Ohio, acting by the Superintendent of Public Works, for and on behalf of the Board of Trustees, C. N. & I. Department, Wilberforce University, and The Layne-Ohio Company, of Columbus, Ohio. This contract covers the construction and completion of general contract for water wells, C. N. & I. Department, Wilberforce University, Wilberforce, Ohio, and calls for an expenditure of two thousand, eight hundred and eighty-two and 20/100 dollars ($2,882.20).

You have submitted the certificate of the Director of Finance to the effect that there are unencumbered balances legally appropriated in a sum sufficient to cover the obligations of the contract. There has also been submitted a contract bond upon which the American Surety Company of New York appears as surety.

Inasmuch as the contract price is less than the sum of three thousand dollars, the advertisement for competitive bids has been dispensed with. Evidence has been submitted indicating that the contract was awarded to the lowest bidder, and that the laws relating to the status of surety companies and the Workmen's Compensation Act have been complied with.

In this connection, it will be noted that the award was made prior to January 1, 1929, and that the original appropriation lapsed before such contract was approved by the Attorney General. However, it will be further noted that the 88th General Assembly, reappropriated such funds and authorized the expenditure of money for such purposes with the consent and approval of the Controlling Board, which has been obtained.

Finding said contract and bond in proper legal form, I have this day noted my approval thereon and return the same herewith to you, together with all other data submitted in this connection.

Respectfully,
GILBERT BETTMAN,
Attorney General.

534.

BOARD OF EDUCATION—WITHIN VILLAGE AND RURAL SCHOOL DISTRICTS—DUTY TO PROVIDE SCHOOLING FOR CHILDREN IN ANY ONE OF SEVERAL WAYS—OBLIGATION OF COUNTY BOARDS RESPECTING SUCH DUTY.

SYLLABUS:

It is the duty of a board of education, in a rural or village school district, to provide all necessary school privileges for the youths of school age who are children, wards or apprentices of actual residents of the district. When the determination of the manner of providing such school privileges involves the choice of one of several means of doing so, and the local board fails to exercise its discretion in the premises, and fails to select one of the alternative methods, and thus fails to furnish necessary school privileges for the youths of the district, according to law, it is the duty of the county board of education of the county school district of which the local district is a part, in accordance with Section 7610-1, General Code, to exercise the discretion which the local board should have exercised and thereafter to provide the necssary school privileges in the manner so determined upon, unless the local board chooses to act in accordance with the determination of the county board.

COLUMBUS, OHIO, June 17, 1929.

HON. E. S. YOUNG, *Prosecuting Attorney, West Union, Ohio.*

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

"A one district school building in a small rural school district has been destroyed by fire.

The board of education of the said rural district not having sufficient funds to rebuild the schoolhouse have refused to call an election of the electors of the school district to vote on a bond issue to rebuild the schoolhouse.

Section 7610-1 of the General Code provides as follows:

"If the board of education in a district under the supervision of the county board of education fails to provide sufficient school privileges for all the youth of school age in the district * * * * or to provide suitable schoolhouses for all the schools under its control, * * * * . '

Does this section of law permit a county board of education to call an election of the electors in the said school district to vote upon a bond issue to be used in erecting the schoolhouse destroyed by fire?

This schoolhouse that was destroyed is one of five or six local schoolhouses in the township and the county school board are asking for the construction of this statute.

Will you please let us have your opinion in this matter at an early date as the county board will want to call an election right away if they can do so according to law?"

Section 7610-1, General Code, reads in part as follows:

"If the board of education in a district under the supervision of the county board of education fails to provide sufficient school privileges for all the youth of school age in the district, or to provide for the continuance of any school in the district for at least thirty-two weeks in the year, or to provide for each school an equitable share of school advantages as required by this title, or to provide suitable schoolhouses for all the schools under its control, or to elect a superintendent or teachers, or to pay their salaries, or to pay out any other school money, needed in school administration, or to fill any vacancies in the board within the period of thirty days after such vacancies occur, the county board of education of the county to which such district belongs, upon being advised and satisfied thereof, shall perform any and all such duties or acts, in the same manner as the board of education by this title is authorized to perform them. * * * "

In the case of *State ex rel.* vs. *Beamer,* 109 O. S. 133, it is said in the opinion of the court on page 139:

"Under Section 7610-1, the duty of the county board of education is measured by the duty of the board of education in the district. The county board is liable to provide sufficient school privileges only if the district board is under a duty to render such service and has failed, and if the county board is satisfied of such failure."

If a mandatory duty rests on the local board of education, in the district referred to in your inquiry, to rebuild the schoolhouse which has been destroyed by

fire and to do so will necessitate calling an election to vote upon a bond issue for that purpose, and the local board of education fails to call such election, there is little doubt but that the county board of education should do so. The substantial legal question before us here is whether or not it is the duty of the local board of education under the circumstances to rebuild the schoolhouse in question, and, if it is the board's duty to rebuild the schoolhouse, a further question presents itself, whether or not it is necessary to call an election to vote on a bond issue to secure funds to rebuild the schoolhouse.

It may be observed at the outset, that, under certain circumstances, bonds may be issued without a vote of the people to the extent of three and one-tenth per cent of the taxable value of the property of a school district for the purpose of building a new schoolhouse in place of one destroyed by fire. This question is discussed, and the circumstances stated under which such unvoted bonds may be issued in Opinion No. 456, rendered by me under date of May 28, 1929, the syllabus of which reads as follows:

> "1. When a schoolhouse has been destroyed by fire or other casualty, bonds may be issued for the purpose of building a new schoolhouse to take the place of the building so destroyed, without a vote of the people, to the extent of three per cent of the total value of all property in such school district as listed and assessed for taxation, under the provisions of paragraph (c) of Section 2293-15, General Code, providing there then exists no indebtedness previously so excepted.
>
> 2. The maximum amount of bonds which may be issued for the above purpose without a vote of the electors, at any time, under the provisions of Section 2293-15, General Code, would be three and one-tenth per cent of the total value of all property in such school district as listed and assessed for taxation, provided that, at such time, there is in existence no unvoted net indebtedness under the first paragraph of this section and further provided that, at such time, there is in existence no indebtedness previously excepted under paragraph (c) thereof."

Not having before me a financial statement of the district in question, or any facts showing what a new building would cost, I am unable to state whether or not it would be necessary to submit the question of issuing bonds to the voters in order to secure funds to build the schoolhouse in question, even if it should be determined to build the schoolhouse. Assuming for the purposes of this opinion that it would be necessary to call an election if the schoolhouse is to be built, we are then confronted with the question of whether or not it is the duty of the local board to build the schoolhouse.

Each district board of education is required by law (Section 7644, General Code) to establish a sufficient number of elementary schools to provide for the free education of the youth of school age, within the district under its control, at such places as will be most convenient for the attendance of the largest number thereof. An elementary school is defined in Section 7648, General Code. A high school is defined in Section 7649, General Code, as being a school of a higher grade than an elementary school in which instruction and teaching is given in certain courses of study therein named. A board of education is not required to establish and maintain a high school within the district, but if such school is not maintained by the board, the tuition of resident pupils, who are eligible for admission to high school, in high schools attended by those pupils, must be paid by the board. (Sections 7747 and 7748, General Code.)

In short, each district board of education is charged with the duty of providing necessary school privileges for all the youths between the ages of six and eighteen

years resident in the district, and such youths who are not employed on age or schooling certificates and have not been deemed to be incapable of profiting substantially by further instruction, must attend a public, private or parochial school under the conditions prescribed in the chapter of the General Code relating to compulsory education. In performing that duty, it is necessary, so far as elementary schools are concerned, that schools be established in accordance with Section 7644, supra. Establishing a school, however, does not necessarily mean that a schoolhouse must be built, nor does the establishing of elementary schools as enjoined by Section 7644, supra, necessarily mean that any particular number of schools be established or that schools be established or school buildings erected at any particular place or places in the district. The provision of Section 7644, General Code, that elementary schools be established "at such places as will be most convenient for the attendance of the largest number thereof," was substantially contained in the school laws of this state as early as 1849, when, in an act passed by the Legislature for the better regulation of the public schools (47 O. L. 22), it was provided, in Section 9 thereof, that:

> "It shall be the duty of said board, so soon as the means for that purpose can be provided, to establish in said district an adequate number of primary schools *to be so located as best to accommodate the inhabitants thereof,* and in which the rudiments of education shall be taught." (Italics the writer's.)

The above provision was carried through several subsequent revisions of the school laws until 1878, when, in an act relating to schools (75 O. L. 513), it was provided:

> "Each board of education shall establish a sufficient number of schools to provide for the free education of the youths of school age within the district, at such places as will be *most convenient for the attendance of the largest number of such youths.*" (Italics the writer's.)

This language was substantially retained in the codification of 1880, in Section 4007, Revised Statutes, which has not since been changed. Section 4007, Revised Statutes, was condified in 1910 as Section 7644, General Code, and now appears as such in the same form, so far as the clause referred to is concerned, as when enacted in 1878.

Even under that language the school authorities were vested with considerable discretion in determining as to what places in the district would be most convenient for the attendance of the largest number of the youths of the district, or as would best accommodate the inhabitants of the district.

In more recent times, with improved roads and modes of travel, the necessity for schoolhouses being located close to the residences of the inhabitants does not exist, and authority is granted to suspend certain schools when thought advisable and assign the pupils to such other schools in the district as seem, in the opinion of the board of education, best to promote the interest of education in the district. (Sections 7730 and 7604, General Code.) In fact, in many rural districts all the schools except one or two have been suspended and the pupils, who normally would attend the suspended schools, assigned to the school or schools not suspended, by authority of the two sections of the Code last above named.

I am not advised as to the situation in the district about which you inquire or what the local board of education have in mind with reference to the school in question. Provision must be made to provide school facilities for the pupils who would have attended school in the schoolhouse which burned, had it not been destroyed, but these

facilities may lawfully be furnished by assigning the pupils to another school in the district or by renting or leasing school rooms, authority for which is given by Section 7620, General Code.

There is yet another way the schooling of the pupils in the vicinity of the burned schoolhouse may be cared for, if circumstances warrant it. Section 7734, General Code, provides as follows:

> "The board of any district may contract with the board of another district for the admission of pupils into any school in such other district, on terms agreed upon by such boards. The expense so incurred shall be paid out of the school funds of the district sending such pupils."

There is some conflict of authority on the question whether pupils may be required to attend school in another district, or whether the authority to contract with a board of education for the admission of pupils only applies where the pupils are willing to attend the school outside their own district because of convenience or otherwise, or where, because of the circumstances, it becomes absolutely necessary, in order to provide school privileges for the pupils, to have them attend school outside their own district in certain emergencies. Section 7684, General Code, authorizing the assignment of pupils to such schools as will, in the opinion of the board of education, best promote the interest of education in the district only auhorizes the board to assign pupils to schools "established by them." In an opinion of the Attorney General in 1916, published in the Attorney General's Opinions for that year, at page 1471, it is held:

> "The board of education of one township rural school district may contract with the board of education of another township rural school district for the admission of pupils of the former district into the schools of the latter district and when such contract is made the board of education of the former district may assign pupils therein to the schools of the latter district and compel the attendance of the pupils so assigned, who are subject to the compulsory education laws, to the schools to which they are assigned subject to the rights of such pupils under the provisions of Section 7735, General Code."

In Opinions of the Attorney General for 1918, at page 927, there appears an opinion in which it is held:

> "A board of education has no authority to assign pupils to schools outside of the district over which such board has jurisdiction."

Again in 1926, a similar question was passed upon by the Attorney General and it was held in his opinion, as published in the Opinions of the Attorney General for 1926, p. 422:

> "A board of education of a given district may contract with the board of education of another district for the admission of pupils into the schools of such other district, but such contract does not effect an assignment of the pupils of the first mentioned district to a school district outside of the district of their residence, and said pupils cannot thereby be required or compelled to attend the school in the adjacent district."

In view of the wording of the statute, and the fact that a board of education

cannot compel the schools of another district to receive its pupils, I am of the opinion that the authority of a board of education to assign the pupils residing in its district to certain schools does not extend to the assigning of them to a school in another district and that the authority to contract with a board of education of another district for the admission of pupils extends only to cases where the pupils are satisfied to attend such other school, or perhaps to cases of temporary emergency where no other means of providing school facilities is possible.

From what has been said, it will be observed that the local board of education in the district referred to in your inquiry may provide school facilities for the pupils affected by the burning of the schoolhouse in question in any one of four ways: First, by building a new schoolhouse; second, by leasing school rooms; third, by assigning the pupils to another school or schools in the same district and providing transportation if required to do so under the laws pertaining thereto; and, fourth, by contracting with a board of education in another district for the admission of those pupils into its schools, if the parents or guardians of the pupils consent to their attending the schools in the other district, or if the circumstances are such that the only possible means of furnishing school facilities is by having the pupils attend school in the other district. One of these courses of action must be pursued. It is discretionary with the local board which one is pursued. If the local board fails to exercise its discretion and pursue one of the alternative courses, it becomes the duty of the county board to act in the premises and do what the local board should have done.

This brings us to the question of whether or not, if the local board fails to exercise its discretion and fails to perform any one of its disjunctive duties, it becomes the duty of the county board of education, by virtue of Section 7610-1, General Code, to exercise the discretion which the local board might and should have exercised and after so doing perform the act, which, in the exercise of that discretion, it determines should be performed.

Prior to the enactment of Section 7610-1, General Code, the duty to provide sufficient school privileges for the youth of school age in a school district devolved on the county commissioners of the county, if the board of education of the district failed to provide such privileges. (Section 3969, Revised Statutes, codified in 1910 as Section 7610, General Code.)

In construing said section the courts have distinguished between the doing of ministerial acts and the performing of judicial functions, which, the court, in *Board of Education* vs. *Commissioners,* 10 O. N. P. (N. S.) 505, defined as those involving investigation and determination of a state of facts, an act of choice or discretion or judgment as to the propriety of actions to be taken in reference to the facts thus ascertained, and held that the statute, Section 3969, Revised Statutes, authorized the county commissioners to perform ministerial acts that should have been performed by the district board of education if they failed in their duty with respect thereto, but did not authorize the performance of judicial acts. See also *Board of Education* vs. *Schaul,* 17 O. D. 269.

The case of *State ex rel. Masters* vs. *Beamers,* supra, was a suit in mandamus against the county board of education of Carroll County, asking that that board either furnish high school facilities for two certain pupils, who resided in Harrison Township Rural School District in Carroll County and who had completed the elementary courses of study and were eligible to attend high school, within four miles of their residence, or furnish and provide transportation for said pupils to a high school, or furnish and provide board and lodging near a high school. The law at that time required a district board of education to perform one of these alternative duties. The court held as stated in the first and third branches of the syllabus (for corrected third syllabus, see 113 O. S. 181):

"1. Mandamus does not lie to control the discretion of a board of education, but mandamus is a proper remedy to compel a board of education to exercise its discretion.

* * * * * * *

3. If a board of education in a district fails to provide sufficient school privileges for all the youth of school age in the district, including the privilege of having high school branches offered at some school within 4 miles of the residence of each and every child of compulsory school age in the district, or of having such branches made accessible to such children by transportation to or board and lodging within a district which offers such high school branches, under Section 7610-1, General Code, a mandatory duty rests upon the county board of education of the county to which such district belongs to perform the acts necessary to provide such high school branches or to make the same accessible to all children of school age within the district."

The court's order in the aforesaid case was as follows:

"It is the judgment of the court, therefore, that a writ of mandamus issue against the board of education of Carroll County, Ohio, commanding that board either to provide high school branches within four miles of the residence of Robert and Florence Masters, or to furnish and provide transportation for said Robert and Florence Masters from their residence in Harrison Township, Carroll County, to the high school at Carrollton, or to provide and furnish board and lodging for Robert Masters and Florence Masters in the Carrollton high school district. Judgment reversed, and judgment for plaintiff in error."

In *Sommers* vs. *Board of Education,* 113 O. S. 177, the first and second branches of the syllabus are as follows:

"1. Under Section 7610-1, General Code, if the board of education in a district fails to provide sufficient privileges for all the youth of school age in the district, the county board of education of the county to which such district belongs is under a mandatory obligation to provide sufficient school privileges for all the youth of school age in the district. * * * *

2. While a board of education has an option as to the method by which it will make high school branches accessible to school children in the district, it cannot, by refusing to exercise any one of the options, absolve itself from liability.

* * * * * * * * . "

To determine in the instant case by which method school facilities are to be provided for the pupils in question involves the exercise of discussion—in a sense the performance of a judicial act. If the local board of education fails to exercise this judicial function and fails to provide necessary school facilities for the pupils in question by any one of the methods by which it may be done, it is my opinion that it is the duty of the county board to do so. In the Beamer case, supra, the court's order was in the alternative, thus in effect ordering it to exercise a judicial discretion.

In this connection, your attention is directed to an opinion of the Attorney General, reported in the Opinions of the Attorney General for 1921, at page 23. It appeared that the electors of a school district had voted bonds for the erection of a school building, which bonds were thereafter issued and sold by the board of education and the money placed on deposit in the bank. The board made no effort to go ahead with

the necessary steps to erect the school building, such as advertising for bids, letting contracts, etc., and the Attorney General was asked whether or not under the provisions of Section 7610-1, General Code, it was the duty of the county board of education to proceed with the erection of the school building, the local board apparently having made no effort to construct the building. It was held as stated in the syllabus:

> "The fact that a board of education has determined to erect a new school building and has submitted the question of a bond issue for the same to the electors of the district and has issued said bonds and obtained the money to build said building, but neglects or refuses to proceed with the erection thereof, is not such neglect of duty, in the absence of other facts, in violation of the powers enumerated in Section 7610-1, G. C., that will warrant the county board of education to perform the duties of the local board in erecting said building."

In the course of the opinion, the Attorney General said:

> "The questions before the county board of education are: Has the local board of education failed, by neglecting to build a new building, to provide sufficient school privileges for all the youth of school age in the district, or to provide for each school an equitable share of school advantages, or to provide suitable schoolhouses for all the schools under its control? * * *
>
> Whether the neglect to build has resulted in a failure of any of the duties or acts enumerated, is not disclosed by the statement of facts given. A lengthy delay in building may not of itself be such omission of duty as to warrant interference on the part of the county board. So the solution of the question asked is not a mere conclusion of law, but a matter depending upon the facts and circumstances surrounding the case in its effect upon the schools of the district.
>
> When the county board of education is advised and satisfied that the local board is in default it is empowered to act for and in the place of such local board. In ministerial functions the county board simply acts for and instead of the local board; in acts judicial in character it is cautioned that before acting, if it acts at all, it must be advised and satisfied that the facts are required to show such abuse of discretion or gross neglect of duty that would be convincing to a court if it hopes to have its action for the local board upheld.
>
> * * * * * * If it be a fact that a new building is necessary to effectuate some of the powers granted in this section for the county board to assume to do, such new building may be erected for the local board. Yet, as has been said before herein, the necessity for such building must clearly appear from all the facts and circumstances of the case before such action is warranted under the law."

In 1924, there was rendered an opinion by the Attorney General which appears in his Opinions for that year at page 527, in which it was held:

> "Where the facts showing a dereliction of duty on the part of the local board are as conclusive as set forth in the instant case, a county board of education under the provisions of Section 7610-1, General Code, would be justified and empowered to take the necessary and proper action to bring about a submission of an additional levy of taxes to the electors in the local district in question."

Under the circumstances presented which called for the opinion just referred to, it clearly appeared that the finances of a certain school district would not permit continuance of schools within the district for thirty-two weeks of the school year without securing additional funds which might have been raised by a tax levy outside the limitations prescribed by law, and the local board of education positively refused to submit the question of the additional tax levy to the electors of the district. The question presented was whether or not under those circumstances the county board of education was empowered to submit the question. In the course of the opinion the Attorney General said:

> "You are advised that there can be little doubt of the intent of the law to invest county boards of education with power to perform all the acts and duties enumerated in Section 7610-1, General Code, in which the local board of education is in default or has failed in its duty, and where the facts showing a dereliction of duty on the part of the local board are as conclusive as set forth in your inquiry and statement, it is believed the county board of education would be fully justified in taking the necessary and proper action to bring about a submission of an additional levy to the electors of the district in question."

It is impossible to state as a matter of law just what the specific duty of the county board of education is in the instant case, under the facts presented. As stated above, I am not advised of what the intentions of the local board are in the matter. If, however, the local board fails to provide necessary school privileges for the school pupils affected by the burning of the schoolhouse, it becomes the duty of the county board to provide those privileges and in doing so they should be guided by the law as hereinbefore set forth.

Respectfully,
GILBERT BETTMAN,
Attorney General.

535.

JOINT AFFIDAVIT—AGAINST DEFENDANTS IN MUNICIPAL COURT—AUTHORIZED—CONDITION NOTED.

SYLLABUS:

Two or more defendants may be joined in a single affidavit in a prosecution instituted in a municipal court where all the defendants participated in the same offense.

COLUMBUS, OHIO, June 17, 1929.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your letter of recent date which is as follows:

> "Can a prosecution in a municipal court be legally instituted and carried on against two or more persons for the commission of a misdemeanor in a joint affidavit? That is, in a prosecution, in a municipal court, for a misdemeanor, may two or more defendants be joined in a single affidavit, or must separate affidavits be filed against each one of the defendants?"