

stances, come a time when the sinking fund would be impaired. The taxing authorities would not have levied annually a sufficient amount to provide for interest and sinking fund and thus in a sense might be held to have violated the constitution, yet they would have levied all they could levy within the limits of the law. The refunding sections would have to be held applicable to such a situation or else repudiation would ensue. Thus it appears that under such circumstances at least we would be driven to the conclusion that sections 3916 and 5656 G. C. would authorize the issuance of refunding bonds to take up bonds issued after January 1, 1913. But if this be conceded, I can not bring myself to the conclusion that the mere fact that the same result might come about through neglect or violation of duty on the part of the taxing authorities would alter the case with respect to the question of power to refund.

On the basis of the foregoing discussion, it is the opinion of the attorney-general that the question submitted by you must be answered in the negative, in the sense that it would be unlawful for the taxing authorities of a subdivision of the state, the sinking fund of which is impaired, to issue refunding bonds for the purpose of providing for the payment of bonds issued since January 1, 1913, instead of performing their mandatory duty by making increased sinking fund levies sufficient to repair the deficiency; and such illegal course could be prevented by mandamus or injunction; and possibly (though no final opinion is expressed on this point) might be made the predicate of pecuniary liability on the part of the delinquent officials; but it is further the opinion of this department that the power to issue refunding bonds still exists and extends to the refunding of bonds issued since January 1, 1913; so that, however wrongful or illegal in the sense above described such action might be, the bonds themselves would be valid.

Respectfully,

JOHN G. PRICE,
Attorney-General.

1158.

KENT STATE NORMAL COLLEGE—WHERE CONTRACT MADE WITH BOARD OF EDUCATION OF RURAL SCHOOL DISTRICT TO MANAGE RURAL SCHOOL—WAIVER OF PROVISION OF CONTRACT FOR RURAL SCHOOL DISTRICT TO PAY ONE HALF OF EXPENSE OF "EDUCATIONAL EQUIPMENT" CONSIDERED—WHAT MONEYS COME WITHIN PROVISIONS OF SECTION 24 G. C.—SURPLUS FROM FEES PAYABLE INTO STATE TREASURY—PAYMENTS FOR COMPENSATION OF STATE NORMAL SCHOOL TEACHERS AND EMPLOYEES SHOULD BE AUTHORIZED BY BOARD OF TRUSTEES.

1. *Where a state normal school, pursuant to section 7654-7 G. C. (107 O. L. 627) makes a contract with a board of education of a rural school district to assume the management of a rural school, and one of the provisions of said contract is that the rural school district shall pay one-half the expense of "educational equipment," the state normal school has the right to waive the performance of said provision when such waiver seems to the board of trustees of said normal school desirable.*

2. *Fees for such student activities as the athletic association, lecture course, entertainments and the college paper, authorized by the board of trustees of a state normal school to be imposed and collected by the school authorities from all*

students and faculty members, are not moneys received "for the state or for the use of any * * * normal school receiving state aid" in the sense in which those words are used in section 24 G. C., and such moneys, in so far as the same are needed to carry on said activities, need not be paid into the state treasury as provided by said section.

3. Any surplus, however, which remains after the accomplishment of the objects for which said fees are imposed and collected, should be paid into the state treasury, agreeably to said section 24 G. C., and there is no legal authority for the application of such surplus to the payment of general expenses of the school, such as wages of office help, salaries and expenses of faculty members, extra pay for bus drivers, etc.

4. The president of a state normal school has not the power, merely because he is president, to pay any compensation whatever to either a faculty member or a school employe for services rendered to the institution. Such payments should first be authorized by the board of trustees.

COLUMBUS, OHIO, April 16, 1920.

HON. A. V. DONAHEY, Auditor of State, Columbus, Ohio.

DEAR SIR:—Acknowledgment is made of your recent letter submitting for my consideration three questions relative to the Kent State Normal School.

Consideration will first be given to your second question, which reads thus:

"Is the accompanying contract between the board of education of the Brimfield township school district and the Kent State Normal School legal, and if so has the State Normal School the right to waive the part of the agreement which requires the board of education to pay half the expenses of educational equipment?"

Said contract is to the following effect:

"Know all men by these presents that the board of education of Brimfield township school district of Portage county, Ohio, party of the first part, and Kent State Normal College of Kent, Ohio, party of the second part, for the purpose of establishing and maintaining in said township a model school as provided by section 7654-7 of the laws of the state of Ohio, have this day entered into agreement as follows:

The party of the first part agrees to provide: (1) Grounds suitable for purposes of recreation; (2) A building with proper light, heat and sanitation; (3) Seating and teaching equipment sufficient to conduct said model school in the most effective way; (4) Proper care of buildings, equipment and maintenance while the school is in progress; (5) Suitable outbuildings. Said party of the first part further agrees to have the above mentioned equipment ready for use not later than September 5, 1917, and to pay one-half the salary of the teacher for said model school.

The party of the second part agrees to pay one-half the salary of the teacher and one-half the necessary educational equipment for the establishment of a high standard of work in the model school, provided that the total amount to be paid by the party of the second part does not in any one year exceed the five hundred dollars (\$500.00) appropriated for this purpose by the state.

In consideration of the payment of the above amount and in accordance with the law of the state, it is agreed that the party of the second part shall select the teacher for the model school, fix the course of study

and supervise the instruction and classification of pupils and management.

This agreement may be terminated at the end of any school year, at the desire of either part of the agreement."

No information is submitted by you touching the manner in which said contract was executed. It will therefore be assumed that it was legally executed; that is, that the parties signing same on behalf of the board of education and the Kent State Normal School were duly authorized to do so.

Our inquiry as to whether said contract is "legal," which is the first part of your question, will therefore simply consider whether the *object* of the contract is one which the statutes authorize the parties to effect.

Section 7654-7 G. C. (107 O. L. 627), to which section the contract itself refers, says:

"Each of the state normal schools at Athens, Oxford, Bowling Green, and Kent shall be authorized to arrange with the boards of education of rural districts to assume the management of one-teacher rural schools, or of rural schools having two or more teachers, or both types of rural schools and to maintain such schools as model rural schools. In no case shall there be more than one of each type of such rural schools established in a rural school district nor more than six model rural schools established by any state normal school. Each state normal school which complies with the provisions of this section subject to the approval of the superintendent of public instruction shall receive five hundred dollars annually from the state for each class room of such model schools when vouchers therefor have been approved by the superintendent of public instruction and each of said normal schools shall also be authorized to arrange with the boards of education of village and city school districts to assume the management of all the schools of the district or districts or such part of them as may be necessary to provide adequate facilities for practice teaching by the students of said normal school, and providing the number of rooms for which such appropriation is made does not exceed six for each state normal school."

It is at once apparent that under said section the parties to the contract in question have the authority to accomplish the object thereof, which in the words of the contract is, "establishing and maintaining in said township a model school." I am therefore of the opinion that said contract is legal.

The second part of your question concerns the right of the state normal school to waive that part of said agreement which requires the board of education to pay one-half the expenses of "educational equipment."

The authority conferred by the statute just cited is conferred by language of a very general character. By it the state normal school is authorized to *arrange* with certain boards of education to assume the management of certain types of schools and *maintain* such schools as model schools. No attempt is made by the legislature to insist upon any particular details of such arrangement. In particular, it may be noted that there is no statutory obligation that the board of education pay one-half, or any part, of the cost of necessary educational equipment for the work of the model school. On the contrary, it would seem that the authority given the state normal school to *maintain* the model school would include the authority to pay all the cost of necessary educational equipment not exceeding the amount allowable for this purpose under section 7654-7 G. C., to-wit, five hundred dollars.

Nor is there any evidence whatever of any intention by the legislature that

any particular arrangement by a state normal school with a rural board of education for a model rural school should, when once made, be unalterable, nor of any intention to deny the state normal school the authority to waive the beneficial provisions of a contract of this kind after said contract was once made, when such waiver seemed to the board of trustees of said normal school, in the exercise of a sound discretion, desirable. One can well imagine a situation where a state normal school, after having made a contract of this nature with a rural board of education, might feel that under the circumstances the terms of that contract were unjustly onerous to the rural board, and that to exact strict compliance with those terms might jeopardize the cordial relations of the parties to the contract, to the serious future detriment of the arrangements for the model school.

You are therefore advised that the state normal school has the right, in its discretion, to waive that part of the agreement above noted.

Your next question reads thus :

“We are herewith submitting what purports to be the ‘Trustees’ Annual Report to the Governor for the year 1917 and direct your attention to page 27 relative to ‘Student Activities,’ and desire to know if the ‘fees’ therein mentioned are such as come within the provisions of Sec. 24, G. C., and if not shall they be handled in the same manner as dormitory and dining room fees—(See your opinion No. 1073 under date of March 13, 1920)—or should they be handled by a joint committee of the faculty, and student body?

If it is held that they should be controlled by the board of trustees, may they be expended for anything except the purposes enumerated on page 27 of said report?

Not only the regular students but the members of the faculty are also required to pay \$3.00 a year, and each summer student is required to pay \$2.00 at the beginning of the term.

The money has been collected and disbursed by the president of the school. It has been expended mainly for the purposes mentioned on page 27 of said report, but numerous bills have been paid therefrom for the following purposes :

- Wages of office help.
- Salaries of faculty members.
- Expenses of faculty members.
- Extra pay for bus drivers.
- Expense of high school athletics (the high school students do not pay any of said fees).
- Extra compensation for assistant to president.

There is no evidence in the minutes of the board that said fees were authorized by it, and even the report does not state the amount that is to be collected from the summer students. There is now a balance in said fund of \$2,533.84.”

The matter set out on page 27 of the report accompanying your letter of inquiry is headed “V. Student Activities,” and, though contained in a pamphlet entitled “Annual Report of the *Board of Trustees* * * *,” seems to be a portion of the “Annual Report for 1916-17 presented by the *president* of the Kent State Normal College to the *board of trustees* at the meeting of July 19, 1917.”

After referring to various school activities such as the athletic association, lecture course, entertainments, and the college paper, the report (p. 27) says :

"In order to carry these and other related enterprises to a successful issue and to develop in the student body unity of action through the operation of common purposes all students will be required to pay three dollars per year, one dollar at the beginning of each of the three terms, into the general fund for the support of student activities. In return for this each student will be admitted to all lectures, entertainments and athletic games free and will receive the college paper without charge. This does not apply to those in attendance at the summer session. A separate entertainment course on a different financial basis is maintained for summer school students."

Throughout the remainder of this opinion it will be found convenient to refer to the fee for the various college activities mentioned on page 27 of said report as the "student activities fee," and it should be understood that the word "activities" when used in this connection, refers only to the various activities mentioned on said page 27, and not otherwise.

It appears from the excerpt above quoted (N. B., * * * all students will be required to pay three dollars * * * into the *general fund* * * *) that the "student activities fee" at the Kent State Normal School is an "official" fee. That is to say, it is one imposed, collected and disbursed under the sanction and control of the normal school authorities. In some institutions, as your letter indicates and as is well known, such student activities are managed by the students themselves, without any affirmative official action by the school authorities, in which case the payment of the student activities fee is self-imposed and voluntary. Where this method is employed, the disbursement of the moneys raised from the fees is of no concern to the school authorities officially, but is solely a matter for the students themselves to determine.

That authority exists in the board of trustees of the Kent State Normal School to require payment of a student's activities fee, is clear. While no statute grants that authority in express language, the same appears by reasonable inference from that part of H. B. No. 44, 101 O. L. 321, which says:

"And said board of trustees shall do any and all things necessary for the proper maintenance and successful and continuous operation of said normal schools * * * ."

Accordingly, we shall assume for the purposes of this opinion that the students' activities fee during the period you have in mind was one imposed and collected by authority of the board of trustees, although your statement is noted that "there is no evidence in the minutes of the board that said fees were authorized by it." In this connection it may be pointed out that the president of the Kent State Normal School has no authority, merely because he is president, to impose, collect and disburse fees like those under consideration or for that matter any other school moneys. His authority must rest upon some action of the board of trustees, to which board the statute gives the general management of the institution.

Regarding the students activities fee as an "official" fee, in the sense just mentioned, we are now to consider whether the same is to be paid into the state treasury as provided by section 24 G. C. (104 O. L. 178). Said section says:

"On or before Monday of each week every state officer, state institution, department, board, commission, college, normal school or university receiving state aid shall pay to the treasurer of state all moneys, checks and drafts received for the state, or for the use of any such state officer, state institution, department, board, commission, college, normal school or

university receiving state aid, during the preceding week, from taxes, assessments, licenses, premiums, fees, penalties, fines, costs, sales, rentals or otherwise, and file with the auditor of state a detailed, verified statement of such receipts. Where tuitions and fees are paid to the officer or officers of any college, normal school or university receiving state aid, said officer or officers shall retain a sufficient amount of said tuition fund and fees to enable said officer or officers to make refunds of tuition and fees incident to conducting of said tuition fund and fees. At the end of each term of any college, normal school or university receiving state aid the officer or officers having in charge said tuition fund and fees shall make and file with the auditor of state an itemized statement of all tuitions and fees received and disposition of the same."

In the opinion of the attorney-general found in 1915 Opinions of Attorney-General, Vol. I, p. 35 (which opinion was cited and followed in the recent opinion of the attorney-general No. 1073, referred to in your letter, rendered March 13, 1920), section 24 G. C. was construed. The following is quoted from said opinion (p. 36) :

"I am, however, of the opinion, that while dormitories are a part of the educational plant and service, yet a distinct separation of such activities from the regular educational activities of the institution may be noted. I think that it is the intention of the legislature, in authorizing the maintenance of dormitories, that the same shall be conducted upon a self-sustaining basis. That is, I do not believe that, in the contemplation of the legislature, the general revenues or educational funds of the state are to be used to pay for the maintenance of dormitories or the food supplies consumed in such dining rooms; I think, on the contrary, that it is the intention that the revenues of the dormitories and the dining rooms, themselves, shall maintain them. In this view of the case, receipts from these sources being devoted to the maintenance of the dormitory and the dining room, respectively, as such, rather than to the general use of the institution or of the state, should not be regarded as moneys received for the use of the state or of the college normal school or university, within the meaning of section 24."

The proposition laid down in said opinion is that the provisions of section 24 G. C. are inapplicable to fees resulting from those activities which the legislature intended should be conducted by the officials of state educational institutions on what may be called a "self-sustaining" basis.

Said opinion did not lay down any hard and fast rule for determining what are, and what are not, self-sustaining activities, nor will the formulation of any such rule be attempted here, it being thought preferable to consider each case on its own peculiar facts.

Many differences, of course, can be detected between the situation presented by the opinion just quoted from and the situation now before us, among them the difference in the activities themselves, and I am not prepared to say that it is proper to class student activities, such as we now are dealing with, as activities intended by the legislature to be placed on a "self-sustaining" basis.

However, I am persuaded that student activity fees should not take the course prescribed by section 24 G. C., because certain untoward consequences following from the view that said section is applicable to them, lead me to think that such was not the legislative intention. "The consequences of evil and hardship," says Black on Interpretation of Laws, p. 88, "may properly exert an influence in giving

a construction to a statute when its language is ambiguous or uncertain and doubtful, but not when it is plain and explicit. The same may be said of the consideration of convenience, and in fact of any consequences." Section 24 G. C. does not plainly and explicitly refer to student activities fees. It refers to "all moneys * * * received * * * for the use of any * * * normal school * * * receiving state aid * * * from * * * fees * * * ." Whether student activities fees are for the use of the normal school is still a matter of construction; hence it seems proper to consider the practical consequences of holding that such moneys are governed by section 24 G. C.

While not the only consequence, certainly an important consequence of holding that student activities fees are governed by section 24 G. C. is the fact that such fees once paid into the state treasury, agreeably to said section, could be available for the purposes for which intended only after the same had been *appropriated* by the legislature. Should that body meet only once in each two years, as is ordinarily the case, a considerable delay in making such appropriation might ensue; and if it should happen that the legislature when it did meet, refused or neglected to make any appropriation at all of such moneys, the carrying on of said student activities might be entirely defeated.

I am unable to conclude that the legislature intended any such untoward consequences, and hence advise you that said fees do not come within the provisions of section 24 G. C.

Your letter says that in the event it is held that said fees do not come within the provisions of section 24 G. C., you desire to know whether the same shall be handled in the same manner as dormitory and dining room fees, or whether they shall be handled by a joint committee of the faculty and student body.

From what has been said above, you can readily understand that this department can not say as a matter of law how the student activities fees should be handled. The manner of their handling—whether by the college authorities or by the students themselves—is a question of policy to be determined by the board of trustees. We can only advise that where the board of trustees by affirmative action has caused such fees to be imposed and collected by the college authorities, such moneys should not be turned into the state treasury as provided by section 24 G. C., but should be used for the purposes for which raised.

This last statement really answers that part of your letter which says:

"If it be held that they should be controlled by the board of trustees, may they be expended for anything except the purposes enumerated on page 27 of said report?"

The purposes "enumerated on page 27 of said report" are simply the purposes for which the student activities fees purport to be imposed, namely, for the maintenance of an athletic association, lecture course, entertainments, the weekly college paper, etc.

It appears, however, from your letter that the student activities fees at the Kent State Normal School, though imposed and collected for the purposes just stated, have been expended, in part at least, by the president of said institution for purposes other than those for which said fees were raised, for instance, for wages of office help, salaries and expenses of faculty members, extra pay for bus drivers, etc. We know of no theory on which said moneys could be properly applied for the purposes last stated. All of such purposes relate to the general administration of the work of the normal school, for which the legislature makes, or is presumed to make sufficient appropriations. The board of trustees of the Kent State Normal School has the authority, it is true, to charge students *tuition* (H. B. No. 44, 101

O. L. 321); yet all tuition moneys, by reason of section 24 G. C., would have to be paid into the state treasury and would not be available to the institution unless and until appropriated by the legislature.

Furthermore, it is not considered that the board of trustees of the Kent State Normal School has the power to authorize the president or other officer of the institution to apply to the payment of wages of office help, salaries of faculty members, etc.; any *surplus* remaining after the accomplishment of the objects for which the student activities fees was imposed and collected. As pointed out in the recent opinion of this department (No. 1073, dated March 13, 1920), relating to dormitory and dining room fees, such surplus should be paid into the state treasury.

As hereinbefore indicated, the board of trustees of the Kent State Normal School has the authority to confide the management of student activities of the kind we have been considering to the students themselves. If such a method be adopted, the whole matter of the imposition of such fees, as well as the disbursement of moneys resulting therefrom, is for the students to determine. If the students see fit to make appropriations, in the nature of donations, to pay in whole or in part the wages of office help, salaries of faculty members, etc., no legal objection can be urged against such action.

It now remains to consider your first question which reads thus:

"When the compensation of a member of the faculty, or other employes of the Kent State Normal School is fixed by the board of trustees and recorded in the minutes, may a greater amount than is so fixed be paid to him legally?"

This question has been reserved until the last for consideration as it really has to do with the question last above considered. You have explained to me in personal conference that the situation you have in mind is this: The board of trustees of the Kent Normal School, by resolution duly passed, fixed the compensation of the members of the faculty, as well as the compensation of the employees of the school. The president of the school then undertook to pay, and did pay, certain faculty members and employes additional compensation, using a portion of the surplus moneys raised from students activities fees and remaining after paying the expenses of such activities.

We do not understand that the president of the Kent State Normal School has the power, merely because he is president, to pay any compensation whatever to either a faculty member or a school employe, unless authorized by the board of trustees to do so. From the statement of your question it would seem that in the case you have in mind the board of trustees had conferred no such authority on the president.

However, this omission becomes unimportant for the larger reason that the board of trustees itself would be without authority to authorize such payments from moneys obtained from student activities fees. The reasons for this view have been stated above and need not be repeated.

Respectfully,
JOHN G. PRICE,
Attorney-General.