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EDUCATION—TRANSFER OF TERRITORY—Am. S.B. 278, 102nd GA—DID NOT AFFECT “PENDING PROCEEDINGS”—§§3311.23, 3311.27 R.C.—PUBLICATION PROVISIONS OF FORMER §3311.27 R.C., TIME HELD DIRECTORY.

SYLLABUS:

1. The repeal by Amended Substitute Senate Bill No. 278, effective January 1, 1958, of Sections 3311.23, 3311.27, Revised Code, did not affect proceedings then pending for transfer of territory from a local school district to an exempted village school district, and publication of the resolution of the county board of education ordering such transfer may be published as provided in said Section 3311.27, Revised Code, notwithstanding such publication is made or completed after January 1, 1958.

2. The provisions of former Section 3311.27, Revised Code, as to the time of publication are directory, and publication of the resolution of the county board of education ordering transfer of territory pursuant to former Section 3311.23, Revised Code, if made with reasonable promptness after January 1, 1958, will be a sufficient compliance with the law relative to such publication.

Columbus, Ohio, February 8, 1958

Hon. Robert G. Tague, Prosecuting Attorney  
Perry County, New Lexington, Ohio

Dear Sir:

I have before me your request for my opinion reading as follows:

“Prior to the 1st day of November, 1957, there was filed with the Perry County Board of Education a petition requesting the transfer of all of the territory comprising Pike Local School District, Perry County, Ohio, as it was then constituted, to the New Lexington Exempted Village School District, Perry County,

Ohio. This petition contained the signatures of more than seventy-five per cent of the qualified electors residing in the territory sought to be transferred, voting at the last general election.

"Thereafter, and on December 18, 1957, the Perry County Board of Education adopted a resolution, pursuant to the provisions of Section 3311.23, Revised Code, making the requested transfer. A copy of this resolution was submitted to the Clerk of the Board of Education of New Lexington Exempted Village School District on December 19, 1957. Thereafter, and on January 15, 1958, the Board of Education of New Lexington Exempted Village School District, by resolution, accepted the transfer.

"Incident to the proceedings of the Perry County Board of Education, there was no publication of the transferring resolution as is required by Section 3311.27, Revised Code. Because the publication dates of the weekly newspapers generally used in this county are on Thursdays, as a practical matter, it was probably impossible for the County Board to have complied with Section 3311.27 because the second publication would have extended into 1958 and after this section was repealed.

#### LAW

"From our study, the pertinent code sections provide, in part, as follows:

"Section 3311.23: *'Transfer of local School District Territory.* If a county board of education deems it advisable to transfer a part or all of the territory comprising a local school district . . . *when the requirements provided herein have been met the transfer shall be effective on the next succeeding July 1.'* (Underscoring ours)

"The foregoing section became effective September 16, 1957, and the paragraph underscored is not found in former Section 3311.23.

"Section 3311.27: *'Publication of Adopted Resolution.* The county board of education shall cause any resolution adopted by such board evidencing any action authorized by Section 3311.23 and 3311.26 of the Revised Code, to be published in one newspaper of general circulation in the territory affected, once each week for two consecutive weeks, and such publication shall be completed not later than the third Saturday following the adoption by the board of such resolution.'

"The foregoing section was repealed, effective January 1, 1958.

"As a practical consideration, with the County Board's having passed the transferring resolution on Wednesday, December

18, 1957, it was impossible for it to have accomplished the two weeks' publication required by Section 3311.27 before 1958 (the effective date of repeal), because the weekly newspapers generally used for publication purposes in this county are all published on Thursdays, and, in consequence, the publications would have been carried in the newspaper issues of December 26, 1957, and January 2, 1958. Moreover, it is certainly arguable that with the addition to Section 3311.23 of the paragraph quoted above which, again, reads, '. . . when the requirements provided herein have been met the transfer shall be effective on the next succeeding July 1,' compliance with the publication requirement of now repealed Section 3311.27 was and is not mandatory.

### QUAERE

"1. Assuming all the requirements of Section 3311.23, Revised Code, are met, would a failure to have complied with the publication requirements of now repealed Section 3311.27, Revised Code, invalidate the transfer of the territory comprising a local school district to an exempted village school district?"

There is one more element in connection with the statutes to which you have called attention which, it seems to me, will be practically decisive of the question which you have submitted. Both Sections 3311.23, 3311.27, Revised Code, were repealed by an act effective January 1, 1958. But that act, Amended Substitute Senate Bill 278, after its repealing section, contained an additional Section 3311.341, reading in part as follows:

"\* \* \* Nothing herein shall nullify or affect any proceedings or actions pending under the provisions of sections 3311.21, 3311.23 and 3311.26 of the Revised Code."

Inasmuch as Section 3311.27, Revised Code, which you have quoted, formed an essential part of the proceeding then pending under Section 3311.23, Revised Code, it seems clear that it provided an essential step in the completion of the transfer of territory then in process. Accordingly, it seems clear that it too was preserved for the purpose of completing the transfer.

Therefore, the only question which remains for consideration is whether the fact that the publication of the resolution of the county board ordering the transfer of the territory was not made within the time limit set out in said Section 3311.27, Revised Code, invalidates the entire proceeding which in all other respects, was complete. This raises the question whether the time limit as to such publication is mandatory or only directory.

It is well settled that the character of a statute in this respect is not always to be determined by the language used. The word "may" is sometimes to be construed as mandatory, while the word "shall" is frequently construed as merely directory. As stated in 37 Ohio Jurisprudence, 333:

"There are a great many statutes in which the time is fixed for doing stipulated things and in which time is of the essence of the matter; and, in such event, the statute must be considered to be mandatory, and the act cannot be performed at any other time. On the other hand, there are many statutes where the time designated is not of the essence of the matter; and, in such instances, the provisions are directory merely—at least where the rights of no person or class of persons would be prejudiced by the delay. All enactments imposing duties impossible of performance within the stipulated time have been declared directory." (Emphasis added)

In the case of *State ex rel. Alcorn v. Mittendorf*, 102 Ohio St., 229, the court had before it a statute which required the county commissioners at each September session; to "cause the list of persons delinquent in the payment of taxes on personal property to be publicly read." It appeared that the list had been read but *purely due to neglect*, it had not been done at the time specified, to-wit, at the September Session. The court held that while the reading was mandatory, the time was not of the essence, and that portion of the statute was merely directory. However, the court indicated that it was the duty of the board to act promptly after its attention was called to the omission.

To like effect see *State ex rel. Perkins v. Ross*, 109 Ohio St., 461, where the court having before it the right of a board of education to apply for and receive aid from the state equalization fund, provided, as specified in the law, it applied therefor by July 31, the application not having been made within the time limit, the court held, on the authority of the *Alcorn* case, that the time provision of the law was purely directory.

In the case you present, there appears no reason why any person or any school district involved in the transfer could be injured or prejudiced in the least by delay in publication of the resolutions of transfer. Furthermore, as strengthening that conclusion, we find in said Section 3311.23, Revised Code, as amended long after the passage of Section 3311.27, *supra*, this paragraph:

"When the requirements provided herein have been met the transfer shall be effective on the next succeeding July 1."

It is accordingly my opinion and you are advised:

1. The repeal by Amended Substitute Senate Bill No. 278, effective January 1, 1958, of Sections 3311.23, 3311.27, Revised Code, did not affect proceedings then pending for transfer of territory from a local school district to an exempted village school district, and publication of the resolution of the county board of education ordering such transfer may be published as provided in said Section 3311.27, Revised Code, notwithstanding such publication is made or completed after January 1, 1958.

2. The provisions of former Section 3311.27, Revised Code, as to the time of publication are directory, and publication of the resolution of the county board of education ordering transfer of territory pursuant to former Section 3311.23, Revised Code, if made with reasonable promptness after January 1, 1958, will be a sufficient compliance with the law relative to such publication.

Respectfully,

WILLIAM SAXBE

Attorney General