

act, he shall in writing certify to such fact in duplicate, and such duplicate certificate shall be given to the taxpayer as evidence of his liquidated claim."

Taxes, as defined in this act, includes, among other things, "taxes and assessments levied against real estate and any delinquencies," while a liquidated claim includes "any sum of money that was due and payable January first, 1933, upon a written contractual obligation duly executed between the subdivision and the taxpayer prior to such date."

In my Opinion No. 1597, dated September 21, 1933, addressed to the Bureau of Inspection and Supervision of Public Offices, I held as follows:

"The term 'liquidated claims' as defined in sub-section (b) of Section 2 of House Bill No. 94 enacted by the 90th General Assembly, includes bonds issued by a subdivision in accordance with the provisions of the Uniform Bond Act, due and payable prior to January 1, 1933, when in the hands of the person to whom originally issued or in the hands of a holder who acquired title thereto prior to January 1, 1933."

This act is the only authority I know of whereby bonds may be accepted in payment of taxes or assessments.

Consequently, I am of the opinion that where special assessments have been certified by a municipality to the county auditor, as provided by law, the owner of property against which any of said assessments have been levied, who holds bonds of such municipality issued in anticipation of the collection of such assessments, which bonds matured on or before January 1, 1933, and title to which was acquired by such property owner prior to said date, may, after the fiscal officer of such municipality has certified in writing his determination that such bonds can be used for the payment of taxes as provided in House Bill No. 94 of the 90th General Assembly, present said bonds to the treasurer of the county in which such municipality is located when such assessments become due and payable, and thereupon it becomes the duty of such county treasurer to accept said bonds in full or partial payment thereof.

Respectfully,
JOHN W. BRICKER,
Attorney General.

2409.

LIQUID FUEL TAX—BOARD OF EDUCATION UNAUTHORIZED TO PAY PROCEEDS THEREOF TO OTHER BOARDS OF EDUCATION ON ACCOUNT OF ATTENDANCE IN THEIR SCHOOLS OF PUPILS RESIDENT IN LATTER SCHOOL DISTRICT—CREDIT ALLOWED ON TUITION—COUNTY COMMISSIONERS UNAUTHORIZED TO PROCURE LIABILITY INSURANCE WHEN.

SYLLABUS:

1. *Boards of education are without authority to pay over to other boards of education the amount of the proceeds of the liquid fuel tax distributed to their*

school districts on account of the attendance in their schools of pupils resident in the districts of the other boards of education. By agreement of two boards of education, the claim of one board against another for tuition of non-resident pupils may be credited with the amount received from the liquid fuel tax incident to the attendance in their schools of the pupils on account of whose attendance the claim for tuition arises.

2. Boards of county commissioners are without authority to expend public funds to pay the premium to procure liability and property damage insurance against loss on account of damage to third persons, arising out of accidents which may occur incident to the operation of county owned and operated motor vehicles in connection with official duties, for the reason that no liability against the county or the county commissioners arises therefrom.

COLUMBUS, OHIO, March 26, 1934.

HON. F. MERCER PUGH, *Prosecuting Attorney, Fulton County, Wauseon, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion concerning the following:

“(1) In regard to the legality of school districts receiving aid under the provisions of the Fuel Tax Law, 5542-1 to 5542-18 Ohio General Code, and the paying of this money over to the different townships and villages whose pupils are attending that particular school:

There have been a number of schools receiving aid under the Fuel Tax Law who are paying this money over to the different townships and villages, the pupils of which are attending these schools. The purpose is to influence the attendance of all the pupils from that particular township or village to attend the school making such refund of fuel tax and for the school to collect the regular tuition from the pupils attending from the different townships and villages, thereby increasing the attendance. In this way the attendance of the pupils of that township or village is drawn to that particular school and in doing this, pupils are drawn away from other schools. I think that making such refund will defeat the purpose for which the law was intended.

(2) I also wish your opinion as to whether the county can legally take out liability insurance on all county owned and operated motor vehicles.”

By force of Amended Substitute Senate Bill No. 354 of the 90th General Assembly codified as Section 5542-1 to Section 5542-18, inclusive, of the General Code, a tax is levied on the use, distribution or sale of liquid fuel within the state, for public school purposes. Section 5542-18, General Code, provides for the distribution of the tax as follows:

“Upon receipt of the taxes herein provided for, the treasurer of state shall place the first fifteen thousand dollars collected in a special fund to be known as the liquid fuel tax rotary fund; and thereafter as required by the depletion thereof he shall place to the credit of said rotary fund an amount sufficient to make the total of said fund at the time of each such credit amount to fifteen thousand dollars.

There is hereby appropriated to the tax commission of Ohio, out of

any moneys in the state treasury received from the taxes herein provided, the sum of thirty-five thousand dollars for the actual and necessary expenses of administering the provisions of this act during the remainder of the year, 1933, and the sum of thirty-five thousand dollars for the year 1934.

The balance collected under the provisions of this act, after the credits to said rotary fund, and after the amounts herein appropriated to the tax commission to pay the actual and necessary expenses of administering the provisions of this act during the remainder of the year 1933, and the year 1934, shall be placed in 'the state public school fund', which fund is hereby created, and which shall be apportioned to each school district of the state on the basis of the average daily attendance in the schools thereof during the next school year preceding such apportionment as determined by the director of education.

On or before the fifteenth day of December each year the director of education shall certify to the auditor of state the average daily attendance in each school district for the next preceding school year. On the basis of these data the auditor of state shall apportion the said fund quarterly each year and as of the last day of March, June, September and December, to the several school districts of the state and shall issue his warrant on the treasurer of state in favor of each district for the amount due and the treasurer of state shall forthwith pay the same to the designated districts."

Appropriation of these funds is made in pursuance of said Section 5542-18, General Code, by Section 5542-18a, General Code, enacted as a part of Amended Senate Bill No. 29 of the first special session of the 90th General Assembly.

It will be noted that the distribution of the proceeds of this tax is to be made to the several school districts in this state, on the basis of "the average daily attendance in the schools thereof." This can mean nothing else than that the school which a pupil attends receives the benefit of the distribution of the tax for that pupil, regardless of whether or not he lives in that district.

Where a pupil resides in one district and attends school in another district, under circumstances which require the payment of tuition for the pupil by the district of residence to the district where the pupil attends school, a distinct advantage is gained from the operation of the law to the district of attendance and a corresponding disadvantage results to the district of residence. However, there is no statutory provision for remedying this situation.

It would probably be more equitable if some provision had been made whereby the district of residence of school pupils should have benefited for those pupils in the distribution of the tax to some extent at least, whether they attend school in their home district or in some other district, especially if tuition for their attendance in the full amount authorized by law is paid by the home district to the district in which they attend school. The law does not so provide, and is incapable of such construction, nor does the law authorize boards of education to remedy the matter by paying over or "rebating" as you term it, to the district of residence the amount received by the district of attendance on account of the attendance of the pupil in the schools of that district.

It is well settled that boards of education being creatures of statute, have such powers only as are expressly given them by statute, or are necessary to carry out the express powers granted. Courts consistently apply this rule and

sometimes quite drastically. *State ex rel. Clark vs. Cook*, 103 O. S., 465; *Schwing vs. McClure*, 120 O. S., 335.

As no express power has been granted to boards of education to do what you state is being done in some districts in your county with respect to receipts of fuel tax distributed to the district and clearly this power can not be said to be implied within any express power granted to boards of education, it necessarily follows that boards of education in so acting, do so entirely without authority.

Substantially the same result may be accomplished by agreement between the boards of education of two districts as to the terms of admission of the resident pupils of one district into the schools of another, whereby the paying district receives a credit of the amount distributed to the receiving district of the liquid fuel tax incident to the attendance of the pupils whose tuition is involved.

It will be observed from the provisions of Section 7682, General Code, that authority is extended to boards of education to admit into the schools of their respective districts pupils other than those described in Section 7681, General Code, including of course, non-resident pupils, "upon the payment of such tuition within the limitations of other sections of law as it prescribes."

Section 7734, General Code, provides that the board of education of any district may contract with the board of another district for the admission of pupils into any school of the other district "on terms agreed upon by such boards".

The expression "limitations of other sections of law" as used in Section 7682, supra, manifestly has reference to Section 7736, General Code and Section 7747, General Code, which purport to fix the method of computing tuition charges for non-resident pupils. Section 7736, General Code, deals with tuition for elementary school pupils and Section 7747, General Code, for high school pupils. These sections do no more than to fix a maximum tuition charge as is clearly shown from the fact that both Section 7682, General Code and Section 7734, General Code, authorize leaving the matter to be fixed by agreement of the interested boards of education. Section 7747, General Code, expressly provides that "no more shall be charged per capita" than the amount to be determined in the manner set out in the statute. See Opinions of the Attorney General for 1931, page 676.

With respect to your second question it consistently has been held by former Attorneys General that public officers are without authority to expend public funds for liability insurance when there does not exist a liability to be insured against unless express and definite authority is extended by statute to procure the insurance. This matter has been discussed in a number of opinions. See Opinions of the Attorney General for 1927, page 814; for 1928, pages 1927 and 2964; for 1929, page 1013; for 1931, page 303, and for 1932, page 1098. In the opinion found in Opinions of the Attorney General for 1928, page 1013 it was expressly held:

"County commissioners * * may not lawfully carry public liability and property damage insurance payable to others on account of damages growing out of the operation of motor vehicles by such boards in connection with their official duties, for the reason that when acting in such capacity they are performing a governmental function and no liability rests under such circumstances".

I am therefore of the opinion, in specific answer to your questions:

1. Boards of education are without authority to pay over to other boards of education the amount of the proceeds of the liquid fuel tax distributed to their

school districts on account of the attendance in their schools of pupils resident in the districts of the other boards of education. By agreement of two boards of education, the claim of one board against another for tuition of non-resident pupils may be credited with the amount received from the liquid fuel tax incident to the attendance in their schools of the pupils on account of whose attendance the claim for tuition arises.

2. Boards of county commissioners are without authority to expend public funds to pay the premium to procure liability and property damage insurance against loss on account of damage to third persons, arising out of accidents which may occur incident to the operation of county owned and operated motor vehicles in connection with official duties, for the reason that no liability against the county or the county commissioners arises therefrom.

Respectfully,

JOHN W. BRICKER,
Attorney General.

2410.

APPROVAL—NOTES OF WHITEOAK TOWNSHIP RURAL SCHOOL DISTRICT, HIGHLAND COUNTY, OHIO—\$2,802.00.

COLUMBUS, OHIO, March 27, 1934.

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

2411.

APPROVAL—NOTES OF PAINT CONSOLIDATED NO. 1 RURAL SCHOOL DISTRICT, HIGHLAND COUNTY, OHIO—\$3,111.00.

COLUMBUS, OHIO, March 27, 1934.

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

2412.

APPROVAL—NOTES OF CONCORD RURAL SCHOOL DISTRICT, HIGHLAND COUNTY, OHIO—\$3,205.00.

COLUMBUS, OHIO, March 27, 1934.

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