DEAR SIR:—I acknowledge receipt of your letter of recent date enclosing lease from one Harry Summe and one Carl Summe to the State of Ohio. This lease covers premises situated in Section 27, of Springfield Township, Hamilton County, Ohio, consisting of 0.49 acres of land. It is noted that the lease contains the following provisions:

> "Upon * * * the bankruptcy or insolvency of lessee or assigns or the appointment of a receiver or trustee of the property of lessee or assigns, or if this lease pass to any person or persons by operation of law * * *. The lessor may terminate this lease and re-enter and re-possess said premises."

Such a clause would not of course be applicable to the State and should not have been included in the lease. However, these provisions being meaningless in so far as the State is concerned and since considerable delay would result from requiring the execution of a new lease I am of the opinion that these provisions may be ignored.

Finding the lease otherwise correct in form and legal I hereby approve the same.

Respectfully,
EDWARD C. TURNER,
Attorney General.

620.

APPROVAL, CONTRACT BETWEEN THE STATE OF OHIO AND VERNON REDDING AND ASSOCIATES, MANSFIELD, OHIO, FOR HEATING AND VENTILATING SYSTEM IN THE STATE GARAGE AT ASHLAND, OHIO.

COLUMBUS, OHIO, June 14, 1927.

HON. GEORGE F. SCHLESINGER, *Director, Department of Highways and Public Works, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of recent date resubmitting correspondence and five copies of a contract between the State of Ohio and Vernon Redding and Associates of Mansfield, Ohio, together with copy of a letter addressed to this department stating that Lester Redding was authorized to sign the agreement in behalf of Vernon Redding and Associates, Architects.

There now being evidence before this department that Lester Redding was authorized to sign the name of and bind Vernon Redding and Associates to this contract I am returning those contracts to you with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney General.

621.

BOARD OF EDUCATION—WHEN REMOVAL FROM SCHOOL DISTRICT CREATES A VACANCY IN BOARD.

SYLLABUS:

Permanent removal from the district of a member of a board of education creates

a vacancy in such board. Such removal, for temporary purposes only does not create a vacancy. Whether the removal from the district of a member of the board of education is permanent or temporary is in all cases a question of fact to be determined from the intention of the member so moving, considered in the light of all the circumstances connected with such removal.

COLUMBUS, OHIO, June 14, 1927.

HON. E. A. BROWN, *Prosecuting Attorney, Circleville, Ohio.*

DEAR SIR:—This will acknowledge receipt of your communication in which you request my opinion as follows:

> "I submit the following inquiry: Mr. A, living in Deercreek township, Pickaway county, Ohio, a member of the board of education thereof, moved to Circleville, Ohio, the latter part of March, 1927; Mr. B lived in Perry township, Pickaway county, Ohio, a member of the board of education thereof, and moved to Circleville, Ohio, last fall.
>
> These men were farmers, living on their respective farms, both interested in the Farm Bureau and claim they are only temporarily residing here, although their respective homes are occupied, that is, their farm homes. They claim their residence in their respective townships in fact they listed their personal property of all kinds there, and they expect to vote there. They are serving on their respective boards as members thereof.
>
> Can they do so under Section 4748, G. C.?"

Section 4748, General Code, reads as follows:

> "A vacancy in any board of education may be caused by death, non-residence, resignation, removal from office, failure of a person elected or appointed to qualify within ten days after the organization of the board of his appointment, removal from the district or absence from meetings of the board for a period of ninety days, if such absence is caused by reasons declared insufficient by a two-thirds vote of the remaining members of the board, which vote must be taken and entered upon the records of the board not less than thirty days after such absence. Any such vacancy shall be filled by the board at its next regular or special meeting, or as soon thereafter as possible, by election for the unexpired term. A majority vote of all the remaining members of the board may fill any such vacancy."

From the provisions of the foregoing statute, it will be observed that "removal from the district" of a member of a board of education creates a vacancy in the board.

To answer your inquiry requires the consideration of what is meant by "removal from the district", and after determining that, whether or not the actions of the members of the board of education in question as you have stated them, constituted "removal from the district" and created vacancies in their respective boards, within the meaning of the provisions of Section 4748, supra.

"Removal from the district" as used in the statute means something more than the mere physical removal of the person of the member of the board of education, as will be seen from the consideration given to the subject in former opinions of this department to which I will hereafter refer.

It is said in Mecham in his work on public offices and officers at Section 438:

"Where the law thus requires the officer to reside within the district which he represents, and *a fortiore* so where it expressly declares that his removal from the district shall create a vacancy, a permanent removal from the district represented will be deemed an abandonment of the office and a vacancy will result.

But a merely temporary removal for a limited time and with no intention to abandon or surrender the office or to cease to perform its duties will not have this effect."

In support of the above proposition there is cited among others the case of *Curry vs. Stewart,* 8 Bush (Ky.) 560 in which it is held that temporary absence from the district represented for the purpose of engaging in business for a limited time will not amount to an abandonment of the office but that a permanent removal by an officer from the district represented will at once *ipso facto* affect the office.

In a former opinion of this department reported in Opinions, Attorney General, 1915, page 1067 it is said in the syllabus:

"Where the facts in a particular case show that the removal of a member of the board of education of a school district is only temporary; that he maintains a home in said district during his absence and that he fully intends to return to said district at a specified time, said removal does not create a vacancy in said board of education within the meaning of Section 4748, General Code."

Reference is made in the above opinion of 1915 to a former opinion found in the Annual Reports of the Attorney General for 1914 at page 819, in which it is said that:

"The removal from a city school district indefinitely, of a member of a board of education creates a vacancy in said board."

It is therefore apparent that the "removal from the district" as used in Section 4748, supra, means removal of the residence or domicile of the member.

The fundamental rule that the residence or domicile of the person is dependent on his intention is one of considerable difficulty of application and can not be stated more definitely than in general terms, its application in each instance being dependent on the facts of the particular case.

In the case of *Sturgeon vs. Korte,* 34 O. S. 534 the court said:

"In Bell vs. Kennedy, L. R. 1, H. L. 320, it was said by Lord Westbury, that domicile is the relation which the law creates between an individual and a particular locality or country. And by Judge Story, in his commentary on the conflict of laws, that it is of three sorts; domicile of birth, domicile of choice, and that which results from the operation of law. Sec. 46. Domicile of birth remains until another is chosen, or where a person is incapable of choosing, until one results by operation of law. To acquire a new residence or domicile, where one is under no disability to choose, two things must concur—the fact of removal and an intention to remain. The old domicile is not lost or gone until the new one is acquired, facto et animo. It is not, however, necessary that the purpose to acquire a new residence should exist at the time of removal. It may be formed afterward. A residence may be acquired by one who has removed to a place for temporary purposes only,

by a change of purpose, and an election of the new habitation or place of abode as his place of future domicile or home. Story's Conflict of Laws, 39
* * *

These are well settled rules relating to the selection or change of residence, existing when the constitution was adopted, and consequently apply in all cases where a change of residence results from or depends upon choice. The question is, and must always remain, one of fact, often attended with much difficulty; but to be determined by the preponderance of evidence favoring one place as against another."

It is said in Jacobs on Domicile Section 182:

"A change of municipal domicile is a question of act and intention."

In the case of *Henrietta township vs. Oxford township,* 2 O. S. 32 the headnotes read:

"It is error in the court to charge the jury that the question of intention connected with residence is immaterial and not to be considered by them."

Throop on public offices Section 131 says:

"The general rules are, that for the purpose of voting, a person's domicile is deemed his residence; and that he does not lose his residence by absences, however long and frequent, as long as he has *animus revertendi.*"

An examination of the authorities discloses a fixed rule of universal application that the intention of a person of legal age who is not under restraint is determinative of the question of the situs of his residence and to effect a change of residence, after one has been established, he must not only move in a physical sense but he must do so with a fixed intention of remaining away or must form that intention after the consummation of the physical act of moving. If removal be made with the intention to return, the situs of his domicile remains in the place from which he moved and does not change upon the performance of the mere act of removal not coupled with an intention to remain. In other words the question turns upon whether or not the removal is temporary or permanent.

An examination of the two former opinions of the Attorney General to which I have heretofore referred seems to indicate that they turn on the question of the definiteness or indefiniteness of the time when the person expects to return to the place from which they have moved. I do not think the intent to return at any fixed time is entirely determinative of the question. Consideration must be given to other circumstances which are pertinent.

Jacobs on Domicile in chapters 26 and 27 discusses among the Criteria of Domicile:

"Offering to Vote", "Payment of Personal Taxes", "Holding Office", "Ownership of Property" and "Declarations of the Party."

In the case of *State ex rel Hathaway* 22 Circuit Court (N. S.) page 314, it is held:

"Where a councilman removes outside the State to accept employment without any fixed intention either to stay or return the office which he has held does not thereby become vacant."

The declarations of the parties themselves may if made in good faith, become material. In the case of *Lyman vs. Fiske,* 17 Pick. 231 Chief Justice Shaw said:

> "It is often a question of great difficulty, depending on minute and complicated circumstances leaving the question in so much doubt that a slight circumstance may turn the balance. In such a case the mere declaration of the party made in good faith of his election to make the one place rather than the other his home would be sufficient to turn the scale but it is a question of fact for the jury to be determined from all the circumstances of the case."

In an opinion of this department reported in the Opinions of the Attorney General, for 1924, at page 525, where the question was considered as to whether or not a township trustee upon changing his residence from the township in which he had been elected to another, thereby created a vacancy in the office, it was held:

> "Whether or not there has been such a change of residence is a question of fact to be determined by ascertaining the intent of such person. If he removes with the purpose of establishing a fixed habitation elsewhere and does not intend to return to his former home, a change of residence is effected; or, in the event that after a temporary removal he should decide to permanently remain away from his original habitation, this would likewise constitute a change of residence. Circumstances surrounding the acts of such a party may be considered for the purpose of determining what his real intentions are."

In your inquiry you state, with reference to the members of the Deercreek and Perry Township Boards of Education, that they are farmers who have been living on their respective farms and that they are both interested in farm bureau work and you indicate that for that reason they are devoting their time to the work of the bureau and temporarily residing in Circleville. You further state that they themselves claim their residence to be in their respective townships where their respective farms are located thus indicating that they want it to be understood that it is not their intention to change their residence, that they have listed their personal property for taxation in the township where their farms are located, that they expect to vote there and are continuing to perform their duties as members of the boards of education to which they were elected.

As stated in the case of Lyman vs. Fiske, supra, what they say about the matter themselves is of considerable importance if their claims are made honestly and in good faith. If they really intend to return to the places from which they have moved, then their declarations on the subject are in good faith and in my opinion such intent might be had even though no definite time was fixed in their own mind as to when they expected to return.

It will be noted that Section 4748, supra, wherein is enumerated the several situations that may cause a vacancy to be brought about in a board of education enumerates both *"non-residence"* and *"removal from the district."*

There is a suggestion of tautology in the use of this language, that is to say at first blush it might seem that possibly the same thing is said twice and that it was unnecessary to say anything about removal from the district if the requirements of residence were observed. From this apparent tautology it might be contended that the legislature meant something different when it made provision to the effect that removal from the district would work a removal from the office, it having already provided that a vacancy would be caused by non-residence.

On investigation, however, it appears that the language of the section under consideration is not open to the charge of tautology for the reason that a member of

the board of education may become a non-resident of the district in which he has been elected without removing therefrom.

It is provided in Section 4692, General Code, relating to the transfer of part or all of one school district to another, that

> "if an entire district be transferred the board of education of such school district is thereby abolished or if a member of the board of education lives in a part of the school district transferred the member becomes a non-resident of the school district from which he was transferred and ceases to be a member of such board of education."

It will thus be seen that situations which may be created when transfers of part of a school district are made show the justification of the use of both the expressions *"non-residence"* and *"removal from the district"* as used in the statute and removes all suggestion of tautology.

Specifically answering your question it is my opinion, from the facts as you have outlined them, that no vacancy has been created in either the Deercreek or Perry township Boards of Education by reason of the temporary moving of Mr. A and Mr. B to Circleville. It should be understood however, that there may be other circumstances connected with the matter which you do not mention, and of which you are perhaps not informed. This opinion is based entirely on the facts set out in your inquiry.

I might say in conclusion, that in any event so long as the persons to whom you refer continue to exercise the function of the office of members of the boards of education of their respective townships, their acts as such members are valid, no matter where they reside, and the title to their office, which is dependent entirely on the determination of questions of fact, can only be definitely and finally determined in an action in quo warranto.

Respectfully,
EDWARD C. TURNER,
Attorney General.

622.

CURRENT EXPENSES—INSTALLATION OF BOILERS AND STOKERS IN STATE HOUSE IS NOT AN APPROPRIATION FOR CURRENT EXPENSES—PROCEEDINGS LEADING UP TO LETTING OF CONTRACT MAY NOT BE STARTED UNTIL APPROPRIATION ITEM UNDER WHICH SUCH EXPENDITURE IS TO BE MADE BECOMES EFFECTIVE.

SYLLABUS:

1. *An appropriation item entitled "Additions and Betterments—Capital Equipment", for the purchase and installation of boilers and stokers in the State House, is not an appropriation for "current expenses" of the state or its institutions, and hence the moneys so appropriated are not available for expenditure until the expiration of ninety days after the appropriation act of which such appropriation item is a part, was filed with the Secretary of State by the Governor of Ohio, viz., on and after August 9, 1927.*

2. *It is unlawful under Section 2288-2, for an officer, board or commission of the state to enter into any obligation involving the expenditure of money, unless*