

1. Cases requiring immediate repairs to roads, bridges and culverts as provided by Section 2792-1, General Code, designated in such section as "emergency repairs," are not cases of "extraordinary emergency" within the meaning of Section 17-1 of the General Code.

2. The county surveyor is without authority to pay workmen engaged in the repair and maintenance of roads within such county for the time spent by said workmen in going to and returning from the place designated by the proper authority as the place to report for labor.

Respectfully,
EDWARD C. TURNER.
Attorney General.

123.

APPROVAL, BONDS OF SALEM TOWNSHIP RURAL SCHOOL DISTRICT,
WYANDOT COUNTY, \$5,750.00.

COLUMBUS, OHIO, March 1, 1927.

Retirement Board, State Teachers' Retirement System, Columbus, Ohio.

124.

APPROVAL, BONDS OF HICKSVILLE TOWNSHIP, DEFIANCE COUNTY,
\$8,500.00.

COLUMBUS, OHIO, March 1, 1927.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.

125.

LONGVIEW STATE HOSPITAL—APPROVAL OF PURCHASE BY THE
STATE.

COLUMBUS, OHIO, March 1, 1927.

HON. JOSEPH T. TRACY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of February 15, 1927, with reference to the purchase by the State of Ohio of the property now owned by Hamilton County and occupied and used by the State as the Longview State Hospital for the insane. With your letter you transmit the following documents:

1. Lease with Privilege to Purchase, executed on the 19th and 21st days of March, 1924, by the Director of Public Welfare and the County Commissioners of Hamilton County.
2. Copy of Agreement entered into by the same public officials on December 23rd and 30th, 1924.
3. Abstract of Title to said property. (2 volumes)
4. Opinion of the Attorney General, Number 3090, dated December 22, 1926, relating to said abstract.
5. Letter from the Director of Finance, dated January 31, 1927, showing approval of Controlling Board of expenditure of \$250,000.00 to apply on the purchase of Longview Hospital.
6. Encumbrance Estimate No. 1201.
7. Requisition Number 274, dated February 5, 1927.
8. Voucher No. 995, Department of Public Welfare for \$250,000.00.
9. Letter from Director of Public Welfare dated February 11, 1927, transmitting the above enumerated documents excepting the lease with Privilege to Purchase to the Auditor of State.

You request my opinion in the following language:

"Voucher No. 995, Department of Welfare, in the sum of \$250,000 in favor of the Treasurer of Hamilton County, Ohio, has been submitted to me for payment by the Welfare Department. This being the initial payment on the purchase price of said Institution, I desire your review of the papers and documents leading up to said purchase, and invite your special attention to the agreement of purchase dated December 23, 1924. Apparently this agreement was entered into under and by virtue of Sec. 2034-1, et seq., but no paper submitted bears the approval of the Governor, as is provided in Sec. 2034-8. I desire that the contract be binding upon the Commissioners of Hamilton County, Ohio, and that the State's interests be fully protected in said matter.

In order that the accounts of this office reflect the actual conditions relating to said purchase I would ask whether or not the \$250,000 constituting one-sixth of the purchase price (\$1,500,000.00) agreed upon, or if a portion thereof might be held at some future date to have been a payment on accrued interest in accordance with the provisions of said law and lease previously entered into by the Department of Welfare and by the County Commissioners of Hamilton County. I believe the voucher, agreement and lease will give you the main features involved in this matter.

While the lease was executed on December 23, 1924, yet the State has never made any payment of interest as provided in said lease."

1. The "Lease with Privilege to Purchase" the property in question, executed on March 19, 1924 by the Director of Public Welfare and the County Commissioners of Hamilton County, and the agreement signed by the same officials on December 23rd and 30th, 1924, were entered into under the provisions of Sections 2034-1 to 2034-8, General Code, inclusive. I am informed that these instruments were prepared by my predecessor in office.

These agreements, and the law authorizing the execution thereof, provide for the sale of a property already existing and owned by Hamilton County (a property which said county has long been desirous of selling on suitable terms) and the purchase thereof by the State, to whose use such property is peculiarly adaptable. The contract to purchase creates no present or future obligation on the part of the State to buy, nor does it create any indebtedness, it being expressly provided therein

that the purchase of the property is conditional upon the necessary appropriations by the legislature.

The legality of this lease and agreement was attacked in the case of State of Ohio on relation of Herman P. Goebel, et al., Plaintiffs, vs. Clifford Brown, Jacob Krollman and Mason Towle, constituting the board of county Commissioners of Hamilton county, Ohio, and John E. Harper, Director of Public Welfare of the state of Ohio, Defendants, filed in the Court of Common Pleas of Hamilton County, Ohio, being case No. 193558. It was maintained that the director of public welfare and the county commissioners were without authority to enter into the lease and the contract of sale, and that said lease and agreement were invalid, and numerous reasons were urged as to why these officials were without such authority. It was contended *inter alia* that Sections 2034-1 to 2034-8, General Code, had become obsolete; that the lease entered into did not fix a definite time for termination; that Sections 2034-1 to 2034-8 supra, permitted the leasing and sale of the Longview Hospital as distinguished from the real estate described in the lease; that the legislature, in providing that the officials named could not agree on a purchase price in excess of \$1,500,000, had placed a restriction on the right of Hamilton county to contract as to the true value in money for the properties; and that the price agreed upon was so inadequate as to be decisive of actual or implied fraud; that the contract entered into obligated the state to pay the sum of \$1,500,000 for the property and created a debt contrary to the provisions of Section 3, Article VIII of the Ohio Constitution; that such sale was the taking of property without due process of law; and that such sale was a destruction of a public charity and impaired the charter or contract heretofore entered into by the state and the county of Hamilton.

The Court of Common Pleas decided against the plaintiffs in all of their contentions, stating in the opinion as follows:

"The legislature of the state of Ohio in enacting Sections 2034-1 to 2034-7 vested in the commissioners of Hamilton county and an agency of the state of Ohio, then the Ohio board of administration, power and authority to enter into contractual relationship, having for its purpose the lease and ultimate purchase of the county property used for the care and maintenance of the insane and the paupers of said county, and provided that upon the exercise of the authority so conferred, the properties would be used for said purposes in the conduct of Longview State Hospital. The Sections by their terms are not mandatory, but permissive, and the only limitation contained therein has to do with the amount which the two parties can agree upon as the purchase price; that being limited to \$1,500,000.00. But in the event of a disagreement, the sections provided for a board of arbitration whose findings are not limited to any certain amount, but who are authorized to determine the value of the properties. At the time of their enactment, the agency designated to act on behalf of the state was the Ohio board of administration, which board has been succeeded by the director of public welfare who succeeds to all the rights, power and authority theretofore vested in the Ohio board of administration and is therefore competent to act in compliance with the above referred to sections. An examination of the two contracts convinces the court that the terms thereof are definitely determinable, and that their provisions create no existing debt on the part of the state of Ohio. The court is not in sympathy with the contention of the petitioner that a mere failure to act under a permissive statute for a term of years, operates to render the statute ineffective."

This opinion of the Court of Common Pleas was sustained by the Court of Ap-

peals of the first appellate district on January 1, 1926, in case No. 2802, and a motion to certify was denied by the Supreme Court of Ohio on May 18, 1926 (Case No. 19673).

As above stated many objections, including those above set forth, were urged against the legality of the lease and agreement in question, but the validity thereof and the authority of the public officials in question to enter into such agreements was sustained by the courts, and since the *very* lease and contract submitted with your letter have been passed upon by the courts, it is unnecessary for this office further to consider the same.

2. In so far as the abstract of title is concerned, this was heretofore examined by my predecessor in office, who in Opinion No. 3909, dated December 22, 1926, found that such abstract of title "shows a sufficient title to said premises in the county commissioners of Hamilton county, Ohio, in behalf of the county of Hamilton," subject to the defects enumerated in said opinion.

In his letter of February 11, 1927, above referred to, the Director of the Department of Public Welfare states that his department has "investigated the questions set forth in the Opinion of the Attorney General and finds that the rights of way to which attention is called, will in no way be a detriment to the property for state use."

Further examination or action by this department upon the abstract of title is therefore unnecessary.

3. The encumbrance estimate is numbered 1201 and dated February 9, 1927. This encumbrance estimate is in proper form and was duly certified by the Director of Finance under date of February 11, 1927. As will be hereinafter pointed out this encumbrance estimate should bear the endorsement of the governor, showing his approval.

4. In your letter you state that "no papers submitted bears the approval of the governor, as provided in Section 2034-8," General Code.

This section reads as follows:

"The provisions of this act shall be subject to the approval of the governor of the state."

While the wording of this section is peculiar, it seems clear that it was the purpose and intent of the legislature to require the governor's approval of any agreement entered into under authority of Sections 2034-1 to 2034-8, *supra*. Caution dictates that the governor also approve any *act* done for the purpose of effectuating the purchase of said property pursuant to such agreements.

I have been informed by the governor that he did in fact approve the lease and the agreement above mentioned, and that he stands ready at this time to approve any and all further action necessary to carry out the agreement entered into. In view of this fact, it is suggested that a *nunc pro tunc* endorsement of the governor's approval be placed upon the lease, agreement and the encumbrance estimate in substantially this form.

Columbus, Ohio, March ———, 1927.

The within lease and the contents thereof duly approved by me, on the
 _____ day of December, 1924.

 Governor of the State of Ohio.

5. You ask "whether or not the \$250,000, constituting one-sixth of the purchase price (\$1,500,000.00) agreed upon, or if a portion thereof might be held at some future date to have been a payment on accrued interest in accordance with the provisions of said law and lease."

The appropriation by the legislature of the \$250,000 in question is contained in Amended House Bill No. 517, passed March 27, 1925 (Appropriation Acts of the 86th General Assembly of Ohio, 1925, page 97) and reads as follows:

"Longview State Hospital.

* * * * *

G. 1 and G. 2 To apply on purchase price of Longview Hospital--\$250,000.00"

The requisition submitted with your letter states that the \$250,000 is "to apply on the purchase price of Longview Hospital—to carry out the agreement made between the Hamilton county commissioners and the Department of Public Welfare dated December 23, 1924, in which agreement the purchase price was fixed at \$1,500,000." Substantially the same statements are contained in the voucher and in the encumbrance estimate.

Since the money in question was appropriated to apply on the purchase price, and since in accordance with the voucher issued, the money will be paid as a part of the purchase price, it is my opinion that the commissioners of Hamilton county, who are bound by the provisions of the appropriation act and who have the knowledge that the sum in question is being paid by the state as part of the purchase price, and who have stated that they will receive said sum as part of the purchase price, may not treat the money paid as rental due under the lease.

In this connection your attention is invited to paragraph 7 of the lease, having reference to the right of the lessor, that is, the commissioners of Hamilton county, to re-enter and re-possess the premises upon the failure of the state to pay the rental provided for, or any installment thereof. This paragraph reads as follows:

"7. In the event this lease with the privilege to purchase becomes void by reason of the exercise of the right reserved in the lessor by the preceding paragraph (paragraph 6), then all moneys theretofore paid on account of the purchase price shall be paid and refunded to the Director of Public Welfare of the State of Ohio in behalf of the State of Ohio, his successor or successors, without interest."

Whether or not the county commissioners would have the right in case the state should determine not to proceed with the purchase of the property in question to apply all or any part of the purchase price paid to them upon any unpaid rentals, would very probably depend upon facts and circumstances arising in the future which cannot at this time be foreseen. I prefer, therefore, at this time not to attempt to pass upon this question.

In conclusion, in view of the fact that the courts have held that the Director of Public Welfare and the county commissioners of Hamilton county were authorized to enter into the lease and agreement in question and have sustained the validity thereof, and since the abstract of title and the encumbrance estimate have been approved by this department, upon the endorsement upon the lease, agreement and encumbrance estimate of the approval of the governor, as above recommended, I know of no reason why you should not issue to the county commissioners of Hamilton county a warrant upon the treasurer of state for the sum of \$250,000 appropriated by the legislature to apply on the purchase price of the Longview State Hospital.

I herewith return all papers submitted.

Respectfully,
EDWARD C. TURNER,
Attorney General.