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?"

Specific reference is made to the discussion in the opinion to which you refer relative to the power of the city authorities to modify a contract. It is believed that the same reasoning is applicable to the situation as shown in your statement of facts in so far as the authority to modify such a contract is concerned. It is very evident that the city could not legally pay more than $3.00 per ton for coal furnished under a contract that obligated it to pay only $3.00. In view of the foregoing opinion it is very evident that there is no authority for the city to modify such a contract. If it were to be regarded as a new contract then it is apparent that it was not properly entered into.

The question of impossibility of performance is necessarily pertinent in connection with your inquiry. It is a well established general rule of law that one contracting to do a thing must perform unless he has stipulated against it, and unforeseen difficulties will not excuse him unless performance is impossible by reason of an act of God which destroys the subject matter, the operation of law, or the act of the other party.

In the case of Board of Education vs. Townsend, 63 O. S. 514, it was held:

> "Inevitable accident will not excuse the performance of a contract where its essential purposes are still capable of substantial accomplishment, though literal performance has become physically impossible."

The syllabus in the case of Morris Coal Company vs. Thompson, 2 O. App. 345, is as follows:

> "When a party by his own contract creates a duty or a charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his own contract. Hence, where a coal-mining company, operating in mining coal, and owning divers and sundry structures, including shaft, tipple, scales, tracks, and all other necessary machinery and appliances on lands adjoining those of the lessor, enters into a contract of lease with the lessor, whereby it purchases and agrees to mine all the minable coal underlying lessor's farm of 336 acres, agreeing to pay ten cents royalty for each 2,000 pounds and after six months to pay said lessor an aggregate royalty of not less than $4,000 until all the said minable coal has been removed or paid for, and after 150 acres of said demised coal has been mined and paid for the tipple and appliances by means of which said coal was mined and was intended to be mined were destroyed by fire without fault of said lessee and it would be unprofitable for the said lessee to reconstruct the same for the purpose of mining the amount of coal remaining in said mine on said land, and said lessee had intended to mine said coal through said existing shaft and tipple and had not otherwise provided therefor,
>
> Held: That there was no implied condition that the destruction of said tipple and appliances without fault of the lessee should relieve it from the obligations of said contract, but that it was still bound to mine the minable coal underlying said premises until the same was mined or removed or pay the minimum royalty provided for in said lease."

It seems clear that upon the statement of facts given the party was bound to furnish the coal or answer in damages. Of course, if said party had been dealing with an individual the situation would be different as the contract could have been modified; but the city being without authority to modify said contract, it was in force at the time the coal was delivered. The seller was bound to deliver at the

price of $3.00 per ton. The fact that he would have been required to purchase coal at a higher price would not excuse him. Therefore, it seems clear that the city was without authority to pay more than $3.00 per ton, the contract price. However, the remedy of the city if it has such is an action in damages for the loss it has sustained by reason of the failure of the party to comply with the contract. The measure of said damages is the difference between the contract price and the market price of the same grade of coal at the time the board was compelled to purchase from other sources. However it is believed that it is impossible to determine whether or not an action can be maintained by the city to recover such damages. Undoubtedly, the payment of the increased price could have been enjoined before payment was made. However, we must keep in mind the holding in the case of State vs. Fronizer, 77 O. S., 7. In this case the state brought an action against certain contractors to recover money paid to said contractors under a contract improperly let by the county commissioners. The court in part said:

> "The principle applicable to the situation is the equitable one that where one has acquired possession of the property of another through an unauthorized and void contract, and has paid for the same, there can be no recovery back of the money paid without putting, or showing readiness to put, the other party in *statu quo,* and that rule controls this case unless such recovery is plainly authorized by the statute. The rule rests upon that principle of common honesty that imposes an obligation to do justice upon all persons, natural as well as artificial, and is recognized in many cases."

The above doctrine was re-announced by Judge Westenhaver in the case of Casey, et al vs. City of Canton, decided February 28, 1918, at Cleveland, 16 O. L. Rep., page 42.

Therefore, it will be seen that this phase of your question cannot be determined from your statement of facts in view of the above decision. Whether or not the kind of coal the contract required to be furnished was obtainable is important. Also, the comparative value of the coal furnished and the kind contracted for might be material in this connection. Furthermore, whether or not the action taken by the city in reference to the delivery of the higher grade of coal was a benefit to the city, in view of existing conditions, must be considered in view of the decisions referred to. Therefore, as above stated, while there is no question as to the illegality of payments made by the city above the contract price, for the reasons herein given, you will observe it cannot be definitely determined whether or not an action can be maintained to recover said damages. It further is obvious that your bureau is not authorized to determine questions of damages.

Your second inquiry involves the question of non-performance of the contract and reference is made to the cases heretofore cited. It is elementary that one who contracts to do a thing must perform regardless of the difficulties encountered, unless he has stipulated against it or is excused by reason of an act of God which destroys the subject matter, the operation of the law, or the act of the other party, and if he does not perform he is answerable in damages. Therefore, it will be seen that it cannot be determined definitely at this time what damages would be sustained, if any. In any event, it is a question of fact to be determined as to whether or not there was an impossibility of performance, and if non-performance cannot be excused then it is a further question of fact to be determined in a judicial proceeding as to the amount of damages. As stated in reply to your first inquiry, it is believed that your bureau is not authorized to determine questions of this character, and your second question is therefore answered in the negative.

Undoubtedly, your bureau is authorized to point out the irregularity of the

procedure and make such recommendations as the facts seem to warrant, but not to the extent of making a specific finding when the question involved is one of damages, as in the situations you present.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1510.

BOARD OF EDUCATION—WHERE CITY PASSES FROM ONE CLASS TO DIFFERENT ONE ACCORDING TO FEDERAL CENSUS BY REASON OF INCREASED POPULATION—CITY BOARD OF EDUCATION MUST CONFORM TO LAW FOUND IN SECTIONS 4698, 4699, 4701 AND 4702 G. C.—HOW SECTIONS CONSTRUED—BOARD OF EDUCATION PERMITTED TO HIRE TEACHERS FOR VOCATIONAL SCHOOLS.

1. *In passing from one class or kind of city school district to a different one, when, after the official announcement of the census of the district, it becomes known that a change of status of the district has been produced by a change in population, city boards of education must conform to and apply the law found in sections* 4698, 4699, 4701 *and* 4702 *G. C.*

2. *Effect must be given every law if any reasonable and practical construction can be given its language.*

3. *Since the law allows the establishment and maintenance of vocational schools, a board of education is permitted to hire teachers for such schools.*

COLUMBUS, OHIO, August 23, 1920.

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

DEAR SIR:—Receipt of your recent communication is hereby acknowledged, which is as follows:

> "According to the last federal census, a city has over 150,000 persons. According to the census of 1910 this city had over 50,000 persons but less than 150,000. In passing from a city school district of less than 150,000 persons but more than 50,000 persons to a school district of over 150,000, what change takes place in the board of education of said city and what are the duties of the board of education as to procedure to bring about the proper changes?
>
> "Can a board of education employ a teacher to teach adults for Americanization purposes or otherwise, who are employed in the trades and industries?"

The law applicable to your inquiry, as amended, is found in sections 4628, 4699 and 4701, 108 O. L., Part 1, p. 192. Section 4702 G. C. also applies. The sections, or so much of them as are applicable, are as follows:

> *Sec.* 4698: * * * * * * * * * * * *
> In city school districts containing according to the last federal census a population of 150,000 persons or more, the board of education shall consist of not less than five nor more than seven members elected at large by the qualified electors of such district; the office of subdistrict member in boards