1235.

APPROVAL, TWO GAME REFUGE LEASES.

COLUMBUS, OHIO, November 27, 1929.

HON. J. W. THOMPSON, *Commissioner, Division of Conservation, Columbus, Ohio.*

DEAR SIR:—You have submitted for my approval the following game refuge leases:

No.	*Name*	*Acres*
2063	Denver Ford, Gorham Township, Fulton County,----------	165
551	Clarence E. Eagleton, Salem Township, Columbiana County,----	450

Finding said leases executed in proper legal form, I have endorsed my approval thereon accordingly, and return the same herewith.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1236.

BOARD OF EDUCATION—MAINTAINING HIGH SCHOOL AND NOT CONTRACTING FOR SUCH SCHOOLING—WHEN LIABLE FOR TUITION OF PUPILS—MORAL OBLIGATIONS—TRANSPORTATION AND TUITION, GENERALLY DISCUSSED.

SYLLABUS:

1. *Before a board of education, that does not maintain a high school and does not contract with another board or other boards in the same or an adjoining civil township for the schooling of its high school pupils, can be required to pay the tuition of resident high school pupils attending high school outside the district, due notice of such attendance must be filed in writing with the clerk of the board of education upon which board it is sought to impose the liability for the payment of tuition, as provided by Section 7750, General Code.*

2. *Where a claim for the payment of foreign tuition for a high school pupil is made against a board of education and it appears that no legal liability exists for the payment of such tuition because of the failure on the part of the pupil or his parents or persons in charge of him, to file a written notice of his attendance in the high school in accordance with Section 7750, General Code, such a claim lawfully may be paid as a moral obligation.*

3. *A board of education which maintains a high school, is liable for the payment of tuition for all pupils who reside more than four miles from such school if such pupils attend a nearer high school in another district, unless transportation is furnished for the pupils to the high school maintained by the board. The liability for the payment of tuition under those circumstances exists without the filing of the notice provided for by Section 7750, General Code.*

4. *Because of the specific provisions of Section 7749-1, General Code, with respect to the furnishing of transportation to high school pupils, the board of education of any district is not required in any case, except as provided by Section 7749, General Code, to provide high school transportation, unless a finding is made*

by the county board of education affirmatively to the effect that such transportation is advisable and practicable.

COLUMBUS, OHIO, November 29, 1929.

HON. JOHN R. PIERCE, *Prosecuting Attorney, Celina, Ohio.*

DEAR SIR:—I am in receipt of your letter in which you request my opinion as follows:

> "The board of education of Liberty Township, Mercer County, published the following notice in the Daily Standard to-wit: 'Notice is hereby given that all pupils of Liberty Twp. attending high school in 1929 and 1930, must notify clerk five days before school begins, stating the high school they wish to attend, if they wish tuition paid by order of the Board of Education of Liberty Township. This board will not pay transportation in 1929 and 1930,' signed by Henry W. Fahucke, President, H. S. Bollenbahcer, Clerk.
>
> This notice was published in conformity with a motion made and passed at a meeting of the Board. * * * *
>
> Therefore, I kindly request your opinion on the following questions: First—Where the district board does not designate or contract with some high school outside the district for the attendance of pupils and said district does not maintain a high school of its own, can said board require pupils, who wish to attend high school in another district to give notice to the clerk of said board, five days previous to the commencement of the term and by the failure of pupils to do so evade the payment of tuition?
>
> Second—Can a board of education of a district not maintaining a high school find it impracticable and unnecessary to furnish transportation of pupils who desire to attend high school when there is no high school except at a distance of more than four miles, without basing its finding impracticable and unnecessary on condition out of the ordinary?"

I will consider your questions in their order. First: By the terms of Sections 7747, 7748 and 7748-1, General Code, boards of education in districts where a high school is not maintained are required to pay the tuition of resident school pupils who are eligible for admission to high school in the school selected by such pupil providing the requirements of law with reference to notice are complied with. With reference thereto, it is provided in Section 7750, General Code, as follows:

> "A board of education not having a high school may enter into an agreement with one or more boards of education maintaining such school for the schooling of all its high school pupils. When such agreement is made the board making it shall be exempt from the payment of tuition at other high schools of pupils living within three miles of the school designated in the agreement, if the school or schools selected by the board are located in the same civil township, as that of the board making it, or some adjoining township. In case no such agreement is entered into, the school to be attended can be selected by the pupil holding a diploma, if due notice in writing is given to the clerk of the board of education of the name of the school to be attended and the date the attendance is to begin, such notice to be filed not less than five days previous to the beginning of attendance."

It would seem to be the intent of the law to fix upon boards of education the

obligation of paying the tuition of resident high school pupils in the school they choose to attend, if high school privileges are not available in the district of their residence. This liability would not exist if it were not fixed by statute. The liability of a board of education for the payment of tuition for resident pupils in foreign schools is peculiarly statutory. No such liability existed at common law. It follows that in so far as the Legislature has prescribed rules or made conditions relative to the liability of a board of education for tuition charges, these rules must be complied with and the conditions met.

It will be observed from the terms of Section 7750, General Code, supra, that when a board of education makes an agreement with another board in the same or an adjoining civil township for the furnishing of school privileges for all its high school pupils, it is not required to pay tuition in any other school for any pupils residing within the district and within three miles of the school in the district with which the agreement was made. If no such agreement is made, however, the pupil may select the school he desires to attend and if he complies with the statute as to notice, the board of education of the district of his residence is required to pay his tuition in the school which he has selected.

This statute, Section 7750, General Code, has been under consideration in a number of opinions by former Attorneys General. See Annual Report of Attorney General for 1913, page 1207; Opinions of the Attorney General for 1916, page 976; Opinions of the Attorney General for 1917, page 1455.

In the 1917 Opinion, the direct question was presented "Whether or not actual notice satisfied the requirement of the statute." It was held, as stated in the syllabus of the opinion, "a board of education can not receive tuition for high school pupils from the district of the residence of such pupils unless written notice is given as provided by Section 7750." To the same effect are the holdings in an opinion found in Opinions of the Attorney General for 1927, page 1520 at page 1522, and in an opinion found in Opinions of the Attorney General for 1928, page 1925.

It seems to be well settled that no legal liability exists against a board of education which does not maintain a high school for the payment of tuition of resident high school pupils who attend school in another district in any case unless a written notice has been filed in compliance with Section 7750, General Code.

In my opinion, however, a board of education may pay claims for foreign tuition for high school pupils as moral obligations even though the notice in compliance with the statute had not been filed.

A moral obligation is defined in Cooley on Taxation, 4th Edition, Section 194, as, "A duty which would be enforcible at law were it not for some positive rule which exempts the party in that particular instance from legal liability."

Before a moral obligation may be recognized and lawfully paid, there must have been some benefit received by the party assuming the obligation, or some loss or damage or liability suffered by the party to whom the obligation is found to be owing. See Ruling Case Law, Vol. 26, Sec. 39; *Bailey* vs. *Philadelphia,* 167 Penna. 569; 46 A. S. R. 691; *People* vs. *Westchester County Bank,* 231 New York 465; 15 A. L. R. 1354; *Colwell* vs. *Marion,* 8 O. N. P. (N. S.) 387; Opinion of the Attorney General, No. 595, rendered under date of July 5, 1929.

The situation is somewhat different, however, when a board of education maintains a high school of its own. In that case a liability on the board for the payment of tuition for resident high school pupils may be created by the board refusing or failing to furnish transportation to its high school for resident pupils who live more than four miles from such school and who attend a nearer school.

It is provided by Section 7748, General Code, that "a board of education may

pay the tuition of all high school pupils residing more than four miles by the most direct route of public travel from the high school provided by the board when such pupils attend a nearer high school, or in lieu of paying such tuition, the board of education may pay for the transportation to the high school maintained by the board of the pupils living more than four miles therefrom."

From the provisions of Section 7748, General Code, quoted above, it seems clear that when a board of education maintains its own high school it must either transport children who live more than four miles from the high school, or pay their tuition in a nearer high school if they choose to attend the nearer school. In that case the provisions of Section 7750, General Code, would not apply, as those provisions apply only in cases involving the payment of high school tuition by a board of education which does not maintain a high school. See Opinions of the Attorney General for 1928, pages 289 and 1541.

I understand that the district about which you inquire does not maintain a high school and therefore the terms of Section 7748, General Code, quoted above, are not applicable to your question.

Second: Transportation of high school pupils is controlled by Sections 7749 and 7749-1, General Code, which read as follows:

> Sec. 7749. "When the elementary schools of any rural school district in which a high school is maintained are centralized and transportation of pupils is provided, all pupils resident of the rural school district who have completed the elementary school work shall be entitled to transportation to the high school of such rural district, and the board of education thereof shall be exempt from the payment of the tuition of such pupils in any other high school for such a portion of four years as the course of study in the high school maintained by the board of education includes."
>
> Sec. 7749-1. "The board of education of any district, except as provided in Section 7749, may provide transportation to a high school within or without the school district; but in no case shall such board of education be required to provide high school transportation except as follows: If the transportation of a child to a high school by a district of a county school district is deemed and declared by the county board of education advisable and practicable, the board of education of the district in which the child resides shall furnish such transportation."

It will be observed from the provisions of Section 7749-1, General Code, that boards of education are empowered to provide transportation for its resident high school pupils to a high school within or without the district, but cannot be required to do so, except in districts where the elementary schools have been centralized and transportation provided for as stated in Section 7749, and in cases where such transportation is deemed and declared by the county board of education to be advisable and practicable.

Section 7749-1, General Code, was enacted in its present form in 1925 (111 O. L. 123). The same Legislature that amended Section 7749-1, General Code, to read as it now does, repealed former Section 7764-1, General Code, which provided in substance that each board of education should provide work in high school branches at some school within four miles of the residence of each such child for those children of compulsory school age who had finished the ordinary grade school curriculum except those who lived within four miles of a high school and those for whom transportation to high school was being provided (109 O. L. 380).

While said former Section 7764-1, General Code, was in force, it was held by the Supreme Court of Ohio that a board of education was required to furnish high

school privileges for all resident high school pupils within the district at some school within four miles of the pupil's residence or furnish transportation to a school or board and lodging for the pupil in the vicinity of the school, and if it failed to do so, it was the duty of the county board of education to furnish one or the other of these alternatives. If neither the local or county board provided the school privileges or transportation or board and lodging as stated above, the parent could recover against the local board for the value of the transportation furnished by him for his child. *State ex rel. Masters* vs. *Beamer, et al.,* 109 O. S. 133; *Sommers* vs. *Putnam County Board of Education,* 113 O. S. 177; *Board of Education of Swan Township* vs. *Cox,* 117 O. S. 406. In the last case it is held as stated in the first branch of the syllabus as follows:

> "By virtue of Section 7764-1, General Code, enacted in 1921, and prior to its repeal July 10, 1925, a duty devolved upon either the local board of education or the county board of education to provide work in high school branches at some school within four miles of the residence of children of compulsory school age who have finished the ordinary grade school curriculum if such children live more than four miles from a high school, or such boards may at their election provide transportation of such children to a high school, or provide board and lodging for such children near a high school."

Since the repeal of former Section 7764-1, General Code, and the enactment of Section 7749-1, General Code, it seems apparent that the legislative intent is that in no case may a local board of education be required to furnish transportation for a high school pupil except in districts where the elementary schools are centralized and transportation furnished for elementary pupils, unless the local board chooses to do so or unless the county board of education deems and declares such transportation to be advisable and practicable and thus imposes on the local board the duty to provide the transportation.

In view of the provisions of Section 7731-4, and the compulsory education laws, particularly Section 7764, I appreciate that this question is not without considerable difficulty. The question is discussed at considerable length by my predecessor in several opinions, among which are opinions to be found in Opinions of the Attorney General for 1927 at page 2692, and for 1928 at pages 1955 and 2613.

In only two instances, so far as I have learned, has this question been before the courts since the repeal of former Section 7764-1, General Code, and the amendment to Section 7749-1, General Code, made in 1925. On March 9, 1929, there was decided by the Common Pleas Court of Belmont County, the case of *Cook* vs. *Ewers, et al,* the headnotes of which read as follows:

> "1. It has been the intention of the Legislature, as appears from a consideration of school legislation over a period of years, to supply high school facilities to every child in Ohio of high school age who has completed the elementary school work.
>
> 2. A petition for the recovery of the cost of transporting children of high school age to the nearest first grade high school, which alleges that such transportation was furnished by plaintiff after both the township and county boards of education had refused to furnish same, is good against demurrer."

This case is published in the Ohio Law Bulletin and Reporter, issue of November 11, 1929.

In a later case, however, decided by the Court of Appeals of the 9th District for Wayne County, *State ex rel. Plance* vs. *Wayne County Board of Education*, decided October 17, 1929, it was held that the matter of transportation of high school pupils is within the sound discretion of boards of education. In this case an action was instituted in the Common Pleas Court of Wayne County, asking that a writ of mandamus issue commanding the county board of education of Wayne County to declare that the transportation of plaintiff's daughter to the high school which she was required to attend was advisable and practicable. It appears that both the local board and the county board of education had passed resolutions declaring that such transportation was not advisable or practicable. The statement of the case as published in the Abstract does not show anything about the distance plaintiff lived from the high school in question. The plaintiff sought to show that the physical condition of his daughter was such that she was unable to walk from her home to said school, but apparently the distance was not considered material.

The trial court ruled that the evidence as to the physical condition of plaintiff's daughter was not material and the court, being of the opinion under the admissions made by the pleadings and in the opening statement of counsel for plaintiff that plaintiff was not entitled to the relief sought, dismissed plaintiff's petition. The case was then taken to the Court of Appeals on error and the judgment of the Common Pleas Court was affirmed.

The opinion by Judge Washburn is very short. After quoting Section 7741-1, General Code, Judge Washburn remarks:

> "It is apparent that the matter of transportation was, by law, committed to the sound discretion of said boards of education and that the law does not require such boards to furnish transportation under the circumstances disclosed by the record in this case, and hence the furnishing of transportation was not an act which the law specifically enjoined as a duty upon said boards, and therefore the court could not, by a writ in mandamus, require the furnishing of transportation; the court was fully justified, under the record, in rendering the judgment which was rendered, and the judgment is therefore affirmed."

The aforesaid case is reported in the Ohio Law Abstract, issue of November 16, 1929, 7th Abstract, page 666.

You will observe the statute negatives the imposition of a mandatory duty on the board of education to furnish high school transportation in any case except as provided by Section 7749, General Code, unless that mandatory duty is imposed by a finding of the county board of education that such transportation is practicable and advisable. It is entirely different than as though the duty were imposed on the board in general terms and was excused only in cases where a finding of impracticability or inadvisability was to be made by the county board of education. In such a case the board would be precluded from making such a finding capitously or arbitrarily and would be required to base its finding on facts justifying such a finding, or it would be held to have abused its discretion.

The county board is not charged with the duty of making a finding on the subject one way or the other, and need not make any finding at all in the premises and if it does not make a finding one way or the other, no duty rests on the local board to furnish the transportation. By a failure to make any finding with respect to the matter, it cannot be said to have abused its discretion even though the situation would merit a finding that the transportation was advisable and practicable, for the reason that no duty is imposed on the county board of education to act in the matter at all.

I am therefore of the opinion, in specific answer to your questions, that:

1. Before a board of education, that does not maintain a high school and does not contract with another board or other boards in the same or an adjoining civil township for the schooling of its high school pupils, can be required to pay the tuition of resident high school pupils attending high school outside the district, due notice of such attendance must be filed in writing with the clerk of the board of education upon which board i is sought to impose the liability for the payment of tuition, as provided by Section 7750, General Code.

2. Because of the specific provisions of Section 7749-1, General Code, with respect to the furnishing of transportation to high school pupils, the board of education of any district is not required in any case, except as provided by Section 7749, General Code, to provide high school transportation, unless a finding is made by the county board of education affirmatively to the effect that such transportation is advisable and practicable.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1237.

APPROVAL, LEASE TO MIAMI AND ERIE CANAL LANDS IN THE VILLAGE OF WEST CARROLLTON, MONTGOMERY COUNTY—G. S. PEASE.

COLUMBUS, OHIO, November 30, 1929.

HON. RICHARD T. WISDA, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—You recently submitted for my examination and approval a certain lease in triplicate, executed by you in your official capacity as Superintendent of Public Works and as Director of such Department, whereby there is leased and demised to one G. S. Pease of West Carrollton, for a term of ninety-nine years, renewable forever, a certain parcel of abandoned Miami and Erie canal lands, located in said village of West Carrollton, Montgomery County, Ohio and which parcel is more particularly described in said lease.

The lease here in question which calls for the payment of an annual rental of six per cent upon the present appraised valuation of said parcel, which is one thousand dollars for the first fifteen years of the term, provides for a reappraisement of said parcel of land at the end of each fifteen year period during the term of the lease as provided for by House Bill No. 162, 111 O. L. 208, under the authority of which this lease is executed.

An examination of this lease shows that the same is in conformity with the provisions of the act of the Legislature above referred to, and with other statutory provisions relating to leases of this kind. Said lease is accordingly approved by me as to legality and form as is evidenced by my approval endorsed upon said lease and upon the duplicate and triplicate copies thereof.

Respectfully,
GILBERT BETTMAN,
Attorney General.