2163.

ARCHITECT—CONTRACT FOR PLANS AND SPECIFICATIONS FOR SCHOOL BUILDING INVALID UNLESS CERTIFICATE OF FISCAL OFFICER IS ATTACHED.

SYLLABUS:

A contract with an architect, for the preparation of plans and specifications for a school building and supervision of the erection of the same, is invalid unless there is attached thereto a certificate of the fiscal officer of the school district that the amount of money required to meet the same has been lawfully appropriated for such purpose, and is in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances.

COLUMBUS, OHIO, May 28, 1928.

HON. OTTO J. BOESEL, *Prosecuting Attorney, Wapakoneta, Ohio.*

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

"Uniopolis Village School District is a school district located in our county, of the rural class. On the 16th day of September, 1926, said Board of Education secured the consent of the Ohio Tax Commission for permission to submit to the electors of said school district a proposal to issue bonds in the sum of $60,000.00 for the purpose of erecting a new school building in said district. At the regular election in November, following, the proposition carried by a vote of 162 for the issue of said bonds, and 128 against the issue of said bonds, making one more vote than the fifty-five per cent necessary to carry.

Thereafter legislation was duly enacted by said board providing for the issuance of these bonds.

On November 22, 1927, at an adjourned meeting of said board, said Board of Education authorized the execution of an agreement with_____, architect, providing for the furnishing of drawings, plans and specifications of said proposed school building. The meeting in question was an adjourned meeting and all members present voted on motion authorizing the execution of this contract and authorizing the President and Clerk of the board to sign same on behalf of the board.

At the time of the execution of this contract the records fail to disclose a certificate by the Clerk certifying that the money necessary for the payment of the architect, under this contract, was in the treasury for that purpose, nor was said certificate made at any other time. It appears that Mr._____ furnished all the plans and specifications provided for under the contract, and bids were advertised and received for the said work, but the personnel of the board changed since the 1st of January, 1928, and the new board determined not to proceed with the construction of this building, and repealed all the legislation relating to the proposed bond issue, and hence nothing was done.

Mr._____ now claims 2½% of the estimated costs of said contract, as provided for in the last section of this contract, and the Board of Education desires that I secure the opinion of the Attorney General on the following propositions:

First: Is a Certificate of the Clerk, certifying that the necessary funds are in the treasury for that purpose, necessary on a contract of this character?

Second: Is the Board of Education of Uniopolis School District legally bound to pay to _____, the amount of 2½% of the estimated costs, as provided for under this contract?

The board desires this information in order to be safe in their disposition of this matter. In other words, if the Attorney General's department is of the opinion that this is a valid and binding obligation against the board, and the board is liable therefor, they desire to have this opinion to fortify themselves in the event objection is made by anyone to the payment of this claim. I might add, there is no question as to the proper execution of the contract, nor is there any question in the contract as to the fact that Mr. _____ performed the services required of him under the contract. The only question that seems to be raised in the matter is whether or not the failure of this certificate of proper funds vitiates this contract and whether or not there is any legal obligation on the part of said board to pay to the architect the 2½% provided for under the contract."

Sections 5625-1 and 5625-33, General Code, enacted in House Bill No. 80 of the Eighty-seventh General Assembly, effective August 10, 1927 (112 O. L., 391-496) read in part as follows:

Sec. 5625-1. "The following definitions shall be applied to the terms used in this act:

(a) 'Subdivision' shall mean any county, school district, except the county school district, municipal corporation or township in the state.

* * * * * * * *

(i) 'Taxing unit' shall mean any subdivision or other governmental district having authority to levy taxes on the property in such district or issue bonds which constitute a charge against the property of such district including Conservancy District, Metropolitan Park Districts, Sanitary Districts, Road Districts and other districts."

* * * * * * * *

Sec. 5625-33. "No subdivision or taxing unit shall:

(a) Make any appropriation of money except as provided in this act; provided that the authorization of a bond issue shall be deemed to be an appropriation of the proceeds of the same for the purpose for which such bonds were issued, but no expenditure shall be made from any bond fund until first authorized by the taxing authority.

* * * * * * * *

(d) Make any contract or give any order involving the expenditure of money unless there is attached thereto a certificate of the fiscal officer of the subdivision that the amount required to meet the same * * *, has been lawfully appropriated for such purpose and is in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances. Every such contract made without such a certificate shall be void and no warrant shall be issued in payment of any amount due thereon. In case no certificate is furnished as hereinbefore required, upon receipt by the taxing authority of the subdivision or taxing unit, of a certificate of the

fiscal officer that there was at the time of the making of such contract or order, and at the time of the execution of such certificate a sufficient sum appropriated for the purpose of such contract and in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances, such taxing authority may authorize the issuance of a warrant in payment of amounts due upon such contract; but such resolution or ordinance shall be passed within thirty days from the receipt of such certificate; * * *"

A contract with an architect such as is involved in your inquiry is no exception to the rule laid down in the above section 5625-33, General Code. It will be observed that the statute says:

"No subdivision or taxing unit shall * * * make *any* contract or give *any* order *involving the expenditure of money* unless there is attached thereto a certificate of the fiscal officer of the subdivision that the amount required to meet the same * * * has been lawfully appropriated for such purpose and is in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances."

Obviously, the contract about which you inquire is a *contract involving the expenditure of money*, and if an order were given for payment for services rendered under said contract, it would be an *order involving the expenditure of money.*

Inasmuch as the contract was made without the required certificate of the fiscal officer of Uniopolis Village School District, and no certificate was made at any other time, the contract is "void and no warrant shall be issued in payment of any amount due thereon."

There is no reason why the required certificate could not have been made when the contract was entered into if the board of education had previous to that time authorized the issuance of bonds, as consented to by the Tax Commission, and approved by the vote of the people, and had borrowed money in anticipation of the issuing of these bonds, as they were fully authorized to do. Of course, if there really were sufficient unencumbered money in the general fund of the school district on November 22, 1927, to meet the contract with the architect, a proper certificate might then have been issued and may even yet be issued, as will be seen upon examination of the statute, Section 5625-33, General Code.

It is provided by Section 2293-25, General Code, (112 O. L. 375) as follows:

"Whenever the taxing authority of a subdivision has legal authority to, and desires to issue bonds without vote of the people, it shall pass a resolution or ordinance declaring the necessity of such bond issue, its purpose and amount. In such resolution or ordinance the taxing authority shall determine, and in any case where an issue of bonds has been approved by a vote of the people, the taxing authority shall by ordinance or resolution determine, whether notes shall be issued in anticipation of the issue of bonds, and, if so, the amount of such anticipatory notes, not to exceed the amount of the bond issue, the rate of interest, the date of such notes, and their maturity, not to exceed two years. Such notes shall be redeemable at any interest period. A resolution or ordinance providing for the issue of notes in anticipation of the issue of bonds shall provide for the levy of a tax during the year or years while such notes run, not less than that which would have been levied if bonds had been issued without the prior issue of such notes."

It appears from your communication that the consent of the Tax Commission for permission to submit to the electors a proposal for the issuing of bonds for the building of a new school building in Uniopolis Village School District was received on September 16, 1926, and thereafter at the November election in 1926, the proposal to issue these bonds was approved by the electors of the school district. You state that "thereafter legislation was duly enacted by the said board providing for the issuance of these bonds." While you do not so state, apparently this legislation for the issuance of bonds was enacted prior to November 22, 1927, the date the contract with the architect was entered into.

Section 2293-25, General Code, quoted above, did not become effective until August 10, 1927. Prior to that time there was in force Section 5654-1, General Code, which extended to boards of education authority similar to that contained in Section 2293-25, supra, to issue notes in anticipation of an issue of bonds after the legislation had been enacted for the issuance of the bonds, so that at all times prior to November 22, 1927, the date of the contract with the architect, about which you inquire, and after the November election of 1926, the board of education of the Uniopolis Village School District had authority to enact legislation for the issuance of bonds in the sum of $60,000 for the erection of a new school building in said district, and at the time when such legislation was enacted, to issue notes in anticipation of the issuance of said bonds, and thus secure funds which would permit them to employ an architect and enable their fiscal officer to certify that the money was in the treasury to meet the contract which they might make with their architect.

Not having done this, the contract which they did make was not made in accordance with the statute, and by the terms of the statute, is void.

In specific answer to your questions therefore, it is my opinion that in making a contract such as that about which you inquire, it is necessary that the fiscal officer of the school district certify that the necessary funds are in the treasury to meet the obligation incurred by the contract, and that said funds are free from any previous encumbrances. Inasmuch as the proper certificate was not made in this case, the board of education is not legally liable under said contract.

While the above answers your specific questions, in view of the nature of the facts set forth in your request, I invite your attention to Opinion No. 2016, rendered under date of April 25, 1928, to the Prosecuting Attorney of Allen County, in which it was said as follows:

> "In connection with these conclusions, however, your attention is directed to Opinion No. 1001, rendered by this department, under date of September 14, 1927, to the Prosecuting Attorney at West Union, Ohio. The first and second paragraphs of the syllabus read:
>
> '1. When public authorities expend or authorize the expenditure of public moneys in pursuance of any contract, agreement, obligation or order, without first having obtained the certificate of the chief fiscal officer of the taxing subdivision for which they are acting, that the money required to meet such contract, agreement, obligation or order has been appropriated or authorized or directed for such purpose and is in the treasury to the credit of the appropriate fund, free from any previous and outstanding obligation or certification, as provided by Section 5660, General Code, and such contract, agreement, obligation or order has been executed by the delivery to the taxing subdivision of the subject of the contract, agreement, obligation or order, and the contract price fully paid, the taxing subdivision cannot recover from the contractor or obligor the amount paid on such void and illegal contract without first putting or showing readiness to put the contractor or obligor in statu quo.

2. Public officers who expend or authorize the expenditure of public funds on void contracts, agreements, obligations or orders contrary to the provisions of Section 5660, General Code, are liable to the taxing district whose funds have been so expended for all damages or loss sustained by such taxing subdivision in an amount equal to the full amount of such funds paid on or on account of any such void contract, agreement, obligation or order.'

In this opinion the cases of *Buchanan Bridge Company* vs. *Campbell*, 60 O. S. 406, and *State ex rel.* vs. *Fronizer*, 77 O. S. 7, were referred to and discussed as follows:

'In the case of *Buchanan Bridge Company* vs. *Campbell, et al. Commissioners*, 60 O. S. 406, it was held, where the county authorities refused to pay for a bridge erected by a contractor under a contract entered into in violation of the statutes on the subject, the contractor could not recover when he sued on the contract for the price of the bridge; the court holding that it would leave the parties to such unlawful transaction in the situation in which they had placed themselves. In other words, the contract having been entered into without conformity to the legal requirements, the contractor could not when he came into court prove the legality of the contract that he had acted under and could not therefore maintain the burden of proof. However, the law as to irregularity in the making of contracts of this kind works very differently when a plaintiff sues upon a contract made in violation of the law, and when the city sues to recover back money rightfully paid or paid upon a contract which had been made in violation of law, but which has been performed. The latter situation was involved in the case of *State* vs. *Fronizer*, 77 O. S. 7. There the county authorities had caused a bridge to be constructed by a contractor and when the estimates were presented they paid for it. Thereafter the county undertook to get that money back, claiming the contract illegal because of the lack, through inadvertence, of a certificate of the county auditor that the money was in the treasury to the credit of the fund or had been levied and was in process of collection. The Supreme Court said that the money so paid could not be recovered back, there being no claim of unfairness or fraud in the making, or fraud or extortion in the execution of the contract for said work, nor any claim of effort to put the contractor in statu quo by the return of the bridge or otherwise, the bridge having been accepted by the county commissioners and used as a part of the public highway. The court in this case said:

"The contract though void is not under the facts admitted by the pleadings in this case tainted * * *.

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." '

With reference to the principle of law in the second branch of the syllabus above quoted, it was said in the opinion as follows:

'The liability of the members of the board of education and its members who expended public funds or authorize the expenditure of public funds contrary to the provisions of Section 5660, supra, is fixed by Section 5661, General Code, as follows:

"Any officer, employe or other person who issues any order contrary to the provisions of the preceding section or who expends or authorizes the

expenditure of any public funds for or on account of any such void contract, agreement, obligation, or order, shall be liable to the county or other political subdivision or taxing district for the full amount paid from the funds of such county, subdivision or district on or on account of any such void contract, agreement, obligation or order."

The foregoing provisions were incorporated in the statute by an amendment which became effective July 21, 1925, about five months prior to the allowance and payment of estimate number 3 as set out above.

The members of the Manchester Village Board of Education are therefore amenable to this provision of law.

Prior to the amendment of this statute, in the absence of bad faith or a corrupt motive, public officials were not personally responsible when acting within the scope of their powers even though in so doing they did not comply with the requirements of law and loss or damage resulted therefrom. See *Commissioners of Brown County* vs. *Butt*, 2 Ohio, 253; *Ramsey* vs. *Riley*, 13 Ohio, 107; *Stewart* vs. *Southard*, 17 Ohio, 402; *Gregory* vs. *Small*, 39 O. S. 346.

The rule established by these cases was cited with approval by Judge Schauck, in the case of *State* vs. *Bair*, 71 O. S. 410. In this case, two members of the Board of Commissioners of Sandusky County were indicted under Section 6915, Revised Statutes (now Section 12920, General Code) for misconduct in office, consisting of entering into a contract for the building of a bridge without first securing the certificate of the county auditor that the money therefor was appropriated and in the treasury to the credit of the fund from which it was to be drawn, as provided by a statute then in force very similar to Section 5660, supra.

While the 'misconduct in office' under consideration in the Bair case was with reference to its relation to criminal conduct as defined by the statute, the court cited with approval and applied the principles laid down in the cases of *Stewart* vs. *Southard* and *Ramsey* vs. *Riley*, supra, to the effect that an officer acting within the scope of his duties is only responsible for an injury resulting from a corrupt motive. The syllabus of this case reads as follows:

'A county commissioner who without wilfulness or a corrupt motive but through ignorance, disregards the provisions of a statute regulating the exercise of his faithful duties is not thereby guilty of misconduct in office within the meaning of Section 6915 of the Revised Statutes which prescribes a fine and the forfeiture of office for such misconduct.'

The provisions of Section 5661, General Code, as above quoted have not been the subject of judicial construction. The question arises whether the statute by its provisions provides a penalty, or does it merely fix the measure of liability and make it absolute, in derogation of the common law rule that public officials are not personally liable for their act in the absence of bad faith or corrupt motives, as applied in the case of *Steward* vs. *Southard* and other cases above cited.

If the statute is to be considered as providing a penalty, then clearly the principles laid down by Judge Schauck in the Bair case apply, and the liability for the penalty is dependent on the imputation of wilfulness, bad faith, fraud or corruption.

In my opinion, however, the statute is not to be regarded as penal in its nature but was intended to abrogate the common law rule of liability of public officers and to fix the measure of their liability when they expend public funds or authorize the expenditure of public funds for, or on account of any void contract, agreement, obligation or order so rendered void by reason of failure to comply with the provisons of Section 5660, General Code.

Adopting this construction of the statute, that is, that it is not a penal statute, but one fixing liability as absolute irrespective of wilfulness or bad motive, it follows that the amount for which such officials may be held is the amount of actual damage or loss suffered by the taxing district by reason of such void contract in no case more than 'the full amount paid from the funds of such county, subdivision or district on account of any such void contract, obligation or order' If as a matter of fact the taxing district sustained no damages, there would be no liability. Stated differently, the official is liable only for any damage caused by his wrongful act.

To hold otherwise, that is, to hold that such officials are liable for such full amount of public funds paid, whether or not loss or damage has been suffered by the county, subdivision or district is to be held that the statute is penal.'

While as above pointed out Section 5661, General Code, construed in the above opinion was repealed and Section 5625-37, supra, enacted in its stead, yet the language in the new section here involved is the same as in the old, and the reasoning and conclusions of the opinion are equally applicable."

Respectfully,
EDWARD C. TURNER,
Attorney General.

2164.

JUSTICE OF PEACE—AUTHORITY WHEN NEW TOWNSHIP IS CREATED —PARTICULAR CASE DISCUSSED.

SYLLABUS:

1. *Where a new township is created out of parts of two other townships, a justice of the peace resident of that part of one of said townships which is now included within the limits of the new township is not authorized to exercise jurisdiction in the new township, or any part thereof.*

2. *Where a new township was created in February,* 1927, *and a person was elected at the November,* 1927, *election to the office of justice of the peace, under the provisions of Sections* 1712, *et seq., General Code, the term of office of the person so elected began at the time of his election and runs until December* 31, 1929, *his successor to be elected at the regular election in November,* 1929.

COLUMBUS, OHIO, May 28, 1928.

HON. EDWARD C. STANTON, *Prosecuting Attorney, Cleveland, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication, which reads as follows:

"Your opinion is requested on the following proposition:

West Brecksville Township was erected as a new township February 10, 1927, the territory included therein was formerly parts of Brecksville Township and Royalton Township.

A justice of the peace of Brecksville Township resided in that part of Brecksville Township which was included in West Brecksville Township. He was elected as such justice of the peace in the 1925 election, and his term extends from January 1, 1926, to December 31, 1929.