

1408.

APPROVAL, NOTES OF SOUTH BLOOMFIELD TWP. RURAL SCHOOL DISTRICT, MORROW COUNTY, OHIO—\$5,389.00.

COLUMBUS, OHIO, August 17, 1933.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

1409.

SCHOOLS—"PUBLIC SCHOOLS" AND "COMMON SCHOOLS" DEFINED—
—"PRIVATE SCHOOLS" DISTINGUISHED—PAROCHIAL SCHOOLS
ARE PRIVATE SCHOOLS—PUBLIC SCHOOL FUNDS MAY NOT BE
USED FOR PRIVATE SCHOOLS.

SYLLABUS:

1. The term "public schools" as popularly and generally understood and used, is synonymous with the term "common schools" as used in the Constitution of Ohio. Its precise meaning when found in statutory law, depends on the intent of the legislature in enacting the law.

2. "Common schools" or "public schools", as the terms are used in the Constitution of Ohio and the present statutory law of the state, are those schools or that system of schools established by laws enacted by the legislature in pursuance of the constitutional mandate to establish a thorough and efficient system of common schools throughout the state administered by public agencies created by law and maintained from public funds raised by taxation or from school funds otherwise obtained.

3. A "private school" as distinguished from a "public school" is a school administered otherwise than by duly constituted public school authorities who are a part of the public school system of the state and supported from funds other than public school funds. Parochial schools are private schools. *Quigley vs. State*, 5 O. C. C. 638, affirmed by the Supreme Court without report, 27 O. L. B., 332.

4. No authority exists in law for the diversion or use of the school funds of the state for the promotion or maintenance of private schools or for any purpose other than the establishment and maintenance of common or public schools.

5. By reason of the provisions of Section 2 of Article VI of the Constitution of Ohio, no part of the school funds of the state may be used by or controlled by any religious or other sect or sects.

COLUMBUS, OHIO, August 17, 1933.

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

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

"Will you kindly define for us the term 'public school?'"

We are submitting this question in view of the fact that various organizations are asking for funds with which to conduct their schools, these organizations being in control of certain religious groups.

We are asking this in order that we may give a common ruling

in all cases which may arise regarding the expenditure of public money for school purposes."

The system of public education in Ohio is the creature of the legislature of the state acting in pursuance of constitutional mandate and in furtherance of what was declared by the founders of organized government of the state to be one of the essentials of good government.

In the Constitution of 1851, Article I, "Bill of Rights", Section 7, it is declared:

"Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the general assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to *encourage schools and the means of instruction.*" (Italics the writer's.)

In practically the same language the same principle was stated in the Constitution of 1802 (Article VIII, Section 3) and in the Ordinance of 1787 (Article III). In Article VI, Section 2 of the present Constitution of Ohio it is provided:

"The General Assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the State; but, no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this State."

The term "public school" will not be found in the ordinance of 1787, the Constitution of 1802, or the Constitution of 1851.

The term "public school" is used both in common parlance and by the courts, text writers and legislators and as so used, is universally understood to mean those schools or that system of schools established and maintained by law, administered by public officers whose offices are created by law and supported by public funds raised by taxation or otherwise.

It is significant that the term "public school houses" is used in the Constitution of Ohio in connection with provisions for the exemption of certain property from taxation, and courts have definitely established the meaning of the term as so used, to be those school houses owned by the public "such as are designated for the schools established and controlled under the authority of the public." *Gerke vs. Purcell*, 25 O. S. 229. The constitutional provision as it was construed in that case is as follows:

"Article XII, Section 2 * * burying grounds, public school houses, houses used exclusively for public worship, institutions of purely public charity, public property used exclusively for any public purpose * * may by general laws be exempted from taxation."

In the *Gerke* case, *supra*, the question at issue involved not only the proper construction of the term "public school houses" as used in the Constitution, but as well, the meaning of the term as it was used in Section 3 of the Tax Law of 1859, as amended March 21, 1864, S. & S. 761 (now Section 5349, General

Code.) This section purported to exempt from taxation "public school houses" and certain other property "not used with a view to profit." In construing the statute together with the provision of the Constitution authorizing the legislature to exempt certain property from taxation the court held that because of the context of the language of the statute a building in which was conducted a parochial school was a "public school house," as the term was used in the statute, but was not a public school house as such term was used in the Constitution, and justified the exemption from taxation of the building in question under the Constitution, not by authorization based on the employment of the term "public school houses" in the Constitution, but because of the authority conferred on the legislature to exempt "institutions of purely public charity."

In interpreting the provisions of the Constitution referred to above, the court, in the Gerke case, on page 242, said :

"The other classes of property that may be exempted from taxation, are described as 'public school-houses', and 'public property used exclusively for any public purpose.'

It appears to us that the word 'public' as applied to school houses, is used in the same sense in which it is used in the second instance, as applied to property; and that the school houses intended are such as belong to the public, such as are designed for the schools established and conducted under the authority of the public. In the classification, public school houses, from the nature of their use, are named as a distinct species of public property that may be exempted; and we see nothing inconsistent or unreasonable in such specific designation, arising from the fact that the subsequent provision authorizes the exemption of public property generally where it is used exclusively for some public purpose."

On the strength of the holding of the court in the Gerke case, Attorney General Hogan in 1914, was led to construe the term "public school buildings" as used in section 3963, General Code, as not including school buildings maintained for parochial school purposes. This statute provided that no charge should be made by municipalities which maintained their own waterworks, for water "for the use of public school buildings." The term "public school buildings, as used in this statute, was not qualified as it was in the tax exemption statute under consideration in the Gerke case, and for that reason it was held to be limited to the extent the Supreme Court had held the term to be limited in the constitutional provision providing for the passage of laws exempting property from taxation. For that reason, the Attorney General held:

"Under the provisions of section 3963, General Code, the city council is without power in any way to furnish water for parochial schools without making a charge therefor."

See Annual Report of the Attorney General for 1914, page 317.

Similar holdings have been made by the courts of other states. In the case of *People vs. Ryan*, 138 Ill. 263, 27 N. E. 1095, the court said:

"Rev. St. c. 120 Sec. 2 exempting from taxation all public school

houses refers to school houses owned by the state or a school district or boards of education organized under the school laws of the state and does not include a private school."

It will be observed from the terms of Article VI, Section 2 of the Constitution of Ohio quoted above, that the constitutional mandate is to provide a system of "common schools." It is this system that the legislature is authorized to create, and none other. It is for the maintenance of this class of schools that the expenditure of school funds is confined. No authority will be found in the Constitution or in the statutes for the expenditure of public funds for the maintenance of any class of schools except those authorized by the Constitution, that is, "common schools" and by express terms of the Constitution the expenditure of school funds is prohibited for sectarian or religious purposes.

The use of the term "common schools" as descriptive of the established state system of schools is not confined to the Constitution of Ohio. Massachusetts, New York, and a number of other state Constitutions have similar provisions.

Chancellor Kent, in his Commentaries, Vol. 2, page 195, in describing free common schools in the several states of the Union, on the Continent, and in many European countries, uses the phrase "common schools" exclusively. In the case of *Jenkins vs. Inhabitants of Andover*, 103 Mass. 94-98, the court said:

"Common schools, as used in the Constitution is synonymous with public schools."

In the case of *People vs. Brooklyn Board of Education*, 13 Barb. 400-410, it is said:

"'Common schools' are such as are organized by law, and are not confined to any class of pupils, but are open to all. They are such that the trustees have no power to admit or reject pupils arbitrarily, nor to make rules and regulations fixing standards of admission for members. They are bound to instruct all children who present themselves, without regard to their social relations, their station in life, or their religious faith. The word 'common' as applied to our schools, has the broadest and most comprehensive signification, it being equivalent to public, universally open to all, and they are common to all children in the sense that public highways are common to all persons who may choose to ride or drive thereon. Common schools are distinct from such schools as savor of sectarian opinion or control."

In the case of *Board of Education of the City of Lawrence vs. Dick*, 70 Kans. 812, it is said:

"Constitution, Article VI, Section 2 declares that the legislature shall encourage the promotions of intellectual, moral, scientific and agricultural improvement by establishing a uniform system of common schools held that the term 'common schools' means free common schools. The phrase 'common schools' is synonymous with 'public schools.'"

To the same effect are the cases of *Couteulx vs. Buffalo*, 33 N. Y. 333; *Merrick*

vs. *Amherst*, 12 Allen (Mass.) 500; *Roach vs. St. Louis Public Schools*, 77 Mo. 484; *People vs. Hendrickson*, 54 Misc. 337, 104 N. Y. Supp. 122; *School District No. 20, Spokane County*, 51 Wash. 498; *State vs. Dawson Co.*, 87 Mont. 122, 125; *Brunson vs. Jackson*, 168 Ga. 353; *School District No. 65 of Logan Co. vs. Bangs*, 144 Ark. 34, 105.

In 25 American and English Encyclopedia of Law, it is said:

“Common or public schools are, as a general rule, schools supported by general taxation, open to all of suitable age and attainments free of expense and under the control of agents appointed by the voters.”

In Black's Law Dictionary the term “common schools” is defined to be:

“Schools maintained at public expense and administered by a bureau of the state, district or municipal government for the gratuitous education of the children of all the citizens, without distinction.”

In Anderson's Law Dictionary it is said:

“Common or public schools are schools supported by general taxation, open to all, free of expense and under the control of agents appointed by the voters.”

Rapalje & Lawrence define “common schools” to be:

“Public or free schools maintained at public expense, for the elementary education of children of all classes.”

Mr. Bouvier, in his law Dictionary, says that:

“Common schools are schools for general elementary instruction, free to all the public.”

In Volume 56, Corpus Juris, at page 167, it is said:

“The terms ‘public school’ and ‘common school’ are interchangeable and synonymous, and denote a school which is, broadly speaking, open and public to all in the locality, which is subject to and under the control of the qualified voters of the school district in which it is situate, and which is supported and maintained primarily from moneys raised by general taxation, as contradistinguished from a private or denominational school; or, in other words, a school comprised in the free school system which has been generally adopted in the United States. More specifically, public or common schools have been said to be schools established under the laws of the state, usually regulated in matters of detail by the local authorities in the various districts, towns, or counties, and maintained at public expense by taxation, and open without charge to the children of all the residents of the town or other district. * *

A ‘private school’, as distinguished from a ‘public school’, is one

managed and supported by individuals or a private organization. A parochial school is a private school."

There is cited in support of the last statement of the text quoted above, the case of *Quigley vs. State*, 5 O. C. C. 638. This is a case decided by the Circuit Court of Lucas County in 1891. It was later affirmed by the Supreme Court without report. Case No. 2973, 27 O. L. B. 332. In that case the court said:

"We are of opinion that parochial schools are private schools. We suppose, if a certain number of gentlemen were to meet together and agree that they would hire a teacher, and pay him for his services in that school, and no persons should attend that school but their own children, that would be a private school. We cannot see any difference between that school and a school where the congregation of a church should meet together and say 'we will have a school to be supported by this congregation, by the contributions of its members, which shall be open to the children of this congregation, and in which they shall be educated.' We think that becomes a private school within the terms of the statute, so far as that congregation is concerned, and is a private school as distinguished from a public school, which we understand to be a school supported by taxation, and by money raised by the state."

In view of the authorities, I am of the opinion that the term "public school" is synonymous with the term "common school" as used in the Constitution of Ohio, that it means such schools as are established by the legislature, in pursuance of the constitutional mandate to provide a system of common schools. It imports schools that are free to all the inhabitants of the state of proper age and attainments, administered by public agents appointed or elected in accordance with law and supported by public funds raised by taxation or otherwise. No authority exists for the use of public funds for the support or maintenance of any other class of schools than the schools mentioned, and no power exists in the legislature or in any public official, for the diversion or use of any part of the public funds intended for school purposes, for schools administered by religious groups or sects.

Respectfully,
 JOHN W. BRICKER,
Attorney General.

1410.

PROMISSORY NOTE EXECUTED TO A SURETY TAXABLE AS AN INVESTMENT WHEN—MORTGAGE EXECUTED TO SURETY NOT TAXABLE WHEN.

SYLLABUS:

A promissory note executed to a surety to protect him against loss on account of a loan of money made by a bank to the maker of the note, is subject to taxation as the property of such surety although the note is secured by a mortgage, and such note and mortgage have been hypothecated to the bank to secure the loan made by it to the maker of the note. Such note, if interest-bearing,