518.

BOARD OF EDUCATION — VILLAGE — TEACHER — CONTRACTS FOR TEACHING — SALARY — SUPERINTENDENT—CONTINUATION OF TERMS OF OLD CONTRACT INTO NEW CONTRACT.

SYLLABUS:

1. *In the case of a teacher who is not in the employ of a board of education at the time a contract is entered into between such teacher and a village board of education for a three year term with the provision, "to receive same salary as is now being paid" or "the salary would be in accordance with state schedule", such contract is invalid, since it does not fix a salary as required by the provisions of Section 7690-1, General Code.*

2. *A contract between a village board of education and one termed a "superintendent" for a period of three years "at the same salary he now receives", is valid, if at the time such contract was entered into such superintendent was in the employ of said village board of education as a superintendent, and was receiving a salary under a contract that had not expired. Such superintendent should receive the same salary under the new contract as he was receiving at the time he was elected for the new term by the board of education.*

COLUMBUS, OHIO, April 26, 1937.

HON. JAMES W. LANG, JR., *Prosecuting Attorney, West Union, Ohio.*

DEAR SIR: This will acknowledge receipt of your two recent communications, which read as follows:

> "I would appreciate your opinion relative to employment of high school teachers and superintendent of village school district.
>
> The minutes of the Board of Education read in part, as follows: 'Moved by O., seconded by P., that Miss B. and Mr. T. be elected for a three year term and to receive same salary as is now being paid.' This motion was duly carried by a majority vote.
>
> You will observe in the above resolution that the salary is not specified and I would like your opinion as to whether there is a legal contract for a three year term, and if so, what salary should be paid?
>
> On April 8, 1933, the minutes of the Board read in part as follows: 'Motion by L., seconded by F., that Prof. W.,

whose term of three years expires on May 30, 1933, be re-employed for three years from May 30, 1933, to May 30, 1936.' This motion was duly carried by a majority vote and you will observe that no salary was fixed by the board, and this was for the employment of a superintendent. And on May 5, 1936, the minutes in regard to the superintendent read in part, as follows: 'Moved by O., seconded by P. that Mr. W. be elected Superintendent for a period of three years at the same salary he now receives.' This resolution was duly carried by a majority vote and you will observe that the only mention as to the salary refers to the present payment.

The superintendent has performed services, and I would like your opinion as to what salary should be paid. You will observe that at the meeting of April 8, 1933, the salary was not fixed and that the resolution of May 5, 1936, refers to a salary not set by the board of education.

I have received your letter of April 8th, requesting additional information for your opinion relative to employment of high school teachers and superintendent of village school districts.

Beg to advise that contracts between the board of education and the teachers and superintendent were duly executed and entered into, and the only reference to salary was that the salary would be in accordance with state schedule.

Also, beg to advise that this question refers to a village school district and not to an exempted village school district."

The provisions of the General Code that pertain to the employment of teachers in village school districts, provide as follows:

"Section 7705. The board of education of each village, and rural school district shall employ the teachers of the public schools of the district, for a term not longer than three school years, to begin within four months of the date of appointment. The local board shall employ no teacher for any school unless such teacher is nominated therefor by the county or assistant county superintendent except by a majority vote of its full membership. In all high schools and consolidated schools one of the teachers shall be designated by the board as principal and shall be the administrative head of such school."

"Sec. 7690-1. Each board of education shall fix the salaries of all teachers which may be increased but not diminished

during the term for which the appointment is made. Teachers must be paid for all time lost when the schools in which they are employed are closed owing to an epidemic or other public calamity."

"Sec. 7699. Upon the appointment of any person to any position under the control of the board of education, the clerk promptly must notify such person verbally or in writing of his appointment, the conditions thereof, and request and secure from him within a reasonable time to be determined by the board, his acceptance or rejection of such appointment. An acceptance of it within the time thus determined shall constitute a contract binding both parties thereto until such time as it may be dissolved, expires, or the appointee be dismissed for cause."

Your first communication sets forth the minutes of the board of education "in part", only. Your second communication states that: a "contracts between the board of education and the teachers and superintendent *were duly executed and entered into.*" (Italics, ours.) We therefore must assume:—that, pursuant to the provisions of Section 7705, supra, such teachers were employed "for a term not longer than three years", by the board of education upon being nominated "by the county or assistant county superintendent" or "by a majority vote of its full membership"; and that the provisions of Section 7699, supra, were complied with in regard to the notification to, and acceptance by the teachers.

Section 7690-1, supra, contains a mandatory provision that the board of education shall fix the salaries of all teachers. The authorities are numerous in holding that the method of making a contract between a teacher and a board of education is prescribed by statute and must be strictly followed.

In *Board of Education of Benton Township, etc.* vs. *Parker,* an Infant, etc., 1 Ohio App., 114, at page 117, the court said:

"Powers of boards of this character when their exercise are required to be performed in a certain manner, that manner must be strictly followed."

This office has construed and interpreted Section 7690-1, supra, in numerous opinions and held:—that, the statute clearly provides that it is the positive duty of the board of education to fix the salaries of the teachers for the term for which they are appointed; and that, to fix a salary means to make is definite.

In an opinion of a former Attorney General, Opinions of the Attorney General for 1933, Vol. II, page 1166, Sections 7705 and 7690-1, supra, were discussed, and at page 1170 it was stated:

> "The clear import of these statutes is, in my opinion, that it is the positive duty of the Board of Education to fix the salaries of the teachers for the term for which they are appointed and that when that is done, those salaries cannot be changed during the term, except to increase them, and that a board of education is not empowered to contract with teachers so that by the terms of the contract, the salary fixed shall automatically decrease, dependent upon conditions, unless the amount of the lesser salary to be paid upon the happening of some contingency, be fixed and made definite at the same time. To fix a salary means to make it definite. The contracts of September 3, 1932, contain the clause, after fixing a definite salary "as long as State Aid is available," but did not assume to fix any salary to be paid if State Aid should become unavailable during the term of the contract. The proper interpretation and legal effect of this contract, in my opinion, in view of the statutory provisions referred to, which must be read into all such contracts, is that the salary mentioned is the salary fixed for the term."

Another opinion to the same effect is found in Opinions of the Attorney General for 1934, Vol. I, page 644, wherein it was held:

> "1. An agreement between a board of education and a teacher in the public schools, whereby it is agreed to employ said teacher to teach in the schools of the district, which agreement does not fix a definite salary for the services of the teacher is not a valid and binding contract.
>
> 2. Where such an agreement is entered into and the board later, by resolution fixes a definite salary, the terms of which resolution are accepted by the teacher, a valid and binding contract arises, and both parties are bound in accordance with its terms."

Therefore, the specific question here is, do the words "to receive same salary as is now being paid" fix a definite salary?

In the case of *Messner* vs. *Beals,* 16 Ohio Law Abstract, 506, it was held:

> "2. There must be a meeting of the minds as to every essential term of a contract, such as a consideration, and subject matter."

In 9 Ohio Jurisprudence, Contract, Section 2, page 236, it is stated:

> "To constitute a valid contract there must be parties capable to contracting, a meeting of the minds, a lawful subject matter and a sufficient consideration."

In the instant case, there can be no doubt that the parties were capable of contracting, that there was a lawful subject matter and a sufficient consideration. However, it was impossible for there to have been a meeting of the minds of the teachers and the board of education on the essential element of salaries. There is nothing definite to which the words, "salary as is now being paid" can be referred to. It cannot mean the same salary as was being paid at that time to other teachers. For, it is common knowledge that there is no established standard salary. In fixing the salary of a teacher the board of education takes into consideration preparation, experience and teaching success of the individual teacher employed. The phrase in the contract that "the salary would be in accordance with state schedule", does not refer to any definite salary schedule. Neither the legislature nor the Director of Education has established a salary schedule which is to be paid to an individual teacher employed by a board of education. It is within the discretion of each board of education to fix the salary of each teacher employed.

Section 7595-1e, General Code, in part provides:

> "* * that no school district wherein the total of the annual salaries paid the teachers of the district is less than seventy-five per cent of the total cost of the foundation program of such district, exclusive of transportation and tuition costs, shall participate in any portion of the state public school fund."

This statutory provision refers to the total salary payments, by the board of education to all teachers employed by the board. It therefore is my opinion:— that, the terms, "to receive same salary as is now being pair" or, "the salary would be in accordance with state schedule", do not fix a definite salary as required by the provisions of Section 7690-1, General Code, and that the contracts of employment of the teachers by the board of education on such terms in regard to salary, were invalid.

However, it must be observed that if the teachers, Miss B. and Mr. T. were in the employment of the board of education and received a

fixed salary for their services at the time the board of education elected said teachers for the term in question a different conclusion would be reached. The phrase, "to receive the same salary as is now being paid" would be interpreted as the same salary provided for in their old contracts under which they were working at the time the board of education elected them for the new three year term. It would mean that the board of education was entering into a new contract with them for a period of three years at the same salary as provided for in the contract to expire. Obviously, the teachers would know the definite amount of salary they were to receive, since it would be the same as they were receiving, and the board would know the definite amount as it would be the same as it was paying said teachers. There would be no question as to the meeting of the minds of each of the teachers and the board on the element of a definite salary.

It is customary when a contract has expired for a board of education to enter into a new contract with the same teacher for the same number of years at the same salary as was contained in the old contract.

In an opinion of a former Attorney General, Opinions of the Attorney General for 1917, Vol. III, page 2440, it was said:

> "A board of education of a village school may not extend a teacher's contract one or more years, but may enter into a new contract not to exceed three years, by agreement between the board of education and the teacher, and the new contract will stand in place of and be a substitute for the old one."

The facts set forth in your communication show that Prof. W. was employed by the village school board as a superintendent. It may be well to observe that a board of education of either a village or rural school district has no authority to employ a superintendent for such school districts. Section 4679, General Code, provides:

> "The school districts of the state shall be styled, respectively, city school districts, exempted village school districts, village school districts, rural school districts and county school districts."

Section 7763-3, General Code, provides:

> "The term superintendent of schools as used in this chapter shall be interpreted to mean, in the respective classes of school districts, the city, exempted village or county superintendents of schools, or person designated by such superintendent; * *"

Thus, it clearly appears that superintendents for village and rural school districts are excluded from the provisions of Section 7763-3, supra. In discussing this section, in the case of *William V. Lee* vs. *Brewster Village School District,* 29 O. N. P. (N. S.) 134, at page 137, it was said:

> "It will be noted that this latter section provides for the employment of a superintendent by but three classes of districts; city, exempted village, and county. Consequently, no matter that the plaintiff was called 'superintendent of schools' in his contract, he wasn't one and he could not exercise the statutory rights innuring to that office nor be held to the statutory duties thereof; for the defendant had no right to employ a superintendent of schools under the statutes, and it could not alter the plaintiff's status by calling him by that name in the contract. The question at once arises, then, whether his employment comes within the teacher category and consequently is subject to the conditions of Section 7705, for if this last section does apply, then either nomination, as there provided, or appointment by a majority vote of the full board, is a condition precedent to any valid contract of employment.
>
> Section 7690, supra, as has been at least twice already said, conveys broad powers, and in the court's view these are broad enough to permit the board to employ a person to act in a supervisory capacity, who is not employed as a teacher but as a general supervisor and co-ordinator. He is not a true superintendent, however, since he is subject to the supervision of the county superintendent and his assistants, and is under their statutory control; while a superintendent employed in a city or exempted district is not thus subordinate; and under this section the board's right to employ such person is limited only by an abuse of discretion."

To the same effect, it was held in Opinions of the Attorney General for 1932, Vol. II, page 830, wherein it was stated:

> "1. Boards of education, other than city and exempted village boards are without authority to employ superintendents with power to exercise independent supervision over the schools of their respective districts, since the General Assembly has provided for county supervision of schools by a county superintendent and such assistant county superintendents as may be elected by the county board of education.

> 2. Section 7690 grants authority to boards of education of rural school districts to employ a supervisor whom they may designate by the title of 'Superintendent of Schools', although he may not exercise the authority conferred upon superintendents of city and exempted village school districts by Section 7706, and he remains subject to the statutory control of the county superintendent of schools and his assistant. This right is limited only by the exercise of proper discretion."

See also, Opinions of the Attorney General for 1921, Vol. I, page 684:
The County Board of Education of Athens County vs. *Bert M. Thompson,* 25 O. N. P.(N .S.), 431.

The above cited authorities show that the appointment of one who is termed a "superintendent" of a village school district is made under the provisions of Section 7690, General Code, which, in part, provides:

> "Each city, village or rural board of education shall have the management and control of all of the public schools of whatever name or character in the district, except as provided in laws relating to county normal schools. It may elect, to serve under proper rules and regulations, a superintendent or principal of schools and other employes, including, if deemed best, a superintendent of buildings, and may fix their salaries."

It is interesting to observe:—that, in the employment of teachers under the provisions of Section 7690-1, supra, the board of education "shall fix the salaries of all teachers"; that, in the employment of a superintendent under the provisions of Section 7690, supra, the board "may fix their salaries."

In the instant case, on May 5, 1936, a "resolution was duly carried by a majority vote":—that, "Mr. W. be elected Superintendent for a period of three years, at the same salary he now receives." All that Section 7690, supra, requires is that the board "may elect" a superintendent and "may fix" the salary. The only question with which we are concerned herein is, was there a compliance by the board of education with the provisions of Section 7690, supra, at the time of employment of Prof. W. on May 5, 1936? There is no doubt but that Prof. W. was duly elected "superintendent" pursuant to the provisions of Section 7690. The question remains, was a definite salary fixed by the board on May 5, 1936?

Your communication shows:—that, Prof. W. had been employed by the board for a term of three years, which term expired on May 30, 1933; that, he was "re-employed for three years from May 30, 1933

to May 30, 1936;" that, on May 5, 1936, he was performing his duties under this contract; and that, on said May 5, 1936, he was again, as set forth in the minutes, "elected Superintendent for a period of three years at the same salary he now receives."

Prof. W.'s first employment with this board, as shown by the communication, dates back to the year 1930. It is only logical to assume that he had been paid a salary from the time of his initial employment and was receiving a fixed salary at the time he was re-employed by the board on May 5, 1936. The amount of salary he was being paid at that time was within the knowledge of Prof. W. and the board of education and no doubt appeared on the record of the payrolls of the board of education. If, on May 5, 1936, Prof. W. was in the employ of the board of education at a salary of two thousand dollars per annum, and the resolution had stated "at the same salary he now receives—two thousand dollars per annum", the amount of salary would not be any more fixed than saying, "the same salary he now receives." The same salary he now receives and the amount in dollars and cents are the same thing. When Prof. W. accepted the appointment made on May 5, 1936, he knew the amount of salary he was to receive. The board of education knew the amount he was to be paid for the new term. There was a meeting of the minds as to a definite and certain fixed amount. It is not fatal to the contract of employment that this amount was described by a statement of an existing and definite fact instead of the usual fixed amount of dollars and cents.

It therefore is my opinion:—that, the statement, "the salary he now receives", refers to a definite and certain fixed amount; that Prof. W. was employed pursuant to the provisions of Section 7690; and that during his employment from May 30, 1936 to May 30, 1939, he should receive the same salary he was receiving on May 5, 1936.

Specifically answering your questions it is my opinion that:

1. The terms "to receive same salary as is now being paid" or "the salary would be in accordance with state schedule" do not fix a definite salary, as required by the provisions of Section 7690-1, General Code; and that the contracts of employment of the teachers, Miss B. and Mr. T., by the board of education on such terms in regard to salary were invalid.

2. The election of Mr. W. for a "period of three years, at the same salary he now receives", refers to a definite and certain fixed amount; that, he was employed pursuant to the provisions of Section 7690, General Code; and that during his employment from May 30, 1936

to May 30, 1939, he should receive the same salary he was receiving on May 5, 1936.

Respectfully,
HERBERT S. DUFFY,
Attorney General.

519.

DELINQUENT TAXES—COUNTY TREASURER—COLLECTION AFTER FORECLOSURE STARTED, WHEN—PLEADING IN FORECLOSURE OF TAX LIEN—SERVICE OF SUMMONS—DEFENDANT UNKNOWN.

SYLLABUS:

1. *The law as announced in the case of Cook vs. Pomozi,* 40 *O. App.,* 566, *remains the law in the circuit district where it was announced. It may or may not be accepted in other circuit districts.*

2. *Present Section* 5719, *General Code, neither changes nor modifies former Section* 5719, *General Code, in so far as its application to the questions herein involved, are concerned. The former section went out of existence by way of repeal.*

3. *The county treasurer has no authority to accept tax payments under Amendment Supplemental Senate Bill No.* 87, *known as the last "Whittemore Act", after he has instituted foreclosure proceedings to collect such tax.*

4. *It is not necessary in actions to foreclose the lien of the state for taxes to aver in the petition that the defendant has failed to elect to pay under the Whittemore Act.*

5. *In an action to foreclose a tax lien against a defendant concerning whom nothing is known, it is proper to use the style for defendant as follows: "A if living; if deceased, his heirs, devisees and legal representatives."*

6. *In making service in an action to foreclose a tax lien against a defendant concerning whom nothing is known, Sections* 11292, *General Code, et seq., should be carefully followed.*

COLUMBUS, OHIO, April 26, 1937.

HON. CHAS. S. KEENEY, *Prosecuting Attorney, McArthur, Ohio.*

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