You can readily see from the provisions of the above sections that you can not execute this lease until you have obtained permission so to do from the probate court.

Section 10984, supra, provides that the application for authority to make the lease shall be filed by the guardian in "the probate court appointing him." This raises the question as to the proper probate court in which to make the application, for the reason that you are not guardian by virtue of appointment by any probate court but by virtue of your office as provided in Section 1946-3, supra. Said section, however, provides for filing a final account with "the probate judge of the county in which the home is situated."

Under the general statutes the final account must be filed "with the court appointing" the guardian, and it would seem from the language of Section 1946-3, supra, that it was the intention of the legislature to give the probate court of Greene county jurisdiction over the matters which an appointing court would have.

With reference to your request, that I advise you "as to any point affecting the children's welfare" in connection with this lease, in view of my conclusions as to the jurisdiction of the Probate Court of Greene county, it is apparent that whether or not the wards' interests are properly protected in this lease is not a question for me to decide but for the court to determine "upon final hearing" as provided in Section 10987, supra.

It is therefore my opinion that you have no authority to enter into a lease for oil and gas purposes on the real estate of said wards until you have obtained permission so to do from the Probate Court of Greene county.

Respectfully,
EDWARD C. TURNER,
Attorney General.

603.

BOARD OF EDUCATION—UNAUTHORIZED TO APPOINT ONE OF ITS OWN MEMBERS TO BOARD OF LIBRARY TRUSTEES.

SYLLABUS:

1. *A board of education which is authorized to appoint members of a board of trustees for the operation of a joint library under provisions of Sections 7633 and 7634, General Code, may not appoint members of such board of education to the board of library trustees.*

2. *Where an attempted appointment is made by a board of education of its own members to membership on a board of trustees for a school library, the fact that such appointments have been made does not operate to affect the status of the board of education making such appointments.*

COLUMBUS, OHIO, June 13, 1927.

HON. L. E. HARVEY, *Prosecuting Attorney, Troy, Ohio.*

DEAR SIR:—This will acknowledge receipt of your communication as follows:

"Will you kindly give me your opinion on the following question?

Where a library is jointly owned and maintained by two school districts under Section 7633 and three trustees are to be appointed by

each board of education under Section 7634, for the management and control of said library, can members of the respective boards of education be appointed as such library trustees?

In other words, can a member of one of the boards of education hold the office of board member and also library trustee?

About a year ago I was requested for an opinion on this matter and reached the conclusion that inasmuch as Section 7634 did not specifically declare that members of the board of education were not eligible as library trustees, that in a case where a library was jointly maintained by two school districts, members of the board of education of either district would be eligible for appointment as library trustee.

On the other hand, it was my opinion, that if the library was maintained by one school district under the provisions of Sections 7635 and 7636, board members would not be eligible to the appointment as library trustees because of the specific inhibition contained in Section 7636.

A prompt answer to the above question is important for the reason that the Covington School District and the Newberry Township School District, which maintains and operates a joint library have appointed members of the respective boards of education as library trustees.

In the case of the Covington School District certain teachers were employed for the coming year and the deciding vote in employing them was cast by a member of the board of education who is also a trustee of the joint library.

The question is also presented as to whether or not the contract employing the teachers in question would be legal.

The State School Examiner holds that it is not a legal contract and that the teachers in question were not legally employed.

Would you kindly favor me with a prompt opinion in regard to this matter and oblige?"

Sections 7633 and 7634, General Code, read as follows:

Section 7633:

"But when a donation or bequest of money or property has been or is made to two or more school districts jointly, or jointly and severally for the purpose of establishing and maintaining such public library and the money so donated has been or may be expended in the purchase of a site or the erection of a library building thereon or both the provisions of this subdivision shall apply. In such case the board of education of each of the districts annually may levy not exceeding one mill, in addition to all other taxes allowed by law, upon the taxable property of such school districts for the establishment, support and maintenance of such public library, and such library building may be located at a convenient place in either district."

Section 7634:

"The control of such building and library and the expenditure of all moneys for the purchase of books and other purposes and the administration of the library shall be vested in a board of six trustees, three to be appointed by each of the boards of education for the term of five years. They must serve without compensation, and until their successors are

appointed. In case of vacancy in the board, from refusal to serve, resignation or otherwise, it shall be filled by the boards of education of such district for the unexpired term."

The management, control and maintenance of a public library wholly under the jurisdiction of a single school district are provided for by Sections 7635 and 7636 of the General Code, which read in part as follows:

Section 7635:

"The board of education of any city, village or rural school district, by resolution, may provide for the establishment, control and maintenance in such district, of a public library, free to all the inhabitants thereof. It shall provide for the management and control of such library by a board of trustees to be elected by it as herein provided. * * *"

Section 7636:

"Such board of library trustees shall consist of seven members, who must be residents of the school district. No one shall be eligible to membership on such library board who is or has been for a year previous to his election, a member or officer of the board of education. * * *"

Section 7635, supra, as originally enacted, was Section 1 of an act of the legislature enacted in 1902, (96 O. L. 8) entitled: "An act authorizing boards of education to provide library privileges for city, village and special school districts." Section 7636 was embodied within Section II of the same act.

In 1906 the legislature passed an act described in its title as being amendatory to the act of 1902, supra, (98 O. L. 244). Section 1 of this amendatory act embodied within its terms the provisions which were codified as Sections 7635 and 7636.

A general rule of statutory construction applicable to legislative acts is stated in Lewis' Sutherland on Statutory Construction, 2nd Edition, page 444, as follows:

"It is a general rule, however, that an amended statute is construed, as regards any action had after the amendment was made, as if the statute had been originally enacted in the amended form. 'The effect of an amendment of a section of the law is not to sever it from its relation to other sections of the law, but to give it operation in its new form as if it had been so drawn originally, treating the whole act as a harmonious entirety, with its several sections and parts mutually acting upon each other.'"

This rule of construction was applied by the Supreme Court in the case of *State ex rel., vs. Cincinnati,* 52 O. S. 418. The first section of the syllabus in this case reads as follows:

"An amended section of a statute takes the place of the original section, and must be construed with reference to the other sections, and they with reference to it; the whole statute, after the amendment, has the same effect as if re-enacted with the amendment, and hence, an unconstitutional statute may be amended into a constitutional one, so far as its future operation is concerned, by removing its objectionable provisions, or supplying others to conform it to the requirements of the constitution."

Applying this rule of construction, together with the cardinal rule to the effect that the intention of the legislature governs in the construction of statutes, to the statute under consideration here, there would seem to be considerable force to the contention that inasmuch as the legislature had specifically provided that members of a board of education having jurisdiction over a library for a single school district were ineligible to membership on the library board elected by themselves and had not made such provision as to library boards appointed by joint boards of education, it was the intention of the legislature that such ineligibility should not apply to such joint library boards.

However, it is a well recognized rule of common law that a public officer can not use his appointing power to place himself in office, and as I view the law, the provisions of Section 7636 in so far as they provide that a member of a board of education is ineligible to become a member of a library board elected by authority of Section 7635, supra, are merely declaratory of the common law and members of such board of education are disqualified for election to membership on the library board whether there be any statutory enactment on the subject or not.

It will be noted that the statute goes further than merely to say that no one shall be eligible to membership on such library board who is a member of the board of education which is authorized to elect members of such library board, but also that no one is eligible to membership on the library board who is or has been for a year previous to his election a member or officer of the board of education which by the exercise of its electing power may create the library board. The statutory disqualification extends to officers as well as members of the board of education, and to those persons who had been members or officers of such board of education at any time during the year previous to the time when election was made to the library board.

The common law inhibition upon public officers using their appointing power to put themselves in office has nothing to do with the question of ineligibility of a person to hold a public office, who had at some prior time been in the position of the person who is clothed with the authority to make appointments or to elect persons to that particular office.

The reasons for the inhibition in each case are entirely different. Under the common law rule it is not a question of ineligibility to the office to which an appointment may be made, it is an abuse of the power of appointment and a disqualification of the person appointed from accepting or entering upon the duties of the office and the attempted act of appointment is for that reason invalid. The appointment never takes effect. The person so sought to be appointed never enters upon the incumbency of the office with which the invalid act of appointment sought to invest him. The appointment being invalid, the holding of an office by an incumbent whose title is dependent upon such an appointment is void *ab initio* so far as his being a *de jure* officer is concerned.

It is said in 29 Cyc. page 1381:

> "It is contrary to the policy of the law for an officer to use his official appointing power to place himself in office, so that even in the absence of a statutory inhibition all officers who have the appointing power are disqualified for appointment to the office to which they may appoint."

In the case of *State vs. Taylor* 12 O. S. 130, the syllabus reads:

"Where a member of the board of directors of a county infirmary was, by said board, appointed to the office of superintendent of the county infirmary, he still continuing to hold the office of director—Held,

That the duties of the two officers are incompatible, and can not be legally held by the same person at the same time; and such appointment was therefore, illegal and void."

The opinion of the court in this case is set out in eight lines, the substance of which is that the court concurs with "counsel for the relators in their view of the law of the case." In this case the question arose whether a board of directors of a county infirmary could appoint one of its own number as superintendent of the infirmary and it was contended that inasmuch as the statute did not prohibit the making of such appointment that the appointment was valid. Counsel for the relators, to which the court refers in its opinion, said in their brief:

"All, however, that can be inferred from this statutory silence, is, that any citizen of the state is capable of having *conferred upon him,* any two or more offices, the contemporaneous holding of which by the same person, is not prohibited; but this is far from saying that any citizen, under any circumstances, may *confer upon himself,* any office whatsoever. The word *appoint,* when used in connection with an office, *ex vi termini,* implies the conferring of authority upon another. It was not necessary, therefore, that the statute should, in express terms, prohibit the infirmary directors from appointing one of their own number superintendent; for the language, 'the board of directors shall *appoint* a superintendent,' *necessarily* means, that the person *appointed* shall be different from those who *appoint.* * * *"

In the case of *Beebe vs. Supervisors of Sullivan County,* 19 N. Y. Supplement 629, affirmed in 152 N. Y. 631, there was under consideration a contract made by a board of supervisors of a county to employ one of its members, an attorney, to prosecute certain actions in which the county was interested. The employment was held void. While in that case there was employment as distinguished from a public office, the court laid down certain principles which are applicable here. The court said:

"The illegality of such contracts does not depend upon statutory enactments. They are illegal at common law. It is contrary to good morals and public policy to permit municipal officers of any kind to enter into contractual relations with the municipality of which they are officers; * * *"

There are many authorities in other states in which a similar question has arisen. An examination of these authorities discloses the same general attitude of the courts toward it. In some of the instances which have arisen there is a special statute which has been held to be violated, but most, if not all, of these statutes have been enacted in aid of the common law, to put in specific statutory form what the common law frowns upon.

In this connection, there might be a question raised to the incompatibility of the two offices of membership of a board of education and membership of a board of library trustees who are dependent for funds for library purposes on the proceeds of tax levies, the levying of which are entirely within the discretion of the board of education. In view of what I have said, it is not necessary to

examine this question, as the member or members of the board of education who had appointed themselves to the library board never became members of the library board, and the question of incompatibility could not arise.

You also state in your inquiry that the acts of the board of education in the Covington School District in hiring teachers have been questioned for the reason that the deciding vote in employing such teachers was cast by a member of the board of education who is also acting as trustee of the joint library board.

As I view the law, and especially in accordance with the decision of the case of State vs. Taylor, supra, the status of the board of education of the Covington School District has not been in any way affected by its attempted action to appoint its members as members of the board of trustees of the joint library board. In any event, its proceedings would be that of a de facto board, and would be perfectly valid, and its legal existence could not be collaterally attacked.

Specifically answering your questions:

1. The boards of education of Covington School District and Newberry Township School District can not appoint their members to membership, on a board of trustees, for the management of a joint library created under the provisions of Section 7633, General Code.

2. The fact that the Covington School District Board of Education has attempted to appoint certain of its members to membership on a board of trustees for the management of a library owned and operated by it jointly with another school district, and such member or members have been, and are now acting as such library trustees under an attempted appointment does not render the acts and proceedings of the school board invalid, even though such member participated in the proceedings of the board, and contracts entered into with teachers by such board, providing the provisions of law with reference thereto have been complied with, are valid.

Respectfully,
EDWARD C. TURNER,
Attorney General.

604.

BOARD OF EDUCATION—UNAUTHORIZED TO EXPEND IN EXCESS OF A BOND ISSUE UNLESS THE BOND LEGISLATION AND NOTICE OF ELECTION INDICATED THAT THE RESULTING IMPROVEMENT WOULD BE INCOMPLETE OR THAT OTHER SOURCES OF REVENUE WOULD BE UTILIZED IN THE COMPLETION.

SYLLABUS:

Where the electors of a school district have authorized a bond issue for a specific improvement, the board of education is without authority to expend in excess of the sum so authorized for the completion of such improvement, unless the bond legislation and notice of election indicated that the resulting improvement would be