3538.

SALARY—ASSISTANT COUNTY SUPERINTENDENT OF SCHOOLS—STATE PAYS PART ONLY IF LEGISLATURE MAKES APPROPRIATION AND FAILURE TO MAKE APPROPRIATION IS NOT ABROGATION OF CONTRACT—USE OF STATE FUNDS LIMITED TO PURPOSE OF APPROPRIATION.

SYLLABUS:

1. *The provision of section 4743, General Code, to the effect that one-half the salary of an assistant county superintendent of schools not to exceed $750.00 shall be paid by the state, does not constitute a contract on the part of the state to pay a definite portion of the said salary in accordance with the statute, but amounts to a direction merely, that there shall be paid from the state treasury a part of the salaries of assistant county superintendents of schools if and when a proper appropriation is made for that purpose.*

2. *No money may be drawn or paid from the state treasury except in pursuance of a specific appropriation made by law.*

3. *The failure on the part of a state legislature to appropriate a sufficient amount to meet the state's share of the salaries of assistant county superintendents of schools, as the payment of said share is directed by the statute, does not amount to the abrogation of a contract.*

4. *By an "appropriation" is meant a setting aside from public revenues, of a sufficient sum of money for a specified purpose, in such manner that administrative officers of government are authorized to use that money and no more for that object, and no other.*

5. *Neither a direction in a statute that the state shall pay money for a certain purpose nor a promise on the part of the state to pay money for a given purpose, nor a promise on the part of the legislature to make an appropriation, nor a pledge of the faith of the state can amount to an appropriation.*

6. *The obligations of a state, regardless of how solemn they may be or how they may have arisen, can not be discharged unless an appropriation exists that may be made to apply to the purpose.*

COLUMBUS, OHIO, September 5, 1931.

HON. B. O. SKINNER, *Director of Education, Columbus, Ohio.*

DEAR SIR:—This will acknowledge the receipt from you of the following communication:

> "I have the following letter from Mr. R. P. V., Lorain County Superintendent of Schools:
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> 'In conversation today with our county prosecutor, he does not see how it is possible for the legislature to legally cut out the appropriation for the state's share of the salaries of assistant county superintendents. He holds that according to Section 4743, where it states that the salary of any assistant county superintendent shall in no case be less than $1,000.00 per annum, half of which salary, not to exceed $750.00, shall be paid by the state, and the remainder by the county school district, requires that the state shall meet that obligation, and it is his opinion that until the office of assistant county superintendent is abolished that the state is obligated to carry out the provisions of that section. To

me it looks as though the state is absolutely abrogating its contract with the teachers. May I please have your opinion in regard to this?'"

Sections 4739 and 4743, General Code, which pertain to the appointment and compensation of assistant county superintendents of schools, read in part, as follows:

> Sec. 4739. "One or more assistant county superintendents, as may be determined by the county board of education, may be elected for a term of not to exceed three years in each county school district by the county board of education on the nomination of the county superintendent. * * *"
>
> Sec. 4743. "The compensation of the assistant county superintendent shall be fixed at the same time that the appointment is made and by the same authority which appoints him, such compensation shall be paid out of the county board of education fund on vouchers signed by the president of the county board. The salary of any assistant county superintendent shall in no case be less than one thousand dollars per annum, half of which salary not to exceed seven hundred and fifty dollars shall be paid by the state and the remainder by the county school district. The part paid by the county school district shall be pro rated among the village and rural school districts in such county school district in proportion to the number of teachers employed in each district."

Section 4744-3, General Code, provides for the creation of a "county board of education fund" in each county school district and for the augmentation of that fund from the state treasury by an amount equal to the state's share of the salaries of county superintendents of schools and assistant county superintendents of schools as that share is fixed by sections 4743 and 4744-1, General Code.

Section 7706, General Code, sets forth the duties of a county superintendent of schools and of assistant county superintendents of schools, which duties as so fixed are the same for each of such sets of officers. These duties consist of visiting the schools of the county school district, directing, instructing and assisting teachers, classifying and controlling the promotion of pupils and performing other duties in connection with the organization and administration of the schools.

While it has never been definitely held by any court, so far as I am advised, that an assistant county superintendent of schools is a public officer, I have little doubt but that it would be held were the question to arise in a case where it became necessary for a court to decide one way or the other. There has never been a completely satisfactory test devised by which it may be determined in all cases, whether a public position constitutes a public office or merely a governmental agency or employment although there are many cases in which the subject has been considered. As stated by Chief Justice Marshall, in the case of *State ex rel.* v. *Callow,* 110 O. S., 367, 372:

> "One of the features running through the cases where they were held to be public officers was the fact of their having to perform independent duties."

See also *State ex rel.* v. *Brennan,* 49 O. S., 33; *State ex rel.* v. *Jennings,* 57 O. S., 415; *State ex rel. Armstrong* v. *Halliday, Auditor,* 61 O. S., 171; *State ex*

rel. Landis v. *Board of Commissioners,* 95 O. S., 157; *Wright* v. *Clark et al.,* 119 O. S., 462.

By applying the criteria of what constitutes a public office, as set forth in the cases cited above, it seems clear that the position of assistant county superintendent of schools measures up to the standard set for a public officer. It has been definitely held that a county superintendent of schools is a public officer. *State ex rel. Clarke* v. *Cook,* 103 O. S., 465.

Inasmuch as the duties of an assistant county superintendent of schools are fixed by statute and are precisely the same as those of a county superintendent of schools, and that his manner of appointment and the fixing of his compensation are the same as that for a county superintendent of schools, there can be little doubt that the same holding would be made with reference to an assistant county superintendent of schools, as was made with reference to a county superintendent of schools insofar as his being a public officer is concerned, if the question is ever passed upon by the courts.

I have alluded to the status of an assistant county superintendent of schools, with respect to his being a public officer, for the sole purpose of showing that whatever obligation there may exist for the payment of his compensation that obligation does not arise upon contract and the failure to make provision for the payment of such compensation as may be fixed for him by statute does not constitute an abrogation of a contract in any sense of the word.

It is well settled that the right of a public officer to be compensated for his services does not arise upon contract. This principle is stated in Corpus Juris, Volume 46, page 1014, where it is said:

> "The person rightfully holding an office is entitled to the compensation attached thereto; this right does not rest upon contract, and the principles of law governing contractual relations and obligations in ordinary cases are not applicable."

In support of the above principle there are cited many cases.

Moreover, the mere fact that the legislature in 1921, by the enactment of section 4743, General Code, saw fit to provide that a portion of the salary of an assistant county superintendent of schools should be paid from the state treasury did not serve to bind subsequent legislatures so as to require them to provide the means for the payment of that portion of such salary. The Constitution of Ohio, in Article I, Section 2 thereof, provides:

> "All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the general assembly."

Any subsequent legislature to the one which enacted section 4743, possessed the power to repeal, alter or revoke the provisions contained in that statute with reference to the payment of a portion of the salary of a county superintendent of schools from the state treasury. Such a repeal might be an express repeal or it might be repealed by implication. The mere failure on the part of a legislature to provide the means for meeting such payments amounts to neither an express repeal or a repeal by implication of the provisions of the statute with reference thereto, but it does amount to a suspension of the provision until

such time as money is made available to meet the state's share of such salaries.

It is fundamental that the payment of the state's share of the salary of an assistant county superintendent of schools, as fixed by section 4743, General Code, can not be made unless money is made available for that purpose by an appropriation which must be made by the legislature. That an appropriation is necessary before public moneys may be expended has been one of the fundamental principles of English law since the Revolution of 1688 and has been incorporated in some form or other in the written constitution of all English speaking peoples since that time. The importance of such a provision was recognized by the framers of the Federal Constitution in 1789 and was incorporated therein in Section 9, of Article I thereof. The particular provision with reference thereto in the Constitution of Ohio, is Section 22, of Article II of that instrument, which reads as follows:

> "No money shall be drawn from the treasury, except in pursuance of a specific appropriation, made by law; and no appropriation shall be made for a longer period than two years."

By an "appropriation" is meant the setting aside from public revenue of a certain sum of money for a specific object in such manner that executive officers of government are authorized to use that money and no more for that object, and no other. *Hunt, Governor et al.* v. *Callaghan, State Treasurer* (*Ariz.*) 257 Pac. 648; *State* v. *Moore,* 50 Neb., 88; 61 A. S. R., 538.

A well established principle of law is stated in *State* v. *Moore,* supra, in the following terms:

> "Neither a promise on the part of the state to pay moneys for a bounty nor a promise on the part of the legislature to make an appropriation, nor a pledge of the faith of the state can amount to an appropriation."

See also *Carr* v. *State,* 22 A. S. R., 638.

It is a fact that the 89th General Assembly appropriated but $20,000 to meet the state's share, as fixed by statute, of the salaries of assistant county superintendents of schools. The $20,000 so appropriated was limited by the terms of the Appropriation Bill (House Bill No. 624) to expenditures for the year 1931. This means that the $20,000 so appropriated is all the money made available by specific appropriation for the biennium ending December 31, 1932 for the purpose mentioned.

The failure of the legislature to appropriate more makes it necessary for county school districts to make provision for the payment of the salaries of assistant county superintendents of schools from their local county board of education funds after the $20,000 fund so appropriated is exhausted. I am informed that the $20,000 fund is already exhausted in the payment of the state's share of the salaries of assistant county superintendents of schools which have already accrued in accordance with the terms of the statute since January 1, 1931.

The failure of the legislature to provide by appropriation for meeting the state's share of these salaries, as fixed by statute, does not in any sense of the word constitute an abrogation of a contract made by the state, but simply

amounts to a suspension of the portion of the statute until such time as moneys are made available by appropriation to meet the requirements of the statute.

Respectfully,
GILBERT BETTMAN,
Attorney General.

3539.

BOARD OF EDUCATION—NO MORAL OR LEGAL OBLIGATION TO PAY HOSPITAL BILL OF STUDENT INJURED IN FOOTBALL GAME.

SYLLABUS:

Boards of education are without authority to recognize and pay damages or doctor or hospital bills for pupils injured in playing of high school football games as either legal or moral obligations.

COLUMBUS, OHIO, September 8, 1931.

HON. JOHN K. SAWYERS, JR., *Prosecuting Attorney, Woodsfield, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion which reads as follows:

> "A high school student playing upon a the regular high school football team is injured while playing football in a game arranged for and played by the high school football team of the school in question. During the progress of the game the boy in question suffers an injury which calls for medical and surgical and hospital treatment.
>
> The school board has been asked to pay the boy's medical and hospital bill. The High School Athletic Association has also been asked to pay said bill. Are either legally liable for same? Could the same be paid by the school board if it was disposed to do so irrespective of its legal responsibility?
>
> I have read with interest your recent opinion relative to liability in tort for any damage accruing to patrons at a game played on the playgrounds of the board of education, which grounds had been leased or let to some outside party for the purpose of giving some kind of an athletic exhibition. It would seem that the same principle of law would be determinative in both instances, but inasmuch as the clerk of the board of education has asked for an opinion whether it might pay such a bill with public funds or whether the High School Athletic Association would be legally liable therefor, I am asking you for your advice in the matter."

High school football and similar activities are usually conducted and supervised by associations commonly called athletic associations. Sometimes, they are not supervised by anyone other than the participants who have a leader or someone recognized as manager, who arranges dates, solicits and collects funds, purchases supplies and otherwise looks after the affairs of the team. These associa-