

it was held that the personal property tax laws of Arkansas did not operate over the territory of Camp Pike the lands of which had been purchased by the United States with the legislature's consent. The same conclusion would necessarily have been reached had the imposition been a sales or a license tax. In this case, too, the Supreme Court declared that the fact that the Arkansas Legislature inserted, in the act of cession, a provision expressly relinquishing the right to tax the land over which jurisdiction was ceded, did not disclose a purpose to reserve the power to tax save as to such land.

For the foregoing reasons, I am of the opinion that the Ohio cigarette sales and license taxes are not applicable to the sale of cigarettes upon the grounds of the two federal aviation fields, namely, Wright and Patterson Fields, in Montgomery County.

Respectfully,
GILBERT BETTMAN,
Attorney General.

4467.

BOARD OF EDUCATION—EMPLOYMENT OF COUNTY SUPERINTEND-
END OF SCHOOLS—APPOINTMENT OF SUPERVISOR.

SYLLABUS:

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.*

3. *When the board of education of a rural school district employs a supervisor, whom they style "superintendent of schools," for a term of three years, his contract of employment need not bear the certificate of the fiscal officer provided in Section 5625-33.*

4. *The term "current salary" as used in the exception in paragraph D, Section 5625-33, applies to the entire salary of a regular employe, even though his contract of employment runs for more than one year.*

COLUMBUS, OHIO, June 30, 1932.

HON. GEORGE S. MIDDLETON, *Prosecuting Attorney, Bellefontaine, Ohio.*

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

"We have the following problem to present to you for your consideration and judgment:

On May 11, 1931, the Board of Education of Stokes Township School District in Logan County, Ohio, met in adjourned session with all members present; the following motion was made and duly seconded: 'that Prof. J. W. I. be hired as Superintendent for the term of Three (3) years, at a salary of Three Thousand Dollars (\$3,000.00) per year, if the money is available.' Thereupon, the question was called and the motion was carried by three to two votes, all of which is properly shown by the books of the clerk. There also is a note here that one of the members of the board who voted for the motion was a Township Trustee of Stokes Township, Logan County, Ohio, which is included in the Stokes Township Rural School District. Said member was appointed as a member of the Board of Education to fill a vacancy. The Clerk of the Board at that time certified on his minutes that the money was not in the treasury nor in the process of collection to meet the foregoing contract.

Pursuant to the above motion, the following contract, a copy of which is hereto annexed, was entered into by the parties.

The question now is, is the above contract a valid obligation of the Stokes Township Rural School District?"

Accompanying your inquiry is a copy of a contract which was entered into in pursuance of the action of the board of education, mentioned in your letter, which is as follows:

"TEACHER'S CONTRACT

An agreement entered into between J. W. I. of Logan County, Ohio, and the Board of Education of Stokes Township School District in Logan County, Ohio; the said J. W. I. hereby agrees to teach in the public schools of said district for a term of Three years and also agrees to abide by the rules and regulations of the schools of said district. And in consideration of such services, the said board of education agrees to pay said J. W. I. the sum of Three Thousand dollars per year, payable monthly at the office of the treasurer of the board of education.

It is further agreed that the provisions of Section 7700 of the General Code are a part of this contract.

Entered into this 2nd day of June, 1931.

Said J. W. I. to perform all duties of Superintendent of said school, teach, take enumeration and perform all duties pertaining to the administration of the school.

J. W. I.
Teacher
N. J. E.
President
E. L. V.
Clerk"

In the consideration of your inquiry, several questions are suggested. I do not attach any particular significance to the fact that one of the acting members of the board of education who voted for the motion of May 11, 1931, to employ a superintendent, was, at the time, a member of the board of trustees of Stokes Township. Although it has been held by a former Attorney General, and I believe correctly so, that the office of township trustee and member of a board of education of a school district, any part of the territory of which is embodied in the township, are incompatible and may not be held simultaneously by one and the

same person (Opinions of the Attorney General for 1915, page 2251), it is a well recognized principle of law that a person having color of title to an office is regarded as a de facto officer even though legally he is not eligible for the position. As such de facto officer, his acts while performing the duties of the office, are as valid and effectual when they concern the public or the rights of third persons until his title to the office is adjudged insufficient by a court of competent jurisdiction, as though he were an officer de jure. *State vs. Gardner*, 54 O. S., 24; *State vs. Alling*, 12 Ohio, 16.

It has been directly held that one who is qualified for a second office and takes possession of the office and discharges the duties thereof is not precluded from becoming an officer de facto by reason of the fact that at the time of his election or appointment he was the incumbent of another office and was disqualified from holding two offices. *Martin vs. Grandview Independent School District* (Tex.) 266 S. W., 607; *Johnson vs. Sanders*, 131 Ky., 537; *Pruett vs. Slab Forks School District*, 104 W. Va., 35.

There is also good authority for saying that the acceptance of a second office automatically vacates the first where the holding of the two offices by the same person at the same time is contrary to law. This is on the theory that the acceptance of a second incompatible office is an abandonment of the first. Throop on Public Offices, Section 31 and 32; Corpus Juris, Vol. 46, page 947; *State vs. Mason*, 61 O. S., 513.

In any view of the matter it can not be said, in my opinion, that the attempt to make the contract in question, fails because of the fact that one of the members of the board who voted for the motion authorizing the hiring of a superintendent of schools was at the time a member of the Board of Trustees of Stokes Township, nor does the fact that the clerk of the board of education certified at the time of the passage of the motion, that there was not sufficient money in the treasury or in process of collection to meet the terms of the contract, militate against its validity. If a clerk's certificate as to the availability of funds were made necessary by the strict terms of Section 5625-33, General Code, upon entering into this type of contract, it would in any event need to go no farther than to cover funds sufficient to meet the terms of the contract during the fiscal year in which the contract is made.

The contract spoken of in Section 5625-33, General Code, where it is provided that no valid contract involving the expenditure of money may be entered into by a subdivision or a taxing unit unless there is attached thereto a certificate of the fiscal officer of said subdivision or taxing unit, to the effect that the amount required to meet the terms of the contract is in the treasury or in process of collection, does not include, in my opinion, the class of contracts here under consideration. Contracts to be met through payrolls of regular employes and officers are exempted from the provision of the statute referred to above by the specific terms of the statute itself. The statute provides, in the last paragraph but one thereof: "The term 'contract' as used in this section shall be construed as exclusive of current payrolls of regular employes and officers."

Although there is nothing in the terms of the motion passed by the Stokes Township Board of Education to indicate that the person to be employed will be placed on a current payroll or that the contract of employment is any other than an entire contract to perform certain services to be paid for upon the completion of the services, it is a well known fact that contracts of this nature being for personal services, are met by means of payrolls and the persons rendering the services are paid semi-monthly or monthly for the services rendered by payroll accounts as all regular employes are invariably paid. I believe a court would

take judicial notice of this fact and would not hold such a contract to be invalid because of the lack of a clerk's certificate as to the availability of funds to meet the contract. See Opinions of the Attorney General for 1927, Volume 3, page 2256, and Opinions of the Attorney General for 1928, Volume 2, page 1540. *Lee vs. Brewster Village School District* 29 N. P., N. S., 135.

A more difficult question is presented by reason of the fact that the resolution of the Stokes Township School Board, which is quoted in your inquiry, purports to employ a "superintendent." The written contract entered into in pursuance of this resolution provides primarily for the hiring of a "teacher" although it contains provisions requiring the rendition of services as superintendent of the schools of the district as well as teaching in those schools.

This office has consistently maintained that since the enactment of the School Code of 1914 (104 O. L., 133), providing for county school districts and supervision of schools in those districts by a county superintendent of schools and necessary assistant county superintendents of schools, no authority exists for the employment of local superintendents of schools in other than city and exempted village school districts.

Section 7690, General Code, in terms, authorizes, but does not require, rural and village boards of education as well as city boards to employ a superintendent of schools. The language of this section with respect to this matter, however, had its origin in legislation enacted many years prior to 1914, when county school districts were created and supervision of schools within those county school districts provided for otherwise than by local superintendents. This language was retained in several subsequent revisions of this statute since that time.

The powers granted to boards of education by the provisions of Section 7690, General Code, are general in terms, and although broad, should be regarded as being limited by the provisions of Sections 4684, 4728, 7705, 7706, 7763-3 and Sections 4744-1, 4744-2 and 4744-3, General Code.

These latter sections provide for the creation of county school districts and the supervision of the schools within those districts by a county superintendent of schools and necessary assistants selected by the county board of education for the county school district. These sections are in pari materia with Section 7690, General Code, and when so construed, clearly imply that school supervision within a county school district shall be conducted by the county superintendent and his assistants and not locally. This legislation is intended to relieve local districts of a portion of the burden of supervision, inasmuch as it is provided that one-half the salaries of county superintendents of schools and assistant county superintendents of schools is to be paid from the state treasury. The purpose of the legislation, in addition to relieving local districts of a portion of the cost of school supervision, was, no doubt, in furtherance of uniformity of methods of teaching and better and more practical coordination of school curricula, to the end that pupils may be the better prepared for high schools and colleges.

That the legislature intended this method of county supervision of schools within a county school district to be exclusive of local supervision is apparent in that there was enacted, when the county method of supervision was first provided for in 1914, Section 4740, General Code (104 O. L., 141) by force of which those village and rural districts that had, prior to that time (1914), employed a superintendent of schools locally, might continue to do so if they desired and the local superintendent so employed was to be regarded as an assistant or subordinate of the county superintendent so far as the supervision of schools in his particular district was concerned. Said Section 4740, General Code, was repealed in 1929 (113 O. L., 687).

In view of the aforesaid legislation on this subject, a former Attorney General in an opinion reported in the Opinions of the Attorney General for 1921, page 684, was led to hold as follows:

"A rural board of education is without authority to elect a superintendent of schools under the general language of Section 7690, General Code, 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."

The only instance, to my knowledge, that this question has been before the courts was in the case of *Lee vs. Brewster Village School District*, decided by the Common Pleas Court of Stark County January 21, 1932. This case is reported in the issue of February 8, 1932, of the Ohio Law Bulletin and Reporter. The case is interesting in that there were involved other questions more or less pertinent to the present inquiry. The headnotes of the case, as published in the Reporter, read as follows:

"1. 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 superintendent 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.

2. When the board of education of a rural school district employs a supervisor, whom they style 'superintendent of schools,' for a term of three years, his contract of employment need not bear the certificate of the fiscal officer provided in Section 5625-33.

3. The term 'current salary' as used in the exception in paragraph D, Section 5625-33, applies to the entire salary of a regular employe, even though his contract of employment runs for more than one year.

4. A contract of employment of a regular employe is good, even though the money to pay the same is not appropriated under paragraph B, Section 5625-33, at the time the contract is made."

The court, in the above case, held that a rural board of education may employ a local "supervisor." If they choose to call him a "superintendent," that fact does not make him one, only as he may cooperate with the county superintendent of schools in the supervision of the schools of his district. The fact that they call him a "superintendent" does not make his employment illegal, although in reality, he is not a superintendent. Even the employment of a supervisor, under the court's holding, is limited to the exercise of a proper discretion. In many cases the employment of such a person would likely be held to be an abuse of discretion because it would simply result in the duplication of the work of local principals, and of county and assistant county superintendents. Whether or not, in any case, such employment constitutes an abuse of discretion is a question of fact, and can be determined only by the decision of a court.

The fact is that in many rural and village districts such a person is employed and designated a "superintendent of schools." In most such cases he is required to teach at least a part of the time, and is virtually a teacher. In view of this

custom, and the state of the law with respect to this matter, I am of the opinion that the resolution of the Stokes Township Rural District Board of Education would be held to be a proper exercise of power and would be construed as being an employment of a person as a supervisor and teacher, especially at this time, after the lapse of nearly a year during which time he performed duties as teacher and supervisor in accordance with the terms of his contract apparently with the full knowledge of acquiescence of the board of education.

Boards of education in the employment of teachers are required, by the terms of Section 7690-1, General Code, to fix their salaries. This was done in the present instance by fixing the salary at the sum of \$3,000.00 per year. The expression, "if the money is available" used in the resolution of the board fixing this salary, may be regarded as surplusage. Resolutions and motions of administrative boards as well as those of legislative bodies, are subject to construction and interpretation so as to effectuate the real intention and purpose of their adoption. In doing so, it may be observed that, to use the words of the Supreme Court, in the case of *State ex rel. Evans*, 90 O. S., 243, at page 251:

"Obviously, the proceedings of boards of education, of county commissioners, township trustees and the like, may not be judged by the same exactness and precision as would the journal of a court."

I am therefore of the opinion, in specific answer to your inquiry, that the contract in question is a valid obligation of the Stokes Township Rural Board of Education.

Respectfully,
GILBERT BETTMAN,
Attorney General.

4469.

APPROVAL: CONTRACTS FOR ROAD IMPROVEMENT IN HURON,
GUERNSEY AND WOOD COUNTIES.

COLUMBUS, OHIO, July 1, 1932.

HON. O. W. MERRELL, *Director of Highways, Columbus, Ohio.*

4470.

FOREIGN CORPORATION—TREATING TOBACCO IN OHIO—MUST
COMPLY WITH FOREIGN CORPORATION ACT—SUBJECT TO
PENALTY FOR FAILURE TO COMPLY WITH ACT.

SYLLABUS:

1. *Where the contract, sale, delivery, storage and ageing of tobacco are completed within Ohio by representatives of a foreign corporation, such corporation is doing business within the state of Ohio, and must qualify under the provisions*