101 and 107; McQuillin on Municipal Corporations, 2d Ed., Sec. 2322; Attorney General v. Lowell, 246 Mass., 312; Haskin v. Orlando, 51 Fed. 2d, 901; Citizens Bank v. Burtensville, 98 Ind., App., 92; Pace v. Paducah, 241 Ky., 568, 44 S. W. 2d, 574.

At no place in the statutory law of Ohio will there be found the extension to a board of education of any power either express or implied, to acquire property of any description in pursuance of an agreement to pay for it on the installment plan, except the authority extended by Section 7732, General Code, to purchase transportation equipment and school buses in that manner; nor will any authority be found for a board of education to obligate itself by the giving of a mortgage on any property it owns or attempts to acquire, and it has been held in numerous cases that public corporations which do not have the power to encumber their property by a mortgage may not lawfully purchase property and assume an existing mortgage on the property.

McQuillin on Municipal Corporations, 24 E., Sec. 1208; Fidelity Trust and Guarantee Company v. Fowler Water Company, 113 Fed., 560; Voss v. Waterloo Water Company, 163 Ind., 69; 66 L. R. A., 95; Stripe v. Yoeger, 348 Ill., 362; Van Veuth v. Baltimore, 165 Md., 651.

In the absence of such statutory authority, it clearly follows that boards of education do not possess such powers, as these boards, being creatures of statute, are limited in their powers to those either expressly or impliedly granted by statute.

State ex rel. Locher v. Menning, 95 O. S., 97; State ex rel. Clarke v. Cook, 103 O. S., 465; Schwing v. McClure, 120 O. S., 335.

In this state the power to incur debts and the manner of incurring them, as well as the limitations on that power are contained in what is commonly known as the "Uniform Bond Act." Sections 2293-1 et seq. of the General Code. In Section 2293-15, General Code, which is part of the Uniform Bond Act, it is provided that the net indebtedness of a school district, as the term "net indebtedness" is defined in the law, incurred without a vote of the people shall never exceed one-tenth of one per cent of the total value of all property in the district as listed and assessed for taxation and never more than six per cent thereof under any circumstances.

Inasmuch as these statutes set forth the extent of the power of school districts to incur indebtedness and the manner of so doing, they are not empowered or permitted to incur indebtedness in any other manner or to any greater extent. State v. Glidden, 31 O. S., 309; Frisbie v. City of East Cleveland, 98 O. S., 266.

In numerous opinions of former attorneys general this principle has been recognized and applied. As early as 1885, James Lawrence, then Attorney General of Ohio, in a communication addressed to Hon-

orable John McSweeney, Jr., Prosecuting Attorney of Wayne County, a copy of which communication appears in Volume 3, of the official Opinions of Attorneys General from 1846 to 1904, at page 500 said:

“I concur in the opinion that a board of education has no authority to issue notes payable at a future time for maps, charts, etc., purchased by it. Such board cannot lawfully issue these notes for any purpose other than those for which bonds are authorized to be issued by law, nor in any other manner than as therein authorized.”

For the reasons stated above, even if no other limitation upon such action existed, it is clear that a board of education can not lawfully purchase property for a consideration the payment of which is to be spread over a period of years and the deferred payments to be secured by a mortgage on the property. There are, however, other statutory limitations on the powers of a board of education or other similar board to make contracts involving the expenditure of money. This limitation is contained in Section 5625-33, General Code, making it imperative that such boards pay cash when purchasing property of any kind, or at least fix the time for payment when making a contract to purchase property, within a period not longer in the future than is covered by a current appropriation nor longer than a period in the future within which funds to meet the obligations of the contract might be collected that are then in “process of collection” as the phrase is used in the statute. The pertinent part of said Section 5625-33, General Code, reads as follows:

“No subdivision or taxing unit shall:

- (a) * * * * *
- (b) Make any expenditure of money unless it has been appropriated as provided in this act.
- (c) Make any expenditure of money except by a proper warrant drawn against an appropriate fund which shall show upon its face the appropriation in pursuance of which such expenditure is made and the fund against which the warrant is drawn.
- (d) Make any contract or give any order involving the expenditure of money unless there is attached thereto a certificate of the fiscal officer of the subdivision that the amount required to meet the same (or in the case of a continuing contract to be performed in whole, or in part, in an ensuing fiscal year, the amount required to meet the same in the fiscal year in which the contract is made), has been lawfully appropriated for such purpose and is in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances. * * *”

Under the terms of Section 7620, General Code, boards of education are empowered to lease sites for certain school purposes. The proposed lease of the property in question as suggested by your letter is admittedly a purchase of the property however, to be accomplished under the guise of leasing it so as to circumvent the inhibition of the law upon the purchase of the property in the manner outlined in your letter. By the ruse of calling it a lease, the real nature of the transaction is not changed.

It is a maxim of the law of great respected antiquity that, whatever is prohibited by law to be done directly can not legally be effected by an indirect and circuitous contrivance. (*Quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illus*). Co. Littleton Sec. 223b—2 Inst. 48.

The principle embodied in the above maxim has been universally respected by the courts from the earliest times and has been applied in many cases wherein judges have used varying expressions to illustrate the principle. An English judge, Wilmont, C. J., in the case of *Collins v. Blanten*, 2 Mils., K. B., 341, at page 349, in applying this principle in a situation where as he says, courts see attempts made to conceal illegal and void transactions by fictitious documents, used the following expression with respect thereto: "They brush away the cobwebs and show the transactions in their true light." See also *Booth v. Bank of England*, 7 C. L. and F., 509, at page 540.

Morris v. Blackman, 2 H. and C., 912, at page 918; *Minty v. Sylvester*, 84 L. J., K. B., 1982; *Jones v. Merionethshire Building As.*, 1 Chancery, 173; *In re. Watson*, 25 Q. B. D., 27; *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 7 Pickering (Mass.), 344; *McDonald v. Crombine*, 2 Ont., 243, 259; *Ex Parte Lancaster*, (Ala.) 89 So., 721; 18 A. L. R., 713; *Monroe v. Collins*, 17 O. S., 665 at page 685.

A very similar question to that involving the right of this board of education to lease a farm in the manner suggested came under the scrutiny of a former Attorney General, and it was held by him as stated in the syllabus of his opinion thereon, reported in the published Opinions of the Attorney General for 1930, page 1133, as follows:

"A board of education may legally lease a school bus for a two or three year period if in its judgment such action is for the best interests of the schools under its control. Such a contract of lease may contain a provision granting the board the option to purchase at expiration of lease. However, such a lease must provide for the payment of a rental commensurate with the use of such bus, and such a contract may not be in fact a contract of purchase under the guise of a lease."

In the light of the legal principles hereinbefore discussed as applied to the subject of your inquiry, I am of the opinion:

1. A board of education may not lawfully purchase a site for school buildings or other school purposes upon an agreement to pay for the property in installments payable over a period of years.

2. No authority exists for a board of education to encumber property which it owns by a mortgage or to purchase property encumbered by a mortgage by the terms of which agreement of purchase the board of education assumes the mortgage and agrees to pay the same in the future as payments thereon become due.

3. A board of education may not lawfully lease property for any purpose in such manner and upon such terms that the transaction when viewed in its proper light is in fact a purchase of the property under the guise of a lease.

Respectfully,

THOMAS J. HERBERT,
Attorney General.

1268.

RESERVOIR LAND LEASE, STATE TO HELEN B. BAROK,
LAND WESTERLY EMBANKMENT BUCKEYE LAKE,
SOUTH OF LAKESIDE, LOT NO. 2-A, FAIRFIELD
COUNTY, USE, COTTAGE SITE AND DOCKLANDING
PURPOSES.

COLUMBUS, OHIO, October 4, 1939.

HON. DON G. WATERS, *Commissioner, Division of Conservation and
Natural Resources, Columbus, Ohio.*

DEAR SIR: You have submitted for my examination and approval a certain reservoir land lease in triplicate, executed by the State of Ohio, through you as Commissioner of the Division of Conservation and Natural Resources to Helen B. Barok of Columbus, Ohio.

By this lease, which is one for a term of fifteen years and which provides for an annual rental of \$58.80, there is leased and demised to the lessee above named, permission to occupy and use for cottage site and docklanding purposes only, that portion of the inner slope and waterfront and the outer slope and borrow pits adjacent thereto, of the westerly embankment of Buckeye Lake, that is included in embankment Lot No. 2-A, south of Lakeside, as laid out by the Ohio Canal Commission in 1905, and being part of the northwest quarter of the southwest quarter of Section 22, Township 17, Range 18, Fairfield County, Ohio. Said lot has a frontage of one hundred (100) feet, measured along the top of the outer slope of the reservoir embankment.