I am not unmindful of the case of *City of Cincinnati* vs. *Puchta, Mayor,* 94 O. S. 431, in which the court held the publication of a notice of election for four weeks, covering a period of twenty-six days prior to the election, a legal compliance with Section 3946, General Code, which required thirty days' notice of the election in one or more newspapers printed in the municipality once a week for four consecutive weeks prior thereto. The Supreme Court held the election valid on the ground that there was no allegation that anybody was denied the right to vote by reason of the statute not being literally complied with.

While I am not entirely satisfied that in the instant case a court would hold the election illegal because of the fact that Section 5649-9b, General Code, was not literally complied with in the matter of newspaper publication of the notice of election, I feel that the pronouncement of the Supreme Court in the Kuhner & King case, supra, raises a sufficient doubt as to the validity of the election to require me, in the absence of a holding by a proper court to the effect that failure to so comply did not make the election invalid, to advise you not to purchase the above issue of bonds.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1515.

SCHOOLS—TRANSPORTATION OF ELEMENTARY PUPILS—RULE FOR COMPUTATION OF DISTANCE.

SYLLABUS:

In determining the distance which a pupil lives from the school to which he has been assigned, within the meaning of Section 7731, General Code, the distance should be computed by beginning at the door of the school house which would be the most accessible to the pupil in traveling from his home "by the nearest practicable route for travel accessible to such pupil", thence by the regularly used path to the center of the highway, thence along the center of the highway (which is the nearest practicable route for travel accessible to such pupil) to a point opposite the entrance to the curtilage of the residence of the pupil, or, if the curtilage of the residence of the pupil does not extend to the highway, to the path or traveled way leading to the entrance to such curtilage, thence to the entrance of the curtilage, along the path or traveled way to said entrance.

COLUMBUS, OHIO, January 4, 1928.

HON. JOHN K. SAWYERS, JR., *Prosecuting Attorney, Woodsfield, Ohio.*

DEAR SIR:—Permit me to acknowledge receipt of your communication requesting my opinion, as follows:

> "A matter has arisen growing out of a transportation case filed against a district school board in this county on which I desire your opinion for the reason that it will be of practicable importance in determining numerous similar cases which are on the point of being filed in the event the instant case is decided adverse to the contention of the local school board.
>
> The proposition involves the interpretation of Section 7731-4 of the General Code of Ohio relative to the transportation of elementary pupils

living more than *two miles* from school. The particular part of that section of the Code in question is that part consisting of the last clause in next to the last paragraph beginning,

'If, however, the county board of education agrees with the view of the local board, it shall be deemed compliance with the provisions' - - - and concluding with 'a rate determined for the particular case by the local board of education for each day of actual transportation.'

In other words, the county board has agreed with the local board, that it would be impracticable to provide a school bus and the local board has determined a rate for the particular case which it has tendered to the mother of the seven year old child involved in the case. The board has fixed the rate of $35.00, whereas the petition of the plaintiff in the case asks for the sum of $228.00.

The question is:

1. Is the actual determination of the rate to be paid by the board and its tender, such a disposition of the claim as to satisfy the board's legal (statutory) obligation? In other words, does the same rule of interpretation apply in such a matter as was applied by the court in the interpretation of a somewhat similar section of law, the same being Section 3480 of the General Code in regard to compensation of physicians rendering medical attention to the poor. In that statute we find a provision that 'the township or municipal corporation shall be liable for the relief and services rendered such person in *such an amount as such trustees or proper officers determine to be just and reasonable.*'

In the case of *Trustees* vs *Houston*, 2 C. C. 15, Seyney, J., in rendering an opinion of the court on this proposition says that:

'The express language of the statute is, he shall be paid what the trustees determine is just and reasonable after notice, and until this is determined, no liability exists, before this is determined, the right exists to have it determined, or in other words, the right exists to create a liability against the township. There is no hardship as suggested by counsel. The physicians perform the services with knowledge of the law it is a part of their implied agreement so far as pay is concerned. - - - So in this case, where the trustees allowed what was just and reasonable for the service, a legal demand against the township for its payment was created; the legal demand was for the amount so fixed by the trustee; and for nothing more. Before the trustee had determined what was reasonable and just, the legal demand existed to determine what was legal and just. This is the view of the court upon the question, as to services after notice; as to services performed before notice, if the notice is given within three days, the majority of the court are of the opinion that the service relates back to its beginning, and the trustees shall allow for the entire services what in their judgment is reasonable and just.'

It would seem that the above reasoning should apply in the determination of the correct interpretation of the clause in Section 7731-4 of the General Code of Ohio, above referred to. If parents and guardians of children can except to the determination of the rate by the local board of education, and can litigate for what a jury may think would be a reasonable compensation, for the transportation of a child in question, then we will have one law suit after another.

Furthermore, if $224.00 is a reasonable amount for the transportation of this one child, with numerous children who are in the *same predicament*, as this child, in the same district, the total amount that will have to be paid by the board of education for transportation alone will exceed the total operating expenses in the maintenance of the school and will necessitate the discontinuance of most of the schools in the county by reason of the want of funds as all of the schools in this county practically are under state aid at this time and are finding it extremely difficult to take care of operating expenses without making an allowance for transportation.

2. It will be noted further that the statute relative to transportation of elementary pupils, formerly provided that if the pupil lives more than two miles from the school, 'by the nearest practicable route for travel accessible', the board of education shall provide transportation, etc.

In 21 Ohio N. P. (N. S.) page 126, the court, in interpreting the above, held that distance is to be measured in this kind of a case, 'from the exit of the curtilage by the most direct way to the point where it intersects the highway.'

In an Attorney General's Opinion 1919, page 1439, it was ruled that the route must be a traveled public highway, one that could be used by vehicles. Inasmuch as the words of Section 7731, as regards this clause, have been changed somewhat from what they were at the time this opinion was given, the question arises whether or not such route must now be a road open to vehicles. This is a question of extreme importance down here in Monroe County by reason of the fact that frequently during bad weather, the most practical route of travel for school children, and for adults for that matter, is a path across fields. Very frequently the public highway between two points, will be two or three miles in length and impassable, whereas one can cut across fields by paths, sometimes well established, and reach the same destination in less than a mile of walking. In other words, the children can take a path through the fields and reach the school by walking a mile, whereas by the public highway, they would have to go three or four miles over an almost impassable road.

I might add that in all transportation cases, in this county, it has always been determined by the local board and the county board of education that transportation by means of school bus was absolutely impracticable. Therefore, it will be necessary, in disposing of transportation claims, to determine a rate for each particular case.

I would appreciate an opinion on this proposition at your earliest convenience, inasmuch as this case is in litigation and will probably be tried within the next month."

Upon receipt of the above letter I advised you that it had "always been the practice of this department to refrain from expressing an opinion upon any matter which is pending before a court for decision or determination, and in reply thereto you wrote as follows:

"It is true that question No. 1 in my letter of October 20 is based upon the facts of a case now in litigation here. However, question No. 2 relative to how distance should be measured in order to bring a case under 7731 of the Code is not in litigation. I would appreciate very much a construction as regards that inasmuch as the statute provision relative to same

has undergone revision since the last opinion from your office on that point has been written.

I might add that, although the facts of the question listed No. 1 are involved in litigation, yet my opinion is being (requested) every few days on variations of it. The one question that is most frequently asked is can the local board, after being affirmed in their decision that school conveyances are impracticable by the county board, fix a nominal rate of payment for transportation and thereby comply with Section 7731-4 or must they fix a rate that would be deemed reasonable by a jury? Inasmuch as this question is continually bobbing up and I am being pressed by school boards for an opinion on it so as to permit school boards to take action on the same as regards this year's transportation problems, I would appreciate an opinion on same. The case in litigation will not be settled in the Court of Appeals until next April when the school year will be over for rural schools."

With reference to your first question, I feel that I should adhere to the uniform practice of this department and refrain from expressing my opinion thereon, in view of the fact that the matter is now pending in court.

In this connection, however, I feel at liberty to direct your attention to Section 7731-4, General Code, which provides as follows:

"If a local board deems the transportation, required under any provision of law, of certain children to school by school conveyance impracticable and is unable to secure what is deemed a reasonable offer for the transportation of such children the local board shall so report to the county board of education. If the county board of education deems such transportation by school conveyance practicable or the offers reasonable they shall so inform the local board and transportation shall be provided by such local board. If, however, the county board of education agrees with the view of the local board it shall be deemed compliance with the provisions of Sections 7730, 7731, and 7764, General Code, by such local board if such board agrees to pay the parent or other person in charge of the child or children for the transportation of such child or children to school a rate determined for the particular case by the local board of education for each day of actual transportation.

It shall be the duty of the teacher or teachers in charge of such children to keep an accurate account of the days they are transported to and from school. A failure of a parent or guardian to arrange to have his child transported to school, or his failure to have the child attend on the ground that the transportation is not supplied cannot be plead as an excuse for the failure of such parent or guardian to send such child to school or for the failure of the child to attend school,"

and to say that, in my opinion, even though the court should find that a board of education has discretion to fix the amount of compensation to be paid for transportation, and that by reason thereof a civil action would not lie against such board, it would be the duty of the board of education in exercising such discretion not to abuse the same by fixing a merely nominal amount, which would not be at all commensurate with the cost of such transportation. A board of education cannot abuse its discretion, which must be exercised honestly and fairly. Any abuse of discretion can be prevented by a proper action in a court of competent jurisdiction.

Your second question requires a determination of the line to be followed in measuring the two miles provided for in Section 7731 of the General Code, which reads in part as follows:

> "In all city, exempted village, rural and village school districts where resident elementary school pupils live more than two miles from the school to which they are assigned the board of education shall provide transportation for such pupils to and from school except when in the judgment of such board of education, confirmed, in the case of a school district of the county school district, by the judgment of the county board of education, or, in the case of a city or exempted village school district, by the judgment of the probate judge, such transportation is unnecessary.
> * * * * *"

It will be noted that said section applies to transportation of pupils living "more than two miles from the school to which they are assigned." This language has been construed by the courts of this state.

In the case of *State ex rel.* vs. *Board of Education,* 20 O. N. P. (N. S.) 126, the headnote reads:

> "Under the law providing that in all rural and village school districts transportation shall be provided for pupils who live more than two miles from the nearest school house, distance is to be computed by including the distance from the exit of the curtilage by the most direct path or way to the point where it intersects the highway leading to the school house."

The court in that case was required to determine what measurements should be made in case the residence of the pupil was not upon a public highway, but was located off the road and the highway was reached by means of a lane leading from the residence to the highway. The court held that in computing the distance which the pupil would be compelled to travel over such line from the highway to "the curtilage or yard around the house" should be included.

A similar question was also considered in the case of *Board of Education* vs. *Board of Education,* 11 O. N. P. (N. S.) 286. In that case the court was construing the language "when pupils live more than one and one-half miles from the school to which they are assigned". Relative thereto the court said:

> "The ruling of the court is that in estimating the distance from the home to the school the measurement begins at the exit from the curtilage —ordinarily the front gate—from which, if it is not on the highway, thence along the most direct established route, by lane or path, to the nearest highway, thence following the center line of the most direct course in the highway to the door of the school building."

Language similar to that contained in Section 7731, supra, was construed by the Supreme Court in the case of *Board of Education* vs. *Board of Education,* 58 O. S. 390. The syllabus in the case reads as follows:

> "The distance of its residence from the school of its district, which under Section 4022a, Revised Statutes, entitles a child of school age to attend the school of another district, is one and a half miles by the most direct public highway from the school to the nearest part of the curtilage of its residence."

You state in your communication that if the children travel across the fields by a direct route they would travel less than a mile in going to the school to which they are assigned. The Supreme Court in the last above mentioned case clearly pointed out that such a course of travel was not to be considered in determining the distance the pupil lives from the school house. On page 394 the court said:

> "Counsel for the plaintiff in error contend that the distance from residence to school is to be taken 'as the crow flies.' The courts below properly rejected this aerial view of the subject. The legislation provides for the convenience of children in attending school, and the distance is to be taken as they travel along the most direct public highway from the schoolhouse to the nearest portion of the curtilage of their residence."

It is quite apparent that it was not the intention of the legislature to compel parents to send their children across the fields to the school house, which, in many instances, would require them to travel over other people's property. They would thereby become trespassers unless proper arrangements were made with the owners of such property over which the pupil would have to travel.

You refer to an opinion found in Opinions of the Attorney General for 1919, Vol. II, page 1439, in which it was held:

> "Distance from the residence of pupils to the school house to which they are assigned must be measured over the nearest traveled public highway, that is, the highway that is at all times practicable, convenient and accessible to such pupils, and one that can be used by vehicles of travel."

That opinion dealt with a situation wherein the road had been permitted permanently to become in such a condition by gulleys being washed in it and by the growth of weeds, that it no longer could be considered a highway open for public use. The condition of the road considered in that opinion was permanent rather than temporary in nature.

With reference to this question, in Opinion No. 1364, rendered under date of December 14, 1927, to the Prosecuting Attorney of Miami County, this office said as follows:

> "In construing statutes relating to school accommodations, where there is contemplated the passage to and from school of pupils attending school, it is well recognized that the distance is to be measured by the highways which are actually open, passable and available to the pupils for use in going to and from the schools. This does not mean that the closing of a road for ever so short a time necessarily creates a liability on the part of the board of education to transport pupils, which liability would not have existed but for such temporary closing of the road. What is contemplated is that the distance is to be measured along the most direct highway which, but for some unusual happening temporarily obstructing the way, would be open and available for use by the school pupils who desire to avail themselves of its use."

I am herewith enclosing a copy of this opinion.

Answering your second question specifically, it is my opinion that in determining the distance which a pupil lives from the school to which he has been assigned, within the meaning of Section 7731, the distance should be computed by beginning

at the door of the school house which would be the most accessible to the pupil in traveling from his home "by the nearest practicable route for travel accessible to such pupil", thence by the regularly used path to the center of the highway, thence along the center of the highway (which is the nearest practicable route for travel accessible to such pupil) to a point opposite the entrance to the curtilage of the residence of the pupil, or, if the curtilage of the residence of the pupil does not extend to the highway, to the path or traveled way leading to the entrance to such curtilage, thence to the entrance of the curtilage, along the path or traveled way to said entrance.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1516.

INDIGENT POOR—OUTDOOR RELIEF FOR POOR IN MUNICIPALITIES —TAX LEVY—RELIEF FOR POOR RESIDING IN TOWNSHIP.

SYLLABUS:

1. *Outdoor relief, that is partial and temporary relief, for the poor in cities should be furnished by the proper municipal officers, and provision therefor should be made by the proper authorities in the making of tax levies and the adjustment of budgets.*

2. *Township trustees are limited in the granting of partial and temporary relief to the poor, to persons who reside in the territory within the township which lies outside the corporate limits of cities.*

COLUMBUS, OHIO, January 4, 1928.

HON. FRANK WIEDEMANN, *Prosecuting Attorney, Marion, Ohio.*

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

> "Following a ruling of your office, the county budget commission allowed the sum of $4500.00 to the township trustees of Marion Township for the coming year of 1928, to take care of poor relief. Also, following your ruling, no money was allowed the City of Marion for poor relief. Of course the tax levied was levied upon all of the property of Marion Township, hence the township trustees have the burden of looking after the poor in the City of Marion as well as in the township. Have the trustees of Marion Township the authority to hire someone who is familiar with poor relief in the city to look after the poor relief work in the City of Marion and pay him a reasonable compensation for his work?
>
> Formerly, the health commissioner of the City of Marion served in this capacity for the city and received therefor from the city the sum of $25.00 per month. Could the health commissioner of the City of Marion enter into a contract with the township trustees to do this work and still retain the office of health commissioner?"