

any municipality, the provisions of Section 15 apply with respect to the term of a lease executed to any person or corporation other than a municipality or other legal subdivision of the state making application for a lease of said property. By the provisions of Section 15 of said act above quoted, such lease may be for fifteen years or multiples thereof.

As above noted, the lease here in question is one for a stated term of ninety-nine years, renewable forever, and said lease in this respect is not in conformity with the provisions of said act.

Since you as Superintendent of Public Works, have only such authority with respect to the matter of leasing canal lands of the state as is expressly given to you by statute (*State ex rel. vs. Railway Company*, 37 O. S. 157, 174), I am required to hold that you have no authority to execute a lease for the canal property here in question, to said company for a term other than that in conformity with the provisions of said act, and said lease is hereby returned without approval.

Respectfully,

GILBERT BETTMAN,
Attorney General.

563.

SCHOOL DISTRICT—TAXES LEVIED UNDER SECTION 7575, GENERAL CODE—HOW PROCEEDS FOR 1928 AND 1929 APPORTIONED—WHEN EDUCATIONAL SURVEY OF COUNTY BOARD OF EDUCATION TO BE MADE.

SYLLABUS:

1. *The proceeds of the 2.65 mills tax levy provided for by Section 7575, General Code, for the fiscal year 1928, the last half of which is collected in the June, 1929, tax collection, should be apportioned to school districts lying outside of city or exempted village school districts in accordance with the "annual distribution" of those taxes made by the county auditor in 1928, by authority of the then existing Section 7600, General Code.*

2. *The proceeds of the 2.65 mills tax levy provided for by Section 7575, General Code, for the fiscal year 1929, and collected in the December tax collection of 1929 and the June tax collection of 1930, should be apportioned to school districts lying outside of city and exempted village school districts in accordance with Section 7600, General Code, as amended by the 88th General Assembly.*

3. *The making of an educational survey by the county board of education as directed by the terms of amended Section 7600, General Code, contained in House Bill No. 256 of the 88th General Assembly, is a condition precedent to the making of the "annual distribution" of the 2.65 mills tax levy provided for by Section 7575, General Code, to the school districts outside of city and exempted village school districts.*

4. *The requirement of Section 7600, General Code, as amended by the 88th General Assembly, that each county board of education shall make an educational survey of the county school district for certain purposes on or before the first day of April of each year, is directory merely, so far as the time of making the survey is concerned, and if, for any reason, the survey is not made within the time fixed by the statute, it*

is the duty of the county board of education to make the survey at a later date and before the "annual distribution" of tax moneys, as directed by the statute, is made.

COLUMBUS, OHIO, June 27, 1929.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—This will acknowledge receipt of your inquiry which reads as follows:

"You are respectfully requested to furnish this department your written opinion upon the following:

House Bill No. 256, enacted at the recent session of the General Assembly, a copy of which is herewith enclosed, amends Section 7600 of the General Code relative to the distribution of the proceeds of the levy of 2.65 mills provided for in Section 7575, General Code. This act will become effective July 21st, 1929.

Question: Will the new method of distribution apply to the proceeds of this levy for the last half of the tax year 1929, the first half of which was distributed under the old law in February, 1929, or will it only apply to the proceeds of such levy on the tax duplicate of 1929 to be distributed in February and August, 1930?"

Section 7600, General Code, as amended by the 88th General Assembly, reads as follows:

"After each semi-annual settlement with the county treasurer each county auditor shall immediately apportion school funds for his county. Each city school district and each exempted village school district shall receive the full amount of the proceeds of the levy of two and sixty-five hundredths mills provided in Section 7575, General Code, in the given school district. The proceeds of such levy upon property in the territory of the county outside of city and exempted village school districts shall be placed in the 'county board of education fund' and shall be known as a 'county educational equalization fund.'

On or before the first day of April of each year, the county board of education shall make a survey of the county school district to determine the number of teachers and other educational employes, and the number of transportation routes necessary to maintain the schools of the county school district. After a public hearing, the county board of education shall certify to the board of education of each school district of the county school district the basis upon which they are determined and the approximate amounts which the several districts may expect to receive for teachers' salaries, the salaries of other educational employes and for transportation.

The proceeds of the county educational equalization fund shall be apportioned by the county board of education to each school district and part of district within the county outside of city and exempted village school districts on the basis of the number of teachers and other educational employes employed therein, and the expense of transporting pupils as determined by the above educational survey, and the balance according to the ratio which the aggregate days of attendance of pupils in such districts, respectively, bears to the aggregate days of attendance of pupils in the entire county outside of exempted village and city school districts.

The annual distribution attributable to teachers and employes shall be

according to the following schedule: Thirty-seven and one-half per centum of the salary of each teacher or educational employe receiving a salary of not less than eight hundred dollars and a like percentage of the compensation paid to each person giving instruction in trade or technical schools, extension schools, night schools, summer schools and other special school activities, but not to exceed nine hundred dollars for any teacher or educational employe or other such person. Provided that the amount distributed to each district shall be upon the basis of the same salary schedule as determined by the county board of education, but in no case shall the amount paid per teacher or educational employe be less than three hundred dollars or more than nine hundred dollars.

The annual distribution attributed to expense of transportation of pupils shall be in accordance with a schedule to be determined by the county board of education.

No school district shall be entitled to receive any portion of the said funds in any year until the reports of numbers, salaries and qualifications of teachers employed and aggregate days of attendance and expense of transportation of pupils have been made as required by law.

Money received from the state on account of interest on the common school fund shall be apportioned to the school districts and parts of districts within the territory designated by the auditor of state as entitled thereto on the basis of the total enumeration of youth of school age in each whole district entitled thereto, and the enumeration of youth of school age residing in parts of districts so entitled, and all other money in the county treasury for the support of common schools and not otherwise appropriated by law shall be apportioned annually to the school districts and parts of districts in the county in the proportions in which such districts and parts of districts are entitled to share in the distribution of the levy of two and sixty-five hundredths mills provided in Section 7575 of the General Code."

As amended, the above section goes into effect July 21, 1929, at which time the repeal of the present existing Section 7600, General Code, which is provided for by Section 2 of the act (House Bill No. 256) becomes effective.

Upon comparison of the amended section with the present existing Section 7600, General Code, it appears that the change made by the amendment affects the distribution of the 2.65 mills tax levy provided for by Section 7575, General Code, in so far as the proceeds of the said levy inures to the school districts of the state outside of city and exempted village school districts.

The basis of the apportionment of this tax to these several school districts as provided by the present existing Section 7600, General Code, is preserved in the amended statute and therein stated to be the same as before, to-wit:

"On the basis of the number of teachers and other educational employes employed therein, and the expense of transporting pupils * * * and the balance according to the ratio which the aggregate days of attendance of pupils in such districts, respectively, bears to the aggregate days of attendance of pupils in the entire county outside of exempted village and city school districts."

The manner of determining the number of teachers and other educational employes in any district, and the expense of transporting pupils therein, has, however, been changed by the terms of the statute as amended. In the amended statute, it is provided that the number of teachers and other educational employes in any district,

and the expense of transporting pupils therein, for the tax apportionment purposes, shall be "as determined by the above educational survey," meaning the educational survey which the county board of education is directed, by the terms of the statute, to make, on or before the first day of April of each year, whereas, the present existing statute provides that the number of teachers and other educational employes and the expense of transporting pupils, insofar as those considerations are the basis of the distribution of the 2.65 mills tax levy, in school districts outside of city and exempted village districts, shall be "as shown by the reports required by law," and specifically provides that no school district shall receive any portion of the said funds any year until the said reports are made. It further provides that the annual distribution attributed to expense of transportation shall be "fifty per centum of the personal service expense incurred in such transportation."

The "reports required by law" clearly, are the reports provided for by Section 7787, General Code, which section is found in Title V, Chapter 5, Part Second, of the General Code. Said Section 7787, General Code, provides that each school district shall make a report each year, on or before the first day of August, to the county auditor, which report shall contain, among other things, "the number and qualification of teachers and the number of other school employes, mentioned in Section 7600 of the General Code, employed, and their salaries * * * * the personal service expense incurred in transporting pupils, and such other items as the superintendent of public instruction requires."

The statute, Section 7787, General Code, further fixes the manner of computing personal service expense in transporting pupils.

Both amended Section 7600, General Code, and the present existing statute direct the county auditor to apportion the school funds for his county immediately after each semi-annual settlement with the county treasurer. The word "apportion," as here used, evidently means payment or drawing of warrants for payment to be made from the county treasury. Under the present existing statute, the auditor's duty with respect to the proceeds of the levy of 2.65 mills provided for in Section 7575, General Code, is to authorize its payment by proper warrants to the several school districts in accordance with an "annual distribution" made by him upon the basis of "reports required by law." Under the amended statute, however, the auditor simply draws his warrant for the entire amount of the tax levy upon the taxable property of school districts outside of city and exempted village districts payable to the county board of education fund. Further allotment of this fund to the several districts is thereafter made by the county board of education in accordance with an "annual distribution" made by it upon the basis of the educational survey spoken of. The word "distribution" as here used evidently means the allotment or statement of the share or portion of the fund to be "apportioned" to the several districts.

The "distribution" spoken of in each statute is an annual distribution. The word "annual" means by the year. This distribution must necessarily be for an entire year, inasmuch as the reports provided for by Section 7787, General Code, and which are the basis of the distribution under the present existing statute, are made for a year, and the educational survey, which is the basis upon which to compute the distribution under the amended statute, is to be made but once a year and is for the entire year.

Inasmuch as the duration of a school year as fixed by Section 7689, General Code, and of a fiscal year as defined by Section 260-1, General Code, are different, it becomes important to determine what here is meant when provision is made for a yearly or annual distribution of these taxes. Section 260-1, General Code, provides as follows:

"Beginning with January 1, 1928, the fiscal year of the state and beginning with January 1, 1926, the fiscal year of every county * * * school district * * * shall begin at the opening of the first day of January of each

calendar year and end at the close of the succeeding thirty-first day of December. * * * Provisions of law heretofore or hereafter enacted and relating to the levying of taxes, the collection, appropriation or expenditure of revenues or the making of financial reports or statements for a fiscal year or other year shall be construed to refer and apply to the fiscal year as herein defined, except that reports required by Title V, Chapter 5, Part Second, of the General Code shall be for the school year as defined in Section 7689 of the General Code. * * * .”

Section 7689, General Code, reads as follows:

“Beginning on July 1, 1925, the school year shall begin on the first day of July of each calendar year and close on the thirtieth day of June of the succeeding calendar year; provided that reports for the school year beginning September 1, 1924, shall be for the ten months ending June 30, 1925. A school week shall consist of five days, and a school month of four school weeks.”

From the foregoing, it clearly appears that the “annual distribution” spoken of means a distribution for a fiscal year. Under the statute as it now exists, the annual distribution is made by the auditor after the reports provided for by Section 7787, General Code, are filed, which reports shall be filed on or before August 1 of any year. The distribution then made would be of the tax levy for the current fiscal year. The reports, however, which form the basis of the distribution, are for the school year ending on the thirtieth day of the preceding June. By the terms of the amended statute, the county board of education is to make the annual distribution after the educational survey directed to be made by Amended Section 7600, General Code, is made, which survey is to be made on or before the first day of April of each year, and that annual distribution is of the taxes of the then current fiscal year. The survey, however, which is the basis of this annual distribution, although the statute does not specifically say so, is, clearly, for the succeeding school year.

The “annual distribution” when made is, in my opinion, of the taxes levied for the current fiscal year, and not of the revenues collected or available for distribution during the year. Taxes are payable in two semi-annual installments, the collection periods being June and December of each year, the first installment of taxes levied for any fiscal year being payable in December of the current year, and are the subject of the next semi-annual settlement between the county auditor and county treasurer in the next February, commonly called the February settlement. The second installment of these taxes is payable in June of the succeeding fiscal year and is the subject of what is commonly called the succeeding August settlement. Clearly, the expression “annual distribution” as used in the present existing Section 7600, General Code, would not be a distribution of the taxes collected or available for distribution during the fiscal year when made as the distribution would not be made until after August 1 of any year and no provision would then exist for the distribution of that portion of the taxes collected and available for distribution from January 1 of any year to the time when the “annual distribution” could be made. The same observation would be equally pertinent under the statute as amended.

The revenues involved in the August, 1929, settlement include the proceeds of the 2.65 mills tax levy above referred to, made for the fiscal year 1928, the second installment of which is now being collected in the June, 1929, collection. The distribution of these taxes is already fixed by the “annual distribution” made by the auditor in 1928 and they should be so apportioned.

This brings us to a consideration of how the “annual distribution” of these taxes levied for the fiscal year 1929 is to be made. These taxes will be collected in De-

ember, 1929, and June, 1930. Obviously, the "annual distribution" spoken of in Section 7600, General Code, cannot be made by the auditor in accordance with the present existing statute, as he will not be furnished with the reports upon which to base the distribution until after August 1, 1929, at which time the statute will have been repealed and will be no longer in force.

The statute in force after July 21, 1929, will provide that the "annual distribution" is to be made by the county board of education upon the basis of an educational survey to have been made by it on or before April 1 of the then current year. On or before April 1, 1929, however, no authority existed for the county board of education to make such an educational survey as the statute contemplated. At least, there existed no specific statutory direction to make a formal survey of that kind. Unless such a survey is made, however, there is no way to determine the mode of distributing the proceeds of the 1929 levy of the 2.65 mills tax authorized by Section 7575, General Code, to the school districts outside of city and exempted village school districts. This tax will be collected and available for distribution after amended Section 7600, General Code, becomes effective, and should be distributed in accordance with said amended statute. In order to do so, it will be necessary to make the educational survey as provided for in the statute.

The fact that the statute provides that the educational survey shall be made on or before April 1 of each year does not preclude its being made later if, for any reason, it is not done at the time mentioned in the statute. It must necessarily be done before an "annual distribution" under the statute can be made. April 1 was no doubt fixed by the Legislature as the date on or before which the educational survey should be made, so that ample time would be afforded thereafter for the taking of all necessary steps for accomplishing those things which the statute contemplates. On the other hand, it does not seem that the Legislature could have intended that the mere failure to make the survey at that time would preclude its being done later. There is no particular reason why some earlier or later date than April 1 might not have been fixed by the Legislature. The board might be careless or indifferent about the matter and thus leave entirely undetermined the things which the survey should show, if the statute is to be construed strictly as respects the date when the educational survey is to be made. In my opinion, the duty to make the educational survey, is a condition precedent to the duty of the making of an "annual distribution" of the tax; is mandatory, but the time of making it is directory. The time of making the survey is not in my opinion of the essence of the matter. The Supreme Court of Ohio in the case of *State ex rel. Alcorn vs. Mittendorf, et al., Commissioners*, 102 O. S. 229, at page 232, said:

"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 a very great many statutes commanding public officials to perform acts at certain fixed times where time is not of the essence of the matter, and in such instances the provisions are directory merely."

See also *State ex rel. vs. Ross*, 109 O. S. 461.

I am therefore of the opinion:

(1) The proceeds of the 2.65 mills tax levy provided for by Section 7575, General Code, for the fiscal year 1928, the last half of which is collected in the June, 1929, tax collection, should be apportioned to school districts lying outside of city or exempted village school districts in accordance with the "annual distribution" of those

taxes made by the county auditor in 1928, by authority of the then existing Section 7600, General Code.

(2) The proceeds of the 2.65 mills tax levy provided for by Section 7575, General Code, for the fiscal year 1929, and collected in the December tax collection of 1929 and the June tax collection of 1930, should be apportioned to school districts lying outside of city and exempted village school districts in accordance with Section 7600, General Code, as amended by the 88th General Assembly.

(3) The making of an educational survey by the county board of education as directed by the terms of Amended Section 7600, General Code, contained in House Bill No. 256 of the 88th General Assembly, is a condition precedent to the making of the "annual distribution" of the 2.65 mills tax levy provided for by Section 7575, General Code, to the school districts outside of city and exempted village school districts.

(4) The requirement of Section 7600, General Code, as amended by the 88th General Assembly, that each county board of education shall make an educational survey of the county school district for certain purposes on or before the first day of April of each year, is directory merely, so far as the time of making the survey is concerned, and if, for any reason, the survey is not made within the time fixed by the statute, it is the duty of the county board of education to make the survey at a later date and before the "annual distribution" of tax moneys, as directed by the statute, is made.

Respectfully,

GILBERT BETTMAN,

Attorney General.

564.

DISAPPROVAL, FINAL RESOLUTION ON ROAD IMPROVEMENTS IN
THE VILLAGE OF CALDWELL, NOBLE COUNTY.

COLUMBUS, OHIO, June 27, 1929.

HON. ROBERT N. WAID, *Director of Highways, Columbus, Ohio.*

DEAR SIR:—Referring to your letter of June 26, enclosing for my approval several final resolutions, I call your attention to the final resolution relative to

Cambridge-Caldwell Road, I. C. H. No. 353, Sec. North St. in village of Caldwell, Noble County.

It is recited that \$8,750.00, the amount appropriated for this improvement by the county, is \$26,250.00 less than the estimated total cost and expense of said reconstruction project. In the certificate of the Auditor of the Department of Highways, it appears that there has been appropriated from the highway improvement fund of the Department of Highways the sum of \$8,750.00. The total estimated cost of this improvement is in excess of the amount appropriated by the county and your department. If a portion of this cost is to be borne by the railroad, that fact should be noted. I am accordingly returning this final resolution without my approval endorsed thereon.

Respectfully,

GILBERT BETTMAN,

Attorney General.