

1306.

BOARD OF EDUCATION—RIGHT TO PAY LANDOWNER THE COST OF SURVEYING AND FENCING LAND WHEN CONTRACT OF PURCHASE VOID—MORAL OBLIGATION CONSIDERED.

SYLLABUS:

1. *Administrative officials of a political subdivision are not authorized to pay out public money to compromise an alleged claim against the subdivision which claim is not bona fide and is entirely without foundation as a legal obligation.*

2. *A board of education lawfully may recognize and pay a moral obligation of a school district. Whether or not a moral obligation of the district exists is a question of fact to be determined from all the circumstances.*

COLUMBUS, OHIO, December 17, 1929.

HON. FORREST E. ELY, *Prosecuting Attorney, Batavia, Ohio.*

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

“At a regular election a bond issue was declared carried for the purpose of acquiring land and for the erection and equipment of a school building. Before the bonds were sold or any money was in the hands of the Board of Education as a result of this election, the Board entered into a contract to purchase certain land for the new school.

Subsequently a number of people objected to this site as selected, for valid reasons and the State Department after having approved the original location, requested that the Board select another and more appropriate site, injunctions and so forth being imminent and in fact one was filed but later dismissed.

The Board of Education abandoned the first contract on the advice of this office for the reason that the contract was void there being no money in the hands of the Board especially for this purpose and no money having been realized from the bond issue.

The man who owned the land whose contract was avoided did not seriously object, and realized that the Board had acted probably without authority. However, the Board had created, and caused the owner of the land to create about \$100 indebtedness in survey, fencing and so forth.

Can the Board of Education pay this amount of expense incurred, although wrongfully done, or perhaps without authority? The owner of the land began an injunction suit to compel the fulfillment of his contract but upon being advised that he would be paid as to his actual expense he dropped the suit.

Can the Board of Education properly pay the \$100.00 that they promised to pay to compromise the law suit?”

I take from your statement to the effect that “the Board entered into a contract to purchase land for the new school” and later abandoned the contract “for the reason that the contract was void there being no money in the hands of the Board especially for this purpose and no money having been realized from the bond issue,” that the so-called contract was void for the reason that no certificate had been issued by the fiscal officer of the board of education at the time of the authorization of the contract to purchase the land, as provided by Section 5625-33, General Code.

It will be observed upon examination of the said statute, Section 5625-33, General

Code, that if the clerk of the board certified that money was in the treasury, or in process of collection, to meet the obligation of the contract, such certificate was binding on the district whether the facts stated in the certificate were true or not. The statute provides *inter alia*:

“Any certificate of the fiscal officer attached to a contract shall be binding upon the political subdivision as to the facts set forth therein.”

I assume, for the purposes of this opinion, that the certificate was not attached and that therefore no legal liability under the so-called contract ever existed. The board was not required to go through with the purchase of the property nor did there ever exist a basis for a suit to compel the board to make the purchase.

School districts are governmental agencies with limited powers created solely to exercise public functions in furtherance of the constitutional mandate requiring the State to provide for a thorough and efficient system of common schools within the State. Members of boards of education are public officers, whose duties are prescribed by law and must be performed in the manner provided by law. They have such powers only as are expressly provided by law or necessarily included within such express powers properly to carry them into effect.

It is a familiar principle of law that persons dealing with such public agencies as boards of education are charged with the knowledge of the limitations on their powers and cannot be heard to complain because of a failure on their part to carry out the terms of an agreement which is void because of its not having been entered into according to law; nor may there be based a claim for damages on account of money expended in reliance on such a void agreement.

The injunction suit brought by the owner of the land in question, to compel the fulfillment of the board's agreement to purchase the land was, under the circumstances, without foundation, and the board is without authority to compromise a claim such as this, which has no existence. So far as the board's paying \$100 to compromise this suit is concerned, such payment would in my opinion, be without authority, and an unlawful expenditure of public funds.

You state “the board had created and caused the owner of the land to create about \$100 indebtedness in survey, fencing and so forth.” I do not know just how the board created and caused the owner of the land to create this indebtedness. The board possessed the power to purchase the land or to acquire it by the exercise of its right of eminent domain. Sections 7620 and 7624, General Code. As incidental to the power to purchase or condemn the property for school purposes, it had the power to incur a legal liability, if done in the manner provided by statute, for the cost and expense of making a survey of the property to determine its suitability for the board's needs or to get a definite description of the property for the purpose of preparing a deed or a petition to appropriate the property. A contract for the surveying, or whatever incidental preliminary expense may have been necessary, might have been made with the owner of the land or anyone else and, as before stated, if properly entered into, would constitute a lawful, binding obligation of the board, which the board not only could lawfully pay, but could be compelled to pay, and this obligation would exist whether the board went through with the purchase or condemnation proceedings or not.

If the agreement for such surveying or other preliminaries to the purchase was not entered into strictly according to law, so as to impose on the board a legal obligation for its payment, there would arise, if done in good faith, such an obligation on the board as might be recognized and lawfully paid as a moral obligation.

On the other hand, if the owner of the land, on his own initiative, went ahead and incurred expense for surveying and fencing, simply on the prospect of making a sale of the property to the board of education, which prospect never ripened into a

valid sale, no obligation, moral or otherwise, existed which would justify the board in paying out the public money of the district.

It has long been recognized that public authorities, whether the State itself or political subdivisions thereof, might lawfully settle not only lawful claims but those of a moral or equitable character, as well. This right is recognized in the United States government, *U. S. vs. Realty Company*, 163 U. S., 427, as well as in the several states. Some of the earlier cases on this subject which might be mentioned are the following *Bright vs. Chenango County*, 18 Johns, 242; *Powell vs. Newburgh*, 19 Johns, 284; *Nelson vs. Milford*, 7 Pick. 18; *Bancroft vs. Lynnfield*, 18 Pick. 566; *Babitt vs. Savolly*, 3 Cush., 530; *Baker vs. Windham*, 13 Main, 74; *Emerson vs. Hall*, 13 Pet., 409; *Andrews vs. U. S.*, 2 Story, 202.

The power to recognize and pay moral obligations by a board of education is supported by ample authority, R. C. L., Vol. 26, Title, Schools, Section 39. *Bower, et al. vs. Board of Education*, 8 C. C. N. S., 306, affirmed by the Supreme Court, without report, 78 O. S., 443; *State ex rel. vs. Board of Education*, 11 O. C. C., 41; *Caldwell vs. Marvin*, 8 O. N. P., N. S., 387.

Many attempts have been made by the courts and text writers to define a moral obligation, and to designate the limitation within which such an obligation may be recognized, and paid. It is sometimes described as one which an honorable man ought to meet, regardless of whether it is lawfully binding or not. Justice Rumsey defined a moral obligation as "one which a person owes and which he ought to perform, but which he is not lawfully bound to fulfill." In re: *Straus*, 44 App. Div., 425 page 429; 61 N. Y. S., 37. Cooley, in his work on taxation, Fourth Edition, 194, defines a moral obligation as "a duty which would be enforceable at law were it not for some positive rule which exempts the party in that particular instance from lawful liability." See also American and English Encyclopaedia of Law, Vol. 20, page 872. *Longstreet vs. City of Philadelphia*, 245, Penna. St., 233; *Bailey vs. City of Philadelphia*, 167 Penna. St. 569; *People vs. Westchester County Bank*, 231 N. Y., 465.

Stated in general terms, as do the text writers and courts above cited, the rule seems simple enough, but the difficulty comes in its application, and no completely satisfactory rule for the determination of when an alleged claim is a moral obligation has ever been deduced.

Without further discussion of the subject, your attention is directed to an opinion of my predecessor, published in Opinions of the Attorney General for 1928 at page 352, and to Opinion No. 595 rendered by me under date of July 5, 1929, a copy of which is herewith enclosed, where the subject has been fully discussed and the authorities reviewed.

Applying the principles noticed in the former opinions of this office, above referred to, to the circumstances here under consideration, I am of the opinion that if the board of education to which you refer, had requested or authorized the owner of the land in question to make surveys of the land or incur other expense for the benefit of the board of education as preliminary to and in contemplation of its purchase of the land, even though that expense had not been authorized strictly according to law, the board lawfully may recognize its duty to repay the owner for the expense incurred, as a moral obligation, and pay therefor with the public funds of the school district. If, however, the owner of the land, of his own accord, and merely in the hope of, or with the prospect of making a sale of the land to the board incurred expense for surveying or fencing, etc., no obligation, either lawful or moral, existed on the part of the board of education to repay him for the expenses so incurred, and it would be unlawful for the board to pay, under those circumstances public funds in discharge of an obligation which did not exist either as a legal or a moral obligation.

Respectfully,

GILBERT BETTMAN,
Attorney General.