2911.

TUITION—RECOVERY BY ONE SCHOOL DISTRICT OF TUITION MISTAKENLY PAID TO ANOTHER SCHOOL DISTRICT—WHEN SCHOOL DISTRICT TO PAY TUITION OF HIGH SCHOOL PUPIL ATTENDING SCHOOL IN ANOTHER DISTRICT.

SYLLABUS:

1. *Where a school district has been enriched at the expense of another school district by reason of the payment by the one district to the other of high school tuition, under the mistaken apprehension that the pupils whose tuition was so paid resided in the district paying the tuition, whereas as a matter of fact thay resided in a third district, the district which has paid the tuition due to such mistake of fact, may recover from the district receiving the tuition, the amount so paid.*

2. *Before a board of education which does not maintain a high school and does not contract with another board or other boards in the same or an adjoining civil township for the schooling of its high school pupils, can be required to pay the tuition of resident high school pupils attending high school outside the district, due notice of such attendance must be filed in writing with the clerk of the board of education upon which board it is sought to impose the liability for the payment of tuition, as provided by Section 7750, General Code.*

COLUMBUS, OHIO, July 12, 1934.

HON. VERNON L. MARCHAL, *Prosecuting Attorney, Greenville, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion, which reads as follows:

> "I desire an opinion from your office on the following proposition:
>
> 'In district "A" of this county, a number of pupils attended the high school during the school years of 1931, 1932 and 1933. A bill was sent to district "B", covering their tuition to district "A", and this bill was paid by district "B" to district "A". After payment of the above bill district "B" discovered that the pupils were residents of district "C". District "B" is now asking for a refund from district "A", or that they be given credit on their tuition bill now due and owing district "A".'
>
> My first question is:
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> Would district 'B' be entitled to a refund or credit on tuition now due or hereafter to become due district 'A'?
>
> Second:
>
> Whether or not district 'B' could, or if district 'A' refunds district 'B', then could district 'A' recover from district 'C' where no notice of the attendance was sent to district 'C', or where no bill was presented to district 'C', during any of the school years mentioned above?"

With respect to your first question, your attention is directed to an opinion of this office which will be found in the Opinions of the Attorney General for 1933, at page 1728. It is there held:

> "Where a political subdivision has been enriched at the expense of another subdivision, by reason of there having been distributed to it

through a mistake of fact, tax revenues which should have been distributed to the other subdivision, the latter may recover from the former in an action in the nature of an action for money had and received, the amount which the former subdivision had been so unjustly enriched."

The principle of law upon which the above holding is based is equally applicable in cases where unjust enrichment is involved, whether it is brought about by reason of the wrongful distribution of tax revenues or otherwise.

The principle of law upon which recovery in cases of this kind is based, was established by the court of King's Bench, in 1725, in the case of *Attorney General* vs. *Parry,* 2 Com. 481, where it was held:

"Whenever a man receives money belonging to another without any reason, authority, or consideration, an action lies against the receiver for money received to the other's use; and this as well where the money is received through mistake, under color and under an apprehension, though a mistaken apprehension, of having good authority to receive it, as where it is received by imposition, fraud or deceit in the receiver."

The above case has been referred to and followed many times by the courts of this country. Citations from many of them will be found in the opinion referred to above. Applying this principle to the facts stated in your letter, it follows, in my opinion, that district "B" would be entitled to a refund or credit for the amount of money which it has paid to district "A" for tuition for high school pupils, under the mistaken apprehension that the pupils resided in district "B" and that said district "B" was therefore under the law liable for said tuition.

As to your second question, you do not state whether or not district "C" maintains a high school, or if it does, whether or not the pupils in question reside more than four miles from the high school so maintained or whether or not transportation is furnished by district "C" to its high school, if it maintains a high school. If district "C" does maintain a high school, the payment by it of tuition for any of its resident pupils who attend high school in other districts is governed by principles stated in an opinion of my predecessor which will be found in the reported Opinions of the Attorney General for 1932, at page 1128. It is there stated:

"Under no circumstances is a board of education which maintains a high school, liable for the tuition of its resident high school pupils who attend school in another district, except when those pupils live more than four miles from the high school maintained by the board and transportation is not furnished for them to that high school. Under those circumstances, the board may be held for their tuition if they attend a nearer high school."

Assuming that district "C" does not maintain a high school of its own, the question resolves itself into a question of whether or not a school district is liable for the payment of tuition of resident high school pupils who attend high school in another district where notice of such attendance has not been given to the board of education of the district of the pupil's residence.

Under the law, a board of education may provide high school facilities for resident high school pupils in a school maintained by it. If the board does not

see fit to maintain a high school, it may contract for the schooling of all its high school pupils by authority of Section 7750 of the General Code, or it may assign the pupils to schools outside the district, as provided by Section 7764, General Code. It is sometimes more advantageous for a board of education to contract either for the schooling of all its resident high school pupils or for certain pupils in schools to which they may be assigned, if circumstances are such that contracts of this kind may be entered into, than to allow the pupil to select the school he wishes to attend. If no opportunity is given the board to arrange for the schooling of a high school pupil by some one of the methods which the law permits the board to choose, the board can not in my opinion be held for the pupil's tuition.

Under a somewhat similar state of facts, the Supreme Court, in the case of *Board of Education of Swan Township* vs. *Cox,* 117 O. S., 406, held as stated in the second branch of the syllabus of said case:

> "In order that such boards of education may have a choice of the means of discharging the duties imposed upon them, it is the duty of such children or their parents to communicate to such boards the fact of readiness for high school work and the further fact of residence more than four miles from a high school in order that the board may have an opportunity to take official action in exercising such choice of means and to make provision therefor."

Although the above case was decided on a state of facts which arose before the repeal of former Section 7764-1, General Code, which provided in substance that high school facilities must be provided for all high school pupils within four miles of their residence, and had special reference to the transportation of pupils, the principle set forth in that portion of the syllabus which is quoted above has peculiar application to the question here under consideration. As stated above, a board of education has the option of furnishing high school facilities for its resident high school pupils in one of several ways, either by the maintenance of a high school within the district or by contract for the schooling of its high school pupils by authority of Section 7750, General Code, or by assigning the pupils to a school outside the district within four miles of their residence or more than four miles from their residence and furnishing transportation thereto, or board and lodging near the school in lieu of such transportation. Unless the board is advised of the pupil's readiness for high school and its intention to attend high school, the board manifestly has no opportunity to exercise a choice of means with reference to the matter.

In 1915, the then Attorney General, in an opinion which will be found in the reported Opinions of the Attorney General for that year, at page 1381, held with reference to this matter:

> "The board of education of a school district, which does not maintain a high school and which has not entered into an agreement with any other board or boards of education for the furnishing of high school facilities to the pupils residing in said district, and entitled to high school facilities, cannot be charged with the payment of the tuition of such pupils unless the notice in writing required by the provisions of section 7750, G. C., be filed with the clerk of said board of education not less than five days previous to the beginning of the high school attendance

of such pupils, setting forth the name of the school to be attended and the date the attendance is to begin."

The law has not been materially changed since that time.

In the case of *New Madison Special School District* vs. *Harrison Township Board of Education,* 14 O. S. 62, it was held by Judge Allread, then judge of the Common Pleas Court of Darke County, as follows:

> "Where no high school is maintained by the township board of education and no agreement has been made by such township board with one or more boards of education of the same or adjoining townships for the schooling of high school pupils of such township, the high school pupils resident of such township may attend any high school in the state, and tuition in such case shall be chargeable to such township board of education, providing written notice thereof is given to the clerk of the board of education before the attendance begins."

In another opinion of a former Attorney General, which will be found in the reported Opinions of the Attorney General for 1929, page 1828, it is held:

> "Before a board of education, that does not maintain a high school and does not contract with another board or other boards in the same or an adjoining civil township for the schooling of its high school pupils, can be required to pay the tuition of resident high school pupils attending high school outside the district, due notice of such attendance must be filed in writing with the clerk of the board of education upon which board it is sought to impose the liability for the payment of tuition, as provided by Section 7750, General Code.
>
> Where a claim for the payment of foreign tuition for a high school pupil is made against a board of education and it appears that no legal liability exists for the payment of such tuition because of the failure on the part of the pupil or his parents or persons in charge of him, to file a written notice of his attendance in the high school in accordance with Section 7750, General Code, such a claim lawfully may be paid as a moral obligation."

Similar holdings with respect to notice have been made by this office in a number of opinions. See Opinions of the Attorney General for 1912, page 1265; for 1913, page 1205; for 1917, page 1435; for 1927, page 2692; for 1928, pages 1925, 1955 and 2613; for 1930, page 1464 and for 1932, page 506.

Under these holdings it clearly appears that no enforcible legal liability rests upon district "C" for the payment to district "A" of tuition for the resident high school pupils of district "C" who attended school in district "A", inasmuch as no notice of this attendance was ever given to district "C", as provided by law. If, however, district "C" should pay this tuition it would not, in my opinion, be regarded as an illegal payment of public funds and could not be recovered back from district "A" after payment had been made to it by district "C". See Opinions of the Attorney General for 1929, page 1828, supra.

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

1. District "B" is entitled to a refund or credit on tuition now due or hereafter to become due to district "A" from district "B" for the amount of

tuition which had been paid for pupils who resided in district "C", under the mistaken apprehension that they resided in district "B".

2. Inasmuch as no notice as provided by law, had been given to district "C" of the attendance of its resident high school pupils in the schools maintained by district "A", no recovery can be had by district "A" from district "C" for high school tuition for such pupils. District "C" may, however, legally pay such tuition but can not be compelled to do so.

Respectfully,
JOHN W. BRICKER,
Attorney General.

2912.

APPROVAL—CANAL LAND LEASE OF ABANDONED OHIO CANAL LAND IN CHILLICOTHE, ROSS COUNTY, FOR THE RIGHT TO USE AND OCCUPY FOR BUSINESS BUILDING, RESIDENCE AND OTHER LEGITIMATE PURPOSES—OIL AND BATTERY COMPANY OF CHILLICOTHE, OHIO.

COLUMBUS, OHIO, July 12, 1934.

HON. T. S. BRINDLE, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge the receipt of your recent communication submitting for my examination and approval a canal land lease in triplicate, executed by you, as Superintendent of Public Works on behalf of the State of Ohio, to the Oil and Battery Service Company of Chillicothe, Ohio.

By this lease, which is one for a stated term of 15 years and which provides for an annual rental of $900.00, payable in semi-annual installments of $450.00 each, there is leased and demised to the lessee, above named, the right to occupy and use for business building, residence and other legitimate purposes, that portion of the abandoned Ohio canal lands, located in the city of Chillicothe, Ross County, Ohio, and which is more particularly described in said lease as follows:

Tract No. 1.

Beginning at the point of intersection of the easterly line of said canal property and the southerly line of that portion of Water Street in said city that lies east of Mulberry Street, and running thence southerly with the said easterly line of said canal property four hundred fourteen (414′) feet, more or less, to the northerly line of Second Street in said city; thence westerly with the northerly line of Second Street seventy-two (72′) feet, more or less, to the westerly line of said canal property; thence northerly with the said westerly line three hundred forty-one and two-tenths (341.2′) feet, more or less, to a point that is fifty-seven (57′) feet westerly from Station 62 plus 41.2, as measured at right angles to the transit line of the W. O. Sanzenbacher survey of said canal property; thence northwesterly thirty-eight (38′) feet, more or less, to the easterly line of Mulberry Street; thence sixty-eight (68′) feet, more or less, to the southerly line of Water Street; thence easterly with the southerly line of Water Street one hundrd two (102′) feet,