

In view thereof, it was pointed out that in the absence of fraud or collusion, an action would not lie to recover the funds so illegally paid.

In the case under consideration the attorney so employed by the county commissioners, having rendered said valuable services to the county, there apparently being no fraud of any character intervening and the payment having been made, such payment can not be recovered.

Based upon the foregoing, you are specifically advised that where an attorney is engaged to assist the prosecuting attorney in the trial of pending cases, upon request of the prosecuting attorney, which employment is known to the Court of Common Pleas in which said cases are tried, and through an inadvertence, the common pleas judge did not authorize said employment until after the services were rendered and after payment had been made therefor, in pursuance to a resolution of the board of county commissioners, under such circumstances, in the absence of fraud or collusion, said payments may not be recovered from said attorney.

Respectfully,
EDWARD C. TURNER,
Attorney General.

3139.

TEACHERS' RETIREMENT SYSTEM—PENSIONER UNDER FORMER LOCAL DISTRICT TEACHERS' SYSTEM ELIGIBLE TO MEMBERSHIP AND EMPLOYMENT—NO CREDIT TOWARD NEW PENSION FOR SERVICES UPON WHICH OLD PENSION WAS BASED.

SYLLABUS:

1. *It is not unlawful to employ a person who is a pensioner by virtue of a former local district teachers' pension system, to teach in the public schools in any of the school districts of the State, in any school or college or other institution wholly controlled and managed, and wholly or partly supported by the State or any subdivision thereof, the board of trustees or other managing body of which has accepted the requirements and obligations of the teachers' retirement law or in the State Department of Public Instruction.*

2. *When a person is so employed, he may lawfully draw his pension during the time he is in active service. He becomes upon such employment, a "member" of the Teachers' Retirement System, and thereby becomes subject to the rights and obligations of the State Teachers' Retirement Law, including the right of retirement thereunder, or the right to the withdrawal of his accumulated contributions under Sections 7896-40 and 7896-41, General Code, as the case may be.*

3. *A person so employed becomes a "member" of the State Teachers' Retirement System at the time of such employment, with the status of a "new entrant". Thereafter, upon retirement he would receive no credit as and for "prior service", in computing his "total service", for services rendered prior to his having been granted the pension by the local district pension system. Any prior service certificate he may have held, for services rendered prior to his having been granted a pension would be thereafter no longer in full force and effect.*

COLUMBUS, OHIO, January 14, 1929.

HON. W. E. KERSHNER, *Secretary, Ohio State Teachers' Retirement System, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your communication of recent date which reads as follows:

"I should like your official opinion on the following: Prior to 1920, twenty-two Ohio cities had local City Teachers' Pension Systems. These have all merged with the State Teachers' Retirement System and the pensions granted under those city systems were assumed by the State Retirement System. The reserve value of those pensions were transferred to the state system from the funds of the city system, and if the latter were not sufficient, the deficiency was made up by the Board of Education. One particular case will illustrate one of the difficulties we have had. A teacher who was a pensioner under a city system and who received \$300 a year was elected in a neighboring city in 1923 and has been teaching in that city ever since, and at the same time, has been receiving her pension from the system in which she retired.

Is it legal for a pensioner under a former city pension system to teach in that or any other district of the State if such teacher was not in active service on September 1, 1920?

I might say, by way of explanation, that under these city pension systems if a teacher were dismissed after twenty years of service she was put on the retired list at a very nominal pension. During the war, for example, several teachers of German were put on the retired list. A number of these teachers were comparatively young and would still be able to render a considerable number of years of service.

I should like your opinion also on the following:

If the teacher mentioned in the first question can re-enter service in another city after September 1, 1920, should she receive her pension during the time she is in active service, and should she be retired finally under the state system, or would she simply be refunded her money and put back on her city pension?

We already have an opinion of the Attorney General to the effect that a teacher retired under the state system cannot again be employed as a regular teacher."

For a number of years the Legislature of Ohio has consistently sought to provide for the establishment of means for the payment of pensions or retirement allowances to teachers, based for the most part, on average salaries and years of service in that capacity. In discussing the policy of the Legislature with reference to teachers' pensions, the court in the case of *Reed vs. Board of Education*, 6 O. N. P. (N. S.), 526, decided by the Common Pleas Court of Pickaway County in 1906, said:

"In short, from the foundation of our government, state and national, the education of the people—the school system—has rightly been a matter of the deepest and most constant concern. The teachers are employes and servants of the State under this system. That the State clearly recognizes the fact that the mere payment of wages to teachers for the time the schools are actually in session does not fully discharge the duty and obliga-

tion of the State to its teachers, is shown by Section 3897d Revised Statutes and following, which provide a system for the payment of pensions to teachers of the State, under conditions therein named."

The earlier acts of the Legislature relating to teachers' pensions were passed in 1896 and 1900, 92 O. L. 149; 94 O. L. 305 and 94 O. L. 539. Each of these acts was held to be unconstitutional, *State ex rel. Ward vs. Hubbard*, 22 O. C. C. 253; *State ex rel. vs. Kurtz, Treasurer*, 21 O. C. C. 261. The defects in the former laws were remedied in the act of 1902, 95 O. L. 609, which was a law of general nature applicable to all school districts in the State, empowering the board of education of any school district which desired to bring itself within the terms of the act to provide for a system of pensions for its teachers. Many district boards of education availed themselves of the provisions of this act, and established local pension systems for their districts, and during the years following, many teachers within the State retired from teaching, and were granted pensions under these various local pension systems thereby established.

In 1919 the Legislature passed an act, which, by its terms, went into active operation September 1, 1920, (108 O. L. Part I, page 195, Sections 7896-1 to 7896-63, inclusive, of the General Code of Ohio), providing for a State Teachers' Retirement System to be administered by a State Teachers' Retirement Board therein created.

The State Teachers' Retirement Law, as now in force, after having been amended in several respects since its original enactment, provides for the establishment and accumulation of certain funds under the administration of the Retirement Board from which funds certain allowances are to be made to the members of the system upon their retirement therefrom in the nature of pensions, annuities and retirement allowances. Retirement allowances and other benefits under the provisions of the Teachers' Retirement Law accrue to the members of the Retirement System, the membership of which is fixed by the terms of Sections 7896-22, 7896-22a, 7896-23 and 7896-24, General Code, which read as follows:

Sec. 7896-22. "The membership of the retirement system shall consist of the following:

(a) All teachers in service on the first day of September, nineteen hundred and twenty, except teachers who have filed with their employer a statement in writing requesting exemption from membership or teachers who are excluded by the provisions of this act (G. C. 7896-1 to 7896-63).

(b) All teachers who became teachers or who were reappointed as teachers after the first day of September, nineteen hundred and twenty, except teachers who are excluded by the provisions of this act.

(c) The teachers in any school or college or other institution supported in whole or in part by the State or any subdivision thereof and wholly controlled and managed by the State or any subdivision thereof shall become members on the same terms and conditions as the teachers in the public schools, provided that the board of trustees or other managing body of such school, college or other institution, if such institution is now in existence or if in existence on said date, shall agree by formal resolution adopted before September first, nineteen hundred twenty-one, to accept all the requirements and obligations imposed by this act upon employers of members. Any institution which comes into existence as such thereafter shall have ninety days in which to accept said requirements and obligations. A certified copy of said resolution shall be filed with the retirement board. When such resolution shall have been adopted and a copy of it filed with

the retirement board, it shall not later be subject to rescindment or abrogation. Service in such schools, colleges or other institutions shall be then considered in every way the same as service in the public schools so far as the purposes of this act are concerned, and

(d) All other teachers who become contributors under the provisions of this act."

Sec. 7896-22a. "In addition to the membership of the retirement system as prescribed in Section 7896-22, General Code, there shall be included therein the educational employees of the State department of public instruction. The contributions ordinarily made by boards of education shall be made in the cases of employees of the department of public instruction by State appropriation and in the cases of such other employees as may be included, from the funds of the respective boards or organizations.

Persons so included shall be included in the definition of 'teacher' as used in Sections 7896-1 to 7896-63, General Code: the service of all persons in such capacities shall be included as prior service provided such persons are present teachers as defined in Section 7896-1, General Code, or are in the service described in the first sentence of this section at the time this section goes into effect, and in the latter case service for the present school year shall be included in the prior service of such persons.

Payments by and for persons included in the retirement system by virtue of this section shall begin September 1, 1921."

Sec. 7896-23. "Members of a local district pension system maintained under the laws of the State of Ohio from appropriations or contributions made wholly or in part by any employer and existing at the time this bill becomes a law are hereby excluded from membership in this retirement system.

But should a majority of all the teachers participating in any such local district pension system apply for membership in the retirement system created by this act (G. C. 7896-1 to 7896-63) by a petition duly signed and verified, approved by their employer, and filed with the retirement board, all the teachers included in the membership of such local district pension system shall become members of the retirement system created by this act at such time within three months after the filing of such petition and the compliance with the other provisions of this act relative to the dissolution and discontinuance of such local district pension system as the retirement board shall designate."

Sec. 7896-24. "The retirement board, notwithstanding the foregoing provisions, may deny the right to become members to any class of teachers, whose compensation is only partly paid by the State, or who are not serving on a per annum basis, or who are on a temporary basis, or who are not required to have a teacher's certificate, and it may also, in its discretion, make optional with teachers in any such class their individual entrance into membership."

Certain terms used in the Teachers' Retirement Law are defined in Section 7896-1, General Code, as follows:

" * * * * *

'Teacher' shall mean any teacher or other person regularly employed in the public schools of the State of Ohio, who is required by law to have a teachers' certificate; and any teacher in any school or college or other

institution wholly controlled and managed, and wholly or partly supported by the State or any subdivision thereof, the board of trustees or other managing body of which shall accept the requirements and obligations of this act.

'Present-teacher' shall mean any person who was a teacher, as defined by this act, before the first day of September, nineteen hundred and twenty; whose membership in the retirement system has been continuous; and,

(a) who became a member on said date, or on the date of his first service as a teacher after said date and within one year after his last day of service previous to said first day of September, nineteen hundred and twenty; or,

(b) who was a teacher of a school or college or other institution on said date, or on a subsequent date within one year after his last day of service as such teacher previous to said first day of September, nineteen hundred and twenty, and who continued thereafter to be a teacher thereof until he, with the teaching staff of such school or college or other institution, became a member of the retirement system as provided in this act; or,

(c) who was a member of a local district pension system on said date, or on the date of his first eligibility to such membership after said date and within one year after his last day of membership therein previous to said first day of September, nineteen hundred and twenty, and who continued thereafter to be a member until he, with the membership of such local district pension system, became a member of the retirement system.

'New-entrant' shall mean any teacher who is a member except a present-teacher.

'Prior-service' shall mean all service as a teacher, as defined by this act, rendered before the first day of September, nineteen hundred and twenty, by a present-teacher and similar service in another State credit for which was procured by a present-teacher as provided by this act.

'Total-service' shall mean all service of a member of the retirement system since last becoming a member and in addition thereto, all his prior-service, computed as provided in this act.

'Member' shall mean any person included in the membership of the retirement system as provided in this act.

'Contributor' shall mean any person who has an account in the teachers' saving fund.

'Beneficiary' shall mean any person in receipt of a retirement allowance or other benefit provided by this act.

* * * * *

'Accumulated contributions' shall mean the sum of all amounts deducted from the compensation of a member and credited to his individual account in the teachers' savings fund together with regular interest thereon.

'Final average salary' shall mean the average annual compensation, not exceeding two thousand dollars, earnable as a teacher by a member during the ten years immediately preceding his date of retirement.

* * * * *

'Local district pension system' shall mean any school teachers' pension fund created in any school district of the State of Ohio, in accordance with the laws of such State prior to the first day of September, nineteen hundred and twenty."

By the terms of Sections 7896-19, 7896-43 and 7896-52, General Code, provision is made for the keeping of an individual account with each member of the Retirement System, showing the amount of the member's contribution and the interest accumulated thereon. Each teacher who is a member of the Retirement System is required to contribute four per cent. of his earnable compensation, not exceeding \$2,000 per annum, to the Teachers' Savings Fund.

Provision is made for the retirement of members and the payment of retirement allowances to the members so retiring, by Sections 7896-33 et seq. of the General Code. Such retirements may be superannuation retirement, commuted superannuation retirement or disability retirement. The basis for fixing the sum total of the retirement allowances, whether upon superannuation retirement, commuted superannuation retirement or disability retirement is, with a few exceptions, based on "total service" and "final average salary" of the member who retires.

Provision is also made for the merger of local district pension systems with the State Teachers' Retirement System, by Sections 7896-59 et seq. of the General Code. By the terms of these sections, it is provided that pensioners on the rolls of a local district pension system at the time of the merger, shall be carried by the Teachers' Retirement System and these pensions in the same amounts as had been previously paid, shall be assumed and paid by the Teachers' Retirement System. Provision is made for the payment to the Teachers' Retirement System by the local district whose pension system becomes merged with the Teachers' Retirement System, of the accrued liability for such pensions. This accrued liability is determined and based on actuarial computation. The Teachers' Retirement funds are secured in the payment of these pensions as positively and securely as may be done by actuarial determination.

After the rights of a pensioner are fixed under his local district pension system, and the system is merged with the State Teachers' Retirement System, there is no law providing for the suspension or forfeiture of these rights, for any cause. In fact there is little doubt but that a pensioner under the former local district pension law has such a vested right in his pension that any law that would attempt to suspend or cause the pension to be forfeited would be invalid, where the fund from which the pension is derived is made up from voluntary contributions and not from taxation. See Dillon "Municipal Corporations" paragraph 431.

It should be borne in mind that under the former local district pension law the pensions were paid for the most part, from accumulated contributions of its members, and that prior to 1911 all such contributions were voluntary. Even after the amendment of 1911, 102 O. L. 445, the contributions of all the members except "new teachers" were voluntary. New teachers, however, did not include those serving under reappointment. To quote from the law, former Section 7877, General Code, as amended in 1911 and in force until its repeal in 1925, provided:

" * * * All persons employed for the first time as teachers by a board of education which has created such a pension fund shall be deemed new teachers for the purpose of this act, but the term new teachers shall not be construed to include teachers serving under reappointments. New teachers shall by accepting employment as such accept the provisions of this act and thereupon become contributors to said pension fund in accordance with the terms hereof. And the provisions of this act shall become a part of and enter into such contract of employment. * * * "

Prior to the amendment of Section 7877, General Code, in 1911, it was optional with all teachers in districts maintaining a local pension system, whether they contributed to the fund or not, and this privilege was retained in the amendment for all teachers who had been teaching in that district prior to the amendment and continued to teach thereafter. Inasmuch as twenty years was the shortest term of service under the law that teachers might be granted a pension, it follows that all pensions granted under that law were granted to persons who had of their own volition contributed to the pension fund, as twenty years of service could not have accrued to so-called new teachers after 1911 and before 1925 when the law was repealed.

Ruling Case Law, Volume 21, page 242, in speaking of pensions paid from funds made up from compulsory contributions, or deductions made by authority of law from salaries, holds:

“By the great weight of authority the fact that a pensioner has made such compulsory contributions does not give him a vested right in the pension.”

Pennie vs. Pries, 132 U. S. 462; *State ex rel. Price vs. Farley*, 12 O. C. D. 273; 22 O. C. C. 48.

Where, however, the contributions are voluntary, or where it is optional with the employe to join the scheme or contribute to the relief fund, the rule is otherwise; although sometimes spoken of as relief funds these funds are more in the nature of insurance, and are governed accordingly.

Under a statute providing for a teachers' retirement fund, which made it optional with the teachers to elect to come under its provisions to have a certain amount deducted from their monthly salary, it was held in *Ball vs. Teachers' Retirement Fund*, 71 N. J. L. 64, 58 Atl. 111, that the legal relation between the teachers who had accepted the provisions of the statute and the board of trustees of the retirement fund was that of contract, the terms of which were to be ascertained by reference to the statute, and that its terms could not be altered without the consent of both parties thereto, and without a sufficient consideration. The court pointed out in that case that the fund was the result of contributions by the teachers who elected to take part in the scheme, and that the annuity was not a pension granted by the State, as no part of it was payable out of the State funds, and that therefore the right of the contributors must necessarily depend upon the agreement under which they entered into the scheme.

Accordingly, it was held that a subsequent statute which made the retirement of a teacher dependent upon the approval of the board of trustees, so that thereafter the incapacitated teacher was not entitled to receive the annuity merely upon his request, as under the original statute, was inoperative to affect existing contracts, as it was an attempt to impair the obligations of an existing contract, which was beyond the power of the Legislature.

In the case of *Venable vs. Schaefer et al.* 7 O. C. C. (N. S.), 337, decided in 1906, it is said, quoting from the headnotes:

“The school teachers' pension fund does not provide a bounty but a basis of a mutual contract in the nature of insurance.”

At any rate, there is nothing in the Teachers' Retirement Law, or in any other law that could by any construction be said to justify a suspension of a pension granted by a local teachers' pension system and assumed by the retirement system when the local system merges with the retirement system for any cause. The pen-

sioner is free to follow his own bent, and secure such employment as he may choose, and continue to draw his pension; nor is there in my opinion any provision of law prohibiting a board of education from employing a person as teacher merely because he is a pensioner under some local district pension system that has merged with the Teachers' Retirement System. The qualifications of a teacher, if he is to teach in the elementary or high schools of the State, are that he be properly certificated and employed in the manner provided by the statute. A board of education, in my opinion, may lawfully employ a person as teacher, although he may be drawing a pension granted by a local pension system in this State or outside this State. The board may refuse to employ a teacher for any reason, or, if it does employ him consideration may be given to the fact that he is drawing a pension in fixing his salary if the board sees fit to do so, but there is nothing to prevent the board from hiring him and fixing his salary, regardless of his pension.

If such a person is now employed to teach in the public schools or if he was so employed since the merger of the local district pension system of which he was formerly a member and which had formerly granted him a pension with the Teachers' Retirement System it becomes important to determine what his relation is to the Teachers' Retirement System because of this new employment and what his rights and obligations are, if any, in addition to his rights as a pensioner under the Teachers' Retirement Law.

It will be observed from the provisions of Section 7896-22, *supra*, that all "teachers", which means those persons regularly employed in the public schools of the State of Ohio, who are required to have a teacher's certificate, teachers in any school or college or other institution wholly controlled and managed and wholly or partly supported by the State or any subdivision thereof, the board of trustees or other managing body of which shall accept the requirements of this act, and educational employes of the State Department of Education are "members" of the Retirement System, except teachers who are excluded by the provisions of the State Teachers' Retirement Act.

There are no provisions of the act that exclude persons who are employed as active teachers by a board of education on the ground that they are at that time pensioners by virtue of a local teachers' pension system. Hence, in my opinion, we must conclude that such persons when employed to teach in the public schools of the State become members of the Retirement System and are entitled to all the rights and privileges as well as becoming subject to all the obligations given to or imposed upon such members by the law, including retirement rights as the law provides.

Such persons would become members with the status of "new entrants" and of course would not be credited upon retirement, in computing their "total service", with service rendered prior to the date when their pension had been granted as being "prior service". "Total service" upon retirement under the Teachers' Retirement Law, is defined by the terms of Section 7896-33, General Code, which reads as follows:

"At retirement the total service credited a teacher shall consist of all his service as a teacher since he last became a member and, if he has a prior-service certificate which is in full force and effect, all service certified on such prior-service certificate."

All "prior service" rendered before the granting of the pension would have been absorbed by, or rather merged into the pension, and any prior service certificate for service rendered prior to that time would be no longer in full force and effect.

From your statement it appears that the teacher to whom you refer had been pensioned by a local district pension system prior to its merger with the State Teachers' Retirement System, and that she was employed in 1923 to teach in some other district than the one in which the pension had been granted. You do not state whether or not the employment in 1923 was before or since the merger of the system which had granted the pension. In my opinion, this makes no difference. When the local system which had granted the pension merged with the Retirement System, whether before or since 1923, the State system assumed the payment of the pension and the local system must necessarily have secured to the State Teachers' Retirement System the accrued liability for this pension.

Neither do you state whether the district in which the employment in 1923 took place, was at that time under the State Teachers' Retirement System, or whether it maintained a local district pension system and later merged with the State Teachers' Retirement System. If the employment of 1923 took place before the merger with the State system and the person so employed was an active teacher when the merger took place, the State system took over such teacher as a "teacher". The present value at that time of the accrued liability on account of such teacher would have been computed in accordance with actuarial standards and that liability secured to the State system by the local district. If the employment of 1923 took place after the local district where the employment was made had merged with the State system, or if that particular district had never maintained a local pension system, the employe would in my opinion, become a member of the retirement system as a "teacher", by virtue of her employment, and the terms of Section 7896-22, *supra*. I assume of course, that the employment of 1923 was to teach in the elementary or high schools of the State, and that the person so employed was regularly employed on a per annum basis and was required to be certified as a teacher, and her compensation was all paid by the State. Otherwise, the Retirement Board might have by rule, denied her the right to become a member of the Retirement System. See Section 7896-24, General Code. I am informed, however, that no such rule is now, or ever was, in force.

In Opinions of the Attorney General for 1921, Volume II, page 1196, there appears an opinion which holds as stated in the third branch of the syllabus thereof, as follows:

"A pensioner of a local district pension system which has merged with the State Teachers' Retirement System cannot be reinstated as an active teacher either with or without the continuation of his pension payments while in active service."

I am unable to agree with the above mentioned conclusion of the Attorney General as set forth in the 1921 opinion, nor with the reasoning upon which that conclusion is based.

It is therefore my opinion in answer to your specific questions, that:

First, it is not unlawful to employ a person who is a pensioner by virtue of a former local district teachers' pension system, to teach in the public schools in any of the school districts of the State, in any school or college or other institution wholly controlled and managed, and wholly or partly supported by the State or any subdivision thereof, the board of trustees or other managing body of which has accepted the requirements and obligations of the Teachers' Retirement Law, or in the State Department of Public Instruction.

Second, when a person is so employed, he may lawfully draw his pension during the time he is in active service. He becomes, upon such employment, a "member" of the Teachers' Retirement System, and thereby becomes subject to the rights and obligations of the State Teachers' Retirement Law, including the right of retirement thereunder or the right to the withdrawal of his accumulated contributions under Sections 7896-40 and 7896-41, General Code, as the case may be.

Respectfully,
EDWARD C. TURNER,
Attorney General.

3140.

INSURANCE—FOREIGN AGENT NOT QUALIFYING AS FOREIGN INSURANCE BROKER IN OHIO—NO RIGHT TO CIRCUMVENT LAW BY WRITING INSURANCE ON OHIO PROPERTY WITHOUT THE STATE—SPECIFIC CASE DISCUSSED.

SYLLABUS:

A foreign insurance agent, not qualified to do an insurance business in Ohio as a foreign insurance broker, who contracts to control insurance on Ohio real estate, and who writes or causes to be written said insurance elsewhere, and without proper qualification in Ohio, is violating the insurance laws of this state in so doing.

COLUMBUS, OHIO, January 14, 1929.

HON. WILLIAM A. DOODY, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—I am in receipt of a communication from your predecessor, Hon William C. Safford, which reads:

"Herewith I hand you a letter dated October 9th, received from the H. & H. Company, Insurance Agent, Cleveland, Ohio, together with photographs of letters passing between the H. & H. Company and S. W. S. & Company, Chicago, Illinois, and between H. F. E., Cleveland, Ohio, and S. W. S. & Company.

The last named concern is a money lending institution and an insurance agency of Chicago, Illinois.

Your reading of the letter to me from the H. & H. Company will disclose to you the points upon which we respectfully seek your opinion, as to whether the insurance laws of Ohio have been violated by S. W. S. & Company in their insistence upon writing insurance on properties on which they have made loans.

We await your opinion at your convenience."

From the accompanying letters it appears that a certain Chicago money lending institution, which is also engaged in the insurance business, about three years ago, financed the construction of a building situated in Cleveland, Ohio. The then owner