power to elect a president is manifestly not wholly exercised when one election has been made; it is a continuing power which may be exercised at the discretion of the board. Having elected A. to the office without definite term, the board of trustees may at its discretion elect B. to the same position, and the election of B. will of itself put an end to A.'s tenure.

I trust that these observations cover all the points involved in your inquiry.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1517.

JOINT HIGH SCHOOL—WHERE FINANCIAL RESOURCES INSUFFICIENT TO SUPPORT JOINT HIGH SCHOOL AND ELEMENTARY SCHOOLS OF DISTRICT—CANNOT COMPEL CONTRIBUTION TO FORMER NOR BORROW MONEY FOR SUCH PURPOSE—UNION DISTRICT NOT DISSOLVED—BUILDING CANNOT BE TAKEN OVER BY DISTRICT IN WHICH IT IS SITUATED.

Where the financial resources of a member district of a union of school districts for high school purposes are insufficient to permit the contribution of the share of such district toward the support of the joint high school, in addition to the support of the elementary schools of the district, such district can not be compelled to make appropriations from its funds for that purpose.

Under such circumstances, the board of education of such district is without power to borrow money in order to secure funds with which to furnish its share of the support of such high school.

The inability of a member district of such union of high school districts to furnish its share of the support of such high school does not effect a dissolution of the union for high school purposes; accordingly, the high school building in which such joint high school has been conducted may not be taken over by the district in which it is situated and used for the purpose of a high school to be established in that district, whether such building, prior to the union, belonged to such district or not.

COLUMBUS, OHIO, August 25, 1920.

HON. VERNON M. RIEGEL, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—You have requested the advice of this department upon the following questions:

"Joint high schools have been established, maintained, and operated under the provisions of sections 7669, 7670, 7671 and 7672 G. C. The districts in some cases maintaining a joint high school are what is commonly known as weak districts and have been receiving state aid. The questions of authorizing an additional levy under the provisions of sections 5649-5 and 5649-5a G. C. were submitted to the electors at a special election held on August 10, 1920, that these districts might be eligible for state aid this year. In one or more of the districts maintaining joint high schools the issue carried, while in others that helped to maintain these same joint high schools, the issue failed. As a result those districts in which the issue

carried will participate in the reserve fund and will be able to continue to contribute toward the support of the joint high schools. In other districts in which the issue failed, no state aid will be given and, owing to lack of funds, such districts will not be able to contribute their share toward the support of such joint high schools.

What are the rights and duties of the various districts mentioned above in their relation to the joint high school?

Shall the boards of education of the district in which the proposition failed issue bonds to raise funds for their share of the maintenance of such joint high school? What if they neglect or refuse to issue such bonds?

Assuming that they have the right to do so, what will be the result as to the continuance of the joint high school?

Can any one of the districts maintaining such a joint high school, provided the building be located in such district, employ and pay teachers and otherwise finance the expense of operation of the high school as its own and receive aid from the reserve fund to make up any deficit that might exist, provided the building belongs to such district?

What are its rights in so far as the maintenance of such school is concerned if the building belongs to the various districts that established the joint high school?"

The sections to which you refer in their present form provide, in part, as follows:

"Sec. 7669. The boards of education of two or more adjoining rural school districts, or of a rural and village school district by a majority vote of the full membership of each board, may unite such districts for high school purposes. Each board also may submit the question of levying a tax on the property in their respective districts, for the purpose of purchasing a site and erecting a building, and issue bonds, as is provided by law in case of erecting or repairing school houses; but such question of tax levy must carry in each district before it shall become operative in either. If such boards have sufficient money in the treasury to purchase a site and erect such building,. or if there is a suitable building in either district owned by the board of education that can be used for a high school building it will not be necessary to submit the proposition to vote, and the boards may appropriate money from their funds for this purpose."

"Sec. 7670. Any high school so established shall be under the management of a high school committee, consisting of two members of each of the boards creating such joint district, elected by a majority vote of such boards. * * *."

"Sec. 7671. The funds for the maintenance and support of such high school shall be provided by appropriations from the tuition or contingent funds, or both, of each district, in proportion to the total valuation of property in the respective districts, which must be placed in a separate fund in the treasury of the board of education of the district in which the school house is located, and paid out by action of the high school committee for the maintenance of the school."

"Sec. 7672. Boards of education exercising control for the purpose of taxation over territory within a rural or joint rural high school district shall determine by estimate the amount necessary for the maintenance of any rural or joint rural high school to which such territory belongs and

shall certify such amount to the county auditor in the annual budget as provided in section 5649-3a. All funds derived from levies so made shall be kept separate and be paid out for the maintenance of the school for which they were made."

In answering your questions it will be assumed that no steps have been taken or are contemplated to dissolve the union of districts for high school purposes. In fact, the sections which have been quoted fail to provide expressly for such dissolution, and a question of law exists as to whether or not such dissolution can be effected. No opinion is expressed with respect to such question. (See Annual Report of Attorney-General 1914, Vol. II, p. 1495, wherein it was held, in the language of the head-note, that "there is no provision of statute whereby joint high school districts may be dissolved.")

On the assumption thus made the duty of each contributing board of education is that defined by section 7671 of the General Code, above quoted. As the section is phrased it is mandatory. Nevertheless, it has been interpreted by the courts as not being mandatory if the appropriation called for thereby can not be made.

State ex rel. vs. School District, 20 C. C. n. s., 423; affirmed without report 76 O. S., 637.

In this case Giffen, J., of the Hamilton county circuit court, after quoting the statute which was then designated as section 4009-15 of the Revised Statutes, said:

"Hence it was the duty of the board of education of the defendant school district, if it had sufficient funds in the treasury during the year * * * to appropriate from the tuition or contingent funds, or both, its proportionate share for the maintenance of such school; but it can not be compelled to appropriate the same from funds derived from the levy made for subsequent year, unless it can be done without impairing the general school fund or the efficiency of the common schools."

The same opinion goes on to refer to the then existing limitations on tax rates in school districts, leaving at least the inference that if the limitations are such as to preclude contributions no remedy is available. The writ of mandamus applied for in the case was refused.

The facts of the case are not sufficiently reported to enable one to determine whether or not the insufficiency of funds was based upon the setting aside of a sufficient amount to operate the elementary schools during the minimum period required by law. The language which has been quoted, however, seems to imply that such was the case and that the court did not regard the duty arising under section 7671 of the General Code as mandatory in the sense that contribution of the district's share of the expense of conducting the joint high school was a charge on the revenues of the district, preferred as against the expense of maintaining and conducting the elementary schools of the district.

On the authority of the inferences thus drawn from the case cited, therefore, it is the opinion of this department that the funds for the maintenance and support of the joint high school to be provided by the district which is in financial straits can not be charged against the district in preference to the ordinary expenses of maintaining the elementary schools of the district.

This conclusion, under the facts submitted by you, leads to the result that the weak district in which the additional levy failed to carry will be unable to contribute anything from its tuition or contingent funds, or both, because of lack of money in those funds.

The next question which arises is as to whether the board of education of such district may borrow money to meet its share of the expense of conducting the joint high school. No express statutory authority exists for the borrowing of such money by the issuance of bonds, or otherwise. Whether or not section 5656 of the General Code is available depends upon the effect of the operation of the joint high school as giving rise to any obligation of the member district in the nature of an indebtedness. That is to say, unless the conduct of the joint high school gives rise to a claim or claims against the board of education of each member district enforcible to the same degree that any indebtedness of that board of education would be enforcible against it or its district, section 5656 of the General Code, which is a means of borrowing money to satisfy binding obligations in the nature of debts, can not be used for this purpose.

In this connection it must not be forgotten that the member districts of the joint high school district do not themselves conduct the high school. As section 7670 expressly provides, the authority in charge of the joint high school is a high school committee elected by the members of the respective boards of education. This committee employs the principal and teachers and otherwise manages and conducts the joint high school. The expense incurred by such committee is then to be contributed, subject to the qualifications already pointed out, by the member districts. These things being true, it can not be said that either district is the employer of the principal and teachers, so that an unsatisfied claim for the salary of any such principal or teacher could not be said to be an indebtedness of either district. In order to reach this conclusion it is necessary, of course, to reject the theory of agency or partnership. Such a theory would be worked out by holding that the joint high school committee is an agent of both boards of education, so that the obligations which it incurs are claims against both in the same sense in which the agent of a partnership might create claims against both partners for which either would be liable. Such a theory, however, can not be applied to boards of education in the absence of express statutory provision. The statutes which exist, interpreted as they have been by the courts, are not open to such construction. The joint high school committee is without power to incur obligations against either board. The result is, as previously stated, that the indebtedness of the joint high school committee is not the indebtedness of either school district for which money may be borrowed under section 5656 of the General Code.

There is still another possibility which must be weighed before an answer to the question now under consideration can be reached. While it is true, as just concluded, that an obligation incurred by the high school committee is not in any sense an obligation of any of the districts comprising the union for high school purposes, yet it might be argued that the share of the district in the expense of conducting such high school constitutes a charge against the district which the joint high school committee is authorized to enforce to the same extent, for example, as the obligation to pay tuition where pupils have the right to attend a school outside of the disrict constitutes a charge on the funds of the district liable for such tuition. If that should be the case, then either at the beginning of the year or at the end of the year—which, it is not necessary at present to determine—the joint high school committee, by presenting to the board of education of the member district a claim for that district's share of the expense of conducting the joint high school, would cause to be liquidated the obligation of the district which would have to be paid.

It is probably true that the case previously cited is not inconsistent with such an argument, for in that case it was sought to compel the board of education of a member district to make an appropriation. The actual decision of the court goes no further than to hold that the duty to appropriate did not exist unless the money was in the treasury and available for the purpose. But though there might be no

duty to appropriate where the funds were not available, there might yet be a duty to pay. The case is, strictly speaking, therefore, not in point. We are remitted to the statutes which have been considered for the correct answer to the question now under consideration.

Section 7669 provides at the outset that boards of education "may unite such districts for high school purposes." If this were all it might be said that the effect of a union is such as to impose upon each of the districts entering into such union a definite obligation. However, the sections go on to provide in greater detail what the effect of such union shall be. The management and control of the union high school is to be in the hands of a committee as previously stated. The funds for the maintenance and support of the high school are to be provided by appropriations; and special taxes may be levied to meet the respective shares of the districts. Nowhere in the sections is the high school committee authorized to make a charge against a member district. Nowhere in the sections is there express provision or reasonable implication to the effect that the expense of conducting the joint high school, or any part of it, shall be a paramount charge against either district. Rather, the joint high school seems to be an enterprise of each district which, so far as finances are concerned, it is purely optional with the district to support, in the sense that if funds in addition to those required for the maintenance and operation of the elementary schools are not provided at the option of the board of education of a member district there will simply be no way to care for the share of that district. The joint high school law lacks the provisions necessary to make it workable in an emergency of this kind. Instances of legislation in which particular items of expense constitute paramount charges against the funds of taxing districts are very numerous; they occur in the school laws, as, for example, the method by which the county board of education is supported and the salaries of county and district superintendents are provided for. With such models of legislation available the general assembly has neglected to employ such methods to secure certain financial support for the joint high school. On the contrary, by limiting the tax rate it has made it possible, and indeed inevitable (without state aid at least), that the scheme of joint high schools shall be unworkable in many instances.

These things being so, this department has come regretfully to the conclusion that there is no authority to borrow money under section 5656 or any other section of the General Code which may be employed to furnish, directly or indirectly, the means for contributing the share of a member district of a union of districts for high school purposes of the support and maintenance of such union high school.

These conclusions being established, we find the high school committee still in existence with at least implied authority to proceed to employ teachers and a principal and to continue the operation of the joint high school, charging the proportionate share of the district which is able to pay against that district and continuing to charge the remainder against the district which is unable to pay, without however being able to enforce the charge. This situation is, of course, lamentable but it is a situation which seems to have arisen before, in the light of the case which has been cited, and for which there seems to be no help under present laws. Principals and teachers accepting employment in such joint high schools under these circumstances will have to look to the legislature for a considerable portion of their pay.

The only other possible result is to hold that the failure of one of the districts to meet its proportionate share, which can be certainly anticipated at the present time, works a dissolution of the union of districts. Though this question has been reserved, it may be pointed out that under one of the two sets of circumstances referred to by you such a dissolution would seem to be impossible, because in the event that the building in which the school is conducted belongs to the union of districts there is no provision of law for its disposition in the event of dissolution; in

other words, under these circumstances at least the legislature simply failed to provide for dissolution of a union of districts for high school purposes.

The assumption that it will be impossible for the district to meet its share of the expense of conducting the joint high school seems to be well founded; for on your statement of facts the district can not do so without receiving state aid. The submission in August, 1920, is expressly declared by section 3 of House Bill 615 to be "with like effect, for all purposes, as regards levies on the duplicate made up in the year 1920, as if submitted at the regular election in said year"; and section 7596 of the General Code as amended by that bill provides that "if the electors of the district do not approve the additional levy so submitted, the district shall not participate in such reserve." The board of education might indeed have waited until the regular election to submit the proposition, and might have deferred such action until ordered to take it by the superintendent of public instruction under the provisions of the section last cited. Having elected, however, to submit the question in August, the effect of such submission, both positively and negatively, is the same as if the question had been submitted at the regular election and pursuant to the orders of the superintendent of public instruction.

Again, the superintendent of public instruction probably (though no final opinion is expressed upon this point) is without authority to order a resubmission of the question in November, as his express power in this case is limited to action "if the additional levy provided for by sections 5649-4, 5649-5 and 5649-5a of the General Code has not been submitted to the electors," whereas in this case such question has been submitted to the electors and they have failed to approve the additional levy (Sec. 7596 G. C. as amended 108 O. L., Part II, p. 1307). Yet there seems to be no legal impediment in the way of the board of education of the district submitting the question of the additional levy on its own initiative at the November election. Should this be done, and should the electors of the district then approve the proposition, the superintendent of public instruction, who would be then engaged in making the inspection of the schools of the district (assuming an application for state aid), would be able to find that the necessary facts to qualify the district for the receipt of state aid existed. In short, though the district stands at the present time disqualified to receive state aid, and though the board of education at the present time is without power to make the additional levy; and though also the superintendent of public instruction, as the matter now stands, is without power to order the resubmission of the question, yet the board of education has such power, which it may exercise on its own initiative, and if the electors on the occasion of such resubmission approve the proposition, it will not be too late to secure the state aid as well as the proceeds of the additional levy. In such event the difficulty of the situation will disappear.

If, however, nothing is done to ameliorate the conditions which now exist, and the high school committee continues to function (which has been assumed), it is clear that the district in which the high school building used by the high school committee is situated can not take over the building and use it in the maintenance of a high school established by itself, even though the district in the first instance was the owner of the building; and if the building in the first instance was constructed by the use of funds raised in both districts the same conclusion is even clearer.

Respectfully,
JOHN G. PRICE,
Attorney-General.