1508.

SCHOOLS—DUTY OF DISTRICT BOARD OF EDUCATION TO CONTINUE ELEMENTARY SCHOOLS FOR AT LEAST THIRTY-TWO WEEKS IN SCHOOL YEAR—FAILURE OF ELECTORS TO VOTE MAXIMUM LEVY—NO EXCUSE TO DISCONTINUE SCHOOL—BOARD OF EDUCATION MAY BORROW MONEY UNDER PROVISIONS OF SECTIONS 5656 AND 5658 G. C. TO CONTINUE SCHOOL.

1. *Under the provisions of section 7644 G. C., it is a mandatory duty of a district board of education to continue the elementary schools for at least thirty-two weeks in a school year.*

2. *Where a school district cannot participate in the state reserve fund by reason of the electors having failed to vote for the maximum levy, and as a result there is not a sufficient fund to continue the school for thirty-two weeks, the failure of said levy will not excuse the discontinuance of the schools and the board of education may borrow money under the provisions of sections 5656 and 5658 G. C. to pay valid and binding obligations made for said purpose.*

COLUMBUS, OHIO, August 21, 1920.

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

DEAR SIR:—Your letter of recent date is as follows:

> "That a district may participate in the state reserve of $500,000, a three mill levy must be voted beyond the exterior limitations of the Smith law under the provisions of sections 5649-5 and 5649-5a G. C. At an election held for this purpose, a majority of the electors voted against the proposition of authorizing the board of education to make an extra levy. The law requires that a board of education must provide for the continuance of any school in the district for at least thirty-two weeks in the year. In a district such as the one above mentioned, owing to the failure of the electors to authorize the extra levy, there will not be enough funds to continue the schools thirty-two weeks.
>
> What are the rights and duties of a board of education in such a case in so far as sections 7610, 7610-1, 7611, and 5656 G. C., or any other sections of the General Code, are concerned?"

As stated in your letter and pointed out in Opinion No. 1435, issued July 17 1920, a school district may not participate in the state reserve fund unless it has exhausted all of its power by levying taxes for school purposes. At the same time the board of education cannot make the maximum levy without authorization by a vote of the people.

The question presented is whether or not a district may permit the schools to fail because it has refused to avail itself of its opportunity to participate in the state reserve. While it is conceded that a board of education cannot levy a tax except in pursuance of law, and the board's hands are tied in this respect in the situation that you present, we must now consider whether or not other sections of the statute furnish relief.

Section 7644 G. C., provides:

> "Each board of education shall establish a sufficient number of elemen-

tary schools to provide for the free education of the youth of school age within the district under its control, at such places as will be most convenient for the attendance of the largest number thereof. Every elementary day school so established shall continue not less than thirty-two nor more than forty weeks in each school year. All the elementary schools within the same school district shall be so continued."

If the board of education has failed to provide a sufficient levy which is within its power to make and the interest of the schools is handicapped because of such failure, it is believed that under the provisions of section 7610 G. C., the county commissioners can make the levy and perform such duties as the board of education could perform. However, it is apparent that the commissioners under this section cannot go beyond the power of the board of education, and therefore cannot vote the three mill levy which must be authorized by a vote of the people, and the only relief the commissioners would be able to grant would be in case the board of education had not made the maximum levy it is authorized to make without a vote of the people.

Section 7610-1 G. C. provides:

"If the board of education in a district fails to provide sufficient school privileges for all the youth of school age in the district, or to provide for the continuance of any school in the district for at least thirty-two weeks in the year, or to provide for each school an equitable share of school advantages as required by this title, or to provide suitable school houses for all the schools under its control, or to elect a superintendent or teachers, or to pay their salaries, or to pay out any other school money, needed in school administration, or to fill any vacancies in the board within the period of thirty days after such vacancies occur the county board of education of the county to which such district belongs, upon being advised and satisfied thereof, shall perform any and all of such duties or acts, in the same manner as the board of education by this title is authorized to perform them. All salaries and other money so paid by the county board of education shall be paid out of the county treasury on vouchers signed by the president of the county board of education, but they shall be a charge against the school district for which the money was paid. The amount so paid shall be retained by the county auditor from the proper funds due to such school district, at the time of making the semi-annual distribution of taxes."

Under the provisions of section 7610-1 G. C., the power of the county board of education is limited and it can only perform "all of such duties or acts, in the same manner as the board of education * * * is authorized to perform them."

In view of the foregoing, the conclusion must be that there is no authority outside of the voters of the district which can enable the district to participate in the state reserve by reason of the maximum levy, which is a requisite for said purpose. However, the mandatory provisions of section 7644, *supra,* requiring a board of education to continue the elementary school for not less than thirty-two weeks in each school year, must not be overlooked in the consideration of your inquiry. It must be kept in mind that it is the established policy of this state, as evidenced by all the organic and statutory laws and judicial decisions, to provide for the education of the youth of the state, affording equal advantages to all. The courts have frequently announced that the school laws shall be liberally construed to the end that equal benefits and facilities shall be given to every locality, and it also has been held that school laws and compulsory education are not in recognition of personal right but rather for the protection of the state itself.

Inasmuch as "the legislative intent is the pole-star of all judicial interpretation," it is not in harmony with the fixed policy of the state to say that it was the legislative intent that the elementary schools of a district could be operated less than thirty-two weeks in a school year on account of the failure of the district to take advantage of the machinery at its command to levy a sufficient tax to properly secure the maintenance of its schools. It must be assumed that it was the legislative intent that the mandatory provisions of section 7644 G. C., must be complied with, and there is no escape from the conclusion that such elementary schools as will offer proper educational advantages to the youth of the district must be maintained by the board of education regardless of whether or not the maximum tax levy has been made.

The district board of education, in pursuance to the provisions of section 7644, supra, is by implication required to employ a sufficient number of teachers and make other necessary provisions for the purpose of continuing the schools, and when such indebtedness has been incurred the board of education may borrow money to pay the same under authority of sections 5656 and 5658 G. C., which provide:

> "Sec. 5656. The trustees of a township, the board of education of a school district, and the commissioners of a county, for the purpose of extending the time of payment of any indebtedness, which from its limits of taxation, such township, district or county is unable to pay at maturity, may borrow money or issue the bonds thereof, so as to change, but not increase the indebtedness in the amounts, for the length of time and at the rate of interest that said trustees, board or commissioners deem proper, not to exceed the rate of six per cent. per annum, payable annually or semi-annually."

> "Sec. 5658. No indebtedness of a * * * school district * * * shall be funded, refunded or extended unless such indebtedness is first determined to be an existing, valid and binding obligation of such * * * school district * * * by a formal resolution of the * * * board of education * * * thereof. * * * "

Undoubtedly, the board could not borrow money under the provisions of the statutes referred to to pay obligations arising under contracts wherein the clerk is required to certify as to existence of the fund or as to the same being in process of collection, as provided in section 5660 G. C.; but inasmuch as this section does not apply to the employment of teachers (see section 5661) it is believed that the board of education has sufficient authority to create a valid and subsisting obligation in providing for the maintenance of the schools of its district, as required by section 7644, G. C., as will enable it to borrow money to pay such indebtedness, under the provisions of section 5656 G. C.

In the event the district board does not take the action above outlined then the county board of education can take action under the provisions of section 7610-1 G. C., and the amount which it has expended may be deducted from the next semi-annual collection of taxes to be distributed to said district. In such a case it will be observed that the district board would have a deficiency and debts incurred and could borrow under the provisions of section 5656 G. C. to pay the same.

Of course, the procedure above indicated will be unprofitable for the district in so far as finances go. However, in my opinion it is the manifest intent of the law that the elementary schools of the state must be maintained by the district board of education for at least thirty-two weeks, and this responsibility cannot be escaped.

The remedy for the district is to vote the maximum rate at the earliest opportunity to the end that it may participate in the state reserve fund.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1509.

MUNICIPAL CORPORATIONS—WHEN PARTY CONTRACTS WITH CITY TO FURNISH STIPULATED QUANTITY OF COAL AT SPECIFIED PRICE PER TON—DISCUSSION AS TO CONTRACTOR'S LIABILITY IN CASE OF NON-PERFORMANCE OF CONTRACT—AUTHORITY OF BUREAU OF INSPECTION AND SUPERVISION OF PUBLIC OFFICES IN SUCH A MATTER.

Where a party contracts with a city to furnish a stipulated quantity of coal at a specified price per ton, without providing against conditions making performance impossible, in the absence of an act of God, the operation of law or the other party rendering such performance impossible, said party is bound to perform or is liable in damages. However, it is a question of fact as to whether or not the nonperformance is excusable, and if not justified it is a further question of fact as to the amount of damages. The Bureau of Inspection and Supervision of Public Offices is not authorized to determine such a matter.

COLUMBUS, OHIO, August 21, 1920.

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

GENTLEMEN:—Your communication of recent date is as follows:

"We are respectfully requesting your written opinion on the following matter. We are referring you to your opinion to be found page 746 of the 1919 reports.

Statement of Facts.

On May 1, 1919, the City of A entered into a contract with John Smith for coal required in operating waterworks and light plant for one year, ending May 1, 1920, approximately 8,000 tons more or less at a price of $3.00 per ton delivered. This contract contained no clause or provisions relating to strikes, etc. During the latter part of the year 1919 and up to the expiration of the contract, the contractor claimed a sufficient quantity of this coal could not be secured but shipped coal of a higher quality at a considerable advance in price. It was also necessary, due to the failure on the part of the contractor, to purchase coal wherever possible by the municipality and in all cases at a price in excess of the contract price. So far as the original contract is concerned there was no authority for modification of any nature.

Question 1: Can this department make finding for recovery against said coal company for the excess price charged by the coal company on coal delivered in a sum over and above the $3.00 per ton?

Question 2: Can this department make findings for recovery against said coal company for excess price paid for coal which the municipality was compelled to go out and buy from others?"