

with the interest which has since accrued thereon as ascertained and certified by the county auditor, the state shall relinquish to such former owner or owners all claim to such land or lot. The county auditor shall then reenter such land or lot on his tax list with the name of the proper owner."

By securing to the owner or owners of forfeited land the right to redeem at any time before disposal by the State, makes it plain that the State never at any time has a full, complete, indefeasible title to forfeited lands. The most that it can be said to have is a lien for the unpaid taxes, assessments, penalties and interest.

Answering your question specifically, there is no county or state official clothed with authority to grant to the landowner in question, permission to run his drainage ditch across forfeited land. Such permission, if obtained at all, must be gotten from the owner or owners.

Respectfully,

HERBERT S. DUFFY,

Attorney General.

1046.

CREATING NEW SCHOOL DISTRICT—OLD BOARD MAY NOT
AUTHORIZE EXPENDITURE OF FUNDS TO PROSECUTE
MANDAMUS, WHEN.

SYLLABUS:

In a case where a county board of education adopted a resolution creating a new school district, in accordance with the provisions of Section 4736, General Code, and after the expiration of the thirty day period for filing a remonstrance, but before the appointment of members of the board of education for the newly created school district, a petition is filed by authority of Section 4696, General Code, with the county board of education, containing the signatures of more than 75% of the electors in the territory proposed to be transferred, requesting a transfer of the school district that was abolished by the action of the county board of education, the board of education of the school district that was abolished is without authority to authorize the expenditure of funds for the employment of counsel to prosecute an action in mandamus to compel the members of the board of education to make the transfer of the school terri-

tory as requested in the petition filed under the provisions of Section 4696, General Code.

COLUMBUS, OHIO, August 20, 1937.

HON. HUGH A. STALEY, *Prosecuting Attorney, Greenville, Ohio.*

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

"A situation has arisen in our county upon which I desire to have your opinion, which is as follows:

On the first day of April, 1937, the Board of Education of Darke County, Ohio, by resolution, dissolved Special District No. 2, of Harrison Township, together with several other districts, and by the same resolution created a new school district known as the New Madison Village School District. On May 18th, 1937, there was filed with the County Board of Education of Darke County, Ohio, a petition purporting to have been signed by more than 75% of the electors of Special District No. 2, of Harrison Township, asking the Darke County Board of Education to transfer the territory known as Harrison Township Special District No. 2 to the Preble County School District.

On the same day, May 18th, the Darke County Board of Education, by resolution appointed a board of education for the newly created, the New Madison Village School District, and provided in the resolution that the board members were to take their office on the second Monday after their appointment, which was Monday, May 31st, 1937. On Saturday, May 29th, 1937, a suit was filed entitled, the State of Ohio, ex rel. *Guy F. Stephen and Walter D. Cowgill, relators, vs. J. A. Harman, et al.*, being the members of the Darke County Board of Education as respondents; asking for a writ of mandamus against said respondents to compel them to pass a resolution referring said territory to the Preble County Board of Education under the provisions of General Code Section 4696. Prior to May 18th, and subsequent to April 1, the Board of Education of Harrison Township Special District No. 2, by resolution authorized such a suit and pledged itself to pay the attorney fees in connection with such a suit; the prosecuting attorney having declared formally to bring said suit on behalf of the relators.

The suit is now pending undisposed of in the Common Pleas Court of Darke County, Ohio, against the respondents, and the question is as to whether or not the action of the Board

of Education of Harrison Township Special School District No. 2, in authorizing the expenditure of funds for the employment of counsel for the relators, is valid.

I shall be very glad to have an expression of your opinion on this matter bearing in mind that such resolution of the Harrison Township Special School District No. 2, was passed after the resolution of the County Board dissolved the district; in which resolution the County Board provided that all the assets and debts of the Harrison Township Special School District No. 2, would become the respective property and liabilities of the newly created district, the new Madison Village School District, but before the resolution appointing a board for the newly created district and before the newly created board qualified."

By way of a supplemental communication from you, I am advised: that, the relators, Guy E. Stephens and Walter D. Cowgill, members of the Board of Education of Harrison Township Special District No. 2, commenced the mandamus action, as taxpayers, and that the prosecuting attorney *declined* formally to bring the suit on behalf of the relators.

The question presented by your request is: In a case where a county board of education adopted a resolution creating a new school district, in accordance with the provisions of Section 4736, General Code, and after the expiration of the thirty day period for filing a remonstrance but before the appointment of members of the board of education for the newly created school district, a petition is filed by authority of Section 4696, General Code, with the county board of education, containing the signatures of more than seventy-five per cent of the electors in the territory proposed to be transferred, requesting a transfer of the school district that was abolished by the action of the county board of education, has the board of education of the school district that was abolished, authority to authorize the expenditure of funds for the employment of counsel to prosecute an action in mandamus to compel the members of the county board of education to make the transfer of the school territory as requested in the petition filed under the provisions of Section 4696, General Code?

At the outset of this opinion, I think it advisable to state that it is not within the jurisdiction of the office of the Attorney General to determine the validity of any action taken by the County Board of Education of Darke County in dissolving Special District No. 2, of Harrison Township and creating the New Madison Village School District. The validity of such action will be passed upon by the court in the case of *State of Ohio, ex rel. Guy Stephens and Walter D. Cowgill, vs. J. A. Harman, et al.*, now pending in the Court of Common Pleas of Darke County, Ohio.

For the purpose of this opinion we assume that the resolution adopted by the Board of Education of Darke County, on April 1, 1937, dissolving Special District No. 2, of Harrison Township and creating the New Madison Village School District was regular and proper.

Section 4736, General Code, provides as follows:

“The county board of education may create a school district from one or more school districts or parts thereof, and in so doing shall make an equitable division of the funds and indebtedness between the newly created district and any districts from which any portion of such newly created district is taken. Such action of the county board of education shall not take effect if a majority of the qualified electors residing in the territory affected by such order shall within thirty days from the time such action is taken file with the county board of education a written remonstrance against it. Members of the board of education of the newly created district shall be appointed by the county board of education and shall hold their office until the first election for members of a board of education held in such district after such appointment, at which said first election two members shall be elected for two years and three members shall be elected for four years, and thereafter their successors shall be elected in the same manner and for the term as is provided by section 4712 of the General Code. The board so appointed by the county board of education shall organize on the second Monday after their appointment.”

In an opinion rendered by my predecessor in office on August 10, 1936, and numbered 5946, there was discussed the status of a board of education of a school district that had been dissolved by action on the part of the county board of education in pursuance of Section 4736, General Code, during the period of time that intervenes between the date of adoption of the resolution that dissolves an old school district and creates a new school district, and the date upon which the new school district begins to function. The facts presented in that opinion were: That on May 1, 1936, a county board of education adopted a resolution abolishing existing school districts and creating a new school district; that, on May 2, 1936, the board of education of one of the abolished districts entered into contracts with teachers and janitors for the coming year; and that, on May 13, 1936, the contracts were signed. In that opinion it was held:

"1. When a new school district is created by authority of Section 4736, General Code, and a proper remonstrance is not filed within the period fixed by the statute, the new district does not become a body politic or a separate, independent political subdivision of the state until the expiration of thirty days after the adoption of the resolution of the county board of education creating the new district.

2. When a new school district is created in pursuance of Section 4736, General Code, a limited interregnum is created within the territory comprising the new district for a period of thirty days after the adoption of the resolution of the county board of education creating the district, during which time local district boards of education have jurisdiction to administer the affairs of the schools and school patronage within the said territory to the extent only of providing for immediate necessary needs, but cannot lawfully create liabilities against the new district by the making of contracts to be fully performed during the terms of their possible successors, so as to prejudice or forestall the action of those successors in the administration of school affairs for the new district, in the event the district becomes a separate, independent political subdivision at the end of the period of thirty days after the county board of education adopted the resolution creating the district."

Upon consideration of the foregoing opinion, the conclusion therein reached appears to be sound, and I concur in the same.

Applying the principle set forth in that opinion to the instant question, it is necessary to determine whether or not authorizing the expenditure of funds for the employment of counsel for the prosecution of a mandamus action to compel a board of education to transfer a part or all of a school district of the county school district to an exempted village, city, or county school district can be classified as the performance by the Board of Education of the Harrison Township Special District No. 2 of a duty necessary for an immediate need for the public good. The Board of Education of Darke County refused to make the transfer because of the action it had taken on April 1, 1937, under the provisions of Section 4736, *supra*.

It is to be observed that by the provisions of Section 4736, *supra*, the action of a county board of education in creating a school district may be prevented from becoming effective "if a majority of the qualified electors residing in the territory affected by such order shall, within thirty days from the time of such action taken file a written remon-

strance." The facts stated in your request show that no such remonstrance was filed.

It was held in an opinion rendered by a former Attorney General, Opinions of the Attorney General for 1930, Vol. II, page 1419, that:

"Where a new school district is created by authority of Section 4736, General Code, the only right of the residents of the territory affected to control the action so taken, is the right of remonstrance preserved by statute."

It therefore was within the power of a majority of the qualified electors residing in Special District No. 2, of Harrison Township School District, to file a remonstrance and prevent the action taken by the county board of education in creating the new school district, and thereafter it would have been mandatory for the Board of Education of Darke County to have taken action on the petition when it was presented. No remonstrance having been filed, we must assume that a majority of the electors of the school district did not consider that the "public good" required an interference with the action taken by the county board of education.

As stated hereinabove, I concur in the ruling contained in Opinion No. 5946, *supra*, that the board of education of the dissolved school district is authorized to administer the affairs of the school that are "immediate necessary needs for the public good." However, I believe that this rule must be extended. The basic question is to determine first whether or not the action that the board of education has taken, or is contemplating taking, is such a duty or function that the board is authorized to perform.

At this time I deem it advisable to state: that, the law provides no restriction against the institution of such a mandamus action wherein the validity of the action of the county board of education under the authority of the provisions of Section 4736, General Code, can be determined; and that, a board of education is empowered to employ counsel in litigation in which it is involved. This latter proposition was clearly stated in the case of *Knepper vs. French, County Auditor*, 125 O. S., 613. This case involved the question of the transfer of certain territory in Delaware County. The county board of education desiring to resist said action did not avail itself of the services of the prosecuting attorney of Delaware County, as it might have done by virtue of Section 4761, General Code, but, on the contrary, elected to employ an attorney. After defending the action successfully, the attorney was denied payment by the auditor on the ground that the board of education had no authority to employ other counsel. The Supreme Court, under this set of facts held that a school board is, by the provision of Section 2918, General Code, empowered

to employ counsel in litigation in which it is involved, and to pay counsel fees out of the school funds, notwithstanding the provisions of Section 4761, General Code, making the prosecuting attorney the legal adviser of the board of education. The court said, at page 616:

“If Section 2918 had never been enacted, we might be driven to consider all these questions. It is not necessary to give them any consideration in Ohio in the present state of the Code provisions. Standing alone it would be readily conceded that Section 2918 gives full authority to the board. We have no difficulty in determining that the two preceding sections 2916 and 2917, were particularly eliminated, so far as school boards are concerned in the employment of counsel, provided such counsel is paid not from county funds but from the school funds.”

It is to be observed: that, the mandamus action in question was not instituted by the Board of Education of Harrison Township Special District No. 2, but said board authorized such suit and pledged itself to pay the attorney fees therefor; and that the action was commenced by two members of the board of education in the capacity of individuals and taxpayers.

It is my opinion that the provisions of Section 2918, General Code, and the case of *Knepper vs. French, supra*, which construed said section, are limited in their application to the payment of counsel fees out of school funds, in litigation *in which the board of education is involved*. The Board of Education of Harrison Township Special District No. 2, as a board, is *not* involved in the pending mandamus action.

It is true that the board of education is made, by statute, a body corporate, with capacity to sue and be sued, and that, as held in the case of *Knepper vs. French, supra*, it is authorized to pay counsel fees out of school funds. However, as held in the case of *Board of Education of Hopewell Township vs. Guy, County Auditor, et al.*, 64 O. S., 434:

“But capacity to sue is one thing, and right to maintain a particular action is another thing.”

In the instant case, it is to be further observed that the Board of Education of Special District No. 2 of Harrison Township was neither suing nor being sued.

It is an old and uniformly accepted doctrine that public officers, such as members of the board of education, have no powers except such as are expressly conferred by statute, or such as are necessarily implied from the power so conferred. In 1894, the Supreme Court, in the case of

Board of Education vs. Best, 52 O. S., 138, clearly stated this doctrine at page 152, as follows:

“The authority of boards of education, like that of municipal councils, is strictly limited. They both have only such power as is expressly granted or clearly implied, and doubtful claims as to the mode of exercising the powers vested in them are resolved against them.”

The powers and duties given to a board of education for the conduct and management of a school are contained in Section 7620, General Code, which reads as follows:

“The board of education of a district may build, enlarge, repair and furnish the necessary school houses, purchase or lease sites therefor, or rights of way thereto, or purchase or lease real estate to be used as playgrounds for children or rent suitable schoolrooms, either within or without the district, and provide the necessary apparatus and make all other necessary provisions for the schools under its control. It also, shall provide funds for the schools, build and keep in good repair, fences enclosing such school houses, when deemed desirable, plant shade and ornamental trees on the school grounds, and make all other provisions necessary for the convenience and prosperity of the schools within the subdistricts.”

After an examination of the foregoing section, I am compelled to conclude that there is no power expressly conferred by statute or that can be implied from the powers expressly conferred, that authorizes a local board of education to take any action in the formation of school districts or in the changing of the boundaries of the same. The arranging of school districts is an administrative matter and the statutes have invested the county boards of education with the exclusive power to make such changes. Sections 4692, 4696 and 4736, General Code, are the provisions authorizing the county board to alter the boundaries of school districts.

However, though the statutes invest county boards of education with power to change the boundary lines of school districts and evidence a legislative purpose to repose a discretion in the judgment of the county board of education to determine the necessity for the creation of new school districts, it makes the action of the county board of education subject to the approval of the electors residing in the territory affected. That it was the intention of the legislature that the residents of the dis-

trict should have control of the action of the county board of education in the changing of school districts boundaries, and any action against the procedure taken by the county board of education should emanate from the electors, is evidenced from the provisions of Sections 4692, 4696 and 4736, General Code. Sections 4692 and 4736, General Code, provide for the filing of a remonstrance by the electors to prevent the action of the county board from taking effect, and Section 4696, *supra*, makes it mandatory for the county board to transfer school property, upon the filing of a petition signed by seventy-five per cent of the electors in the territory proposed to be transferred.

Therefore, it must be said: that a board of education other than a county board of education is not authorized to take any action in the formation of school districts or in the changing of the boundaries of same.

It must also be remembered: that it is a well known rule of law that an administrative board may not expend money except as provided by statute; and that, if authority to do so is of doubtful import, the doubt is resolved against its exercise. This principle of law was clearly enunciated by the Supreme Court of Ohio, in the case of *State, ex rel. Locher vs. Manning, et al.*, 95 O. S. 97. At page 99, the court said:

“The legal principle is settled in this state that county commissioners, in their financial transactions, are invested only with limited powers, and that they represent the county only in such transactions as they may be expressly authorized so to do by statute. The authority to act in financial transactions must be clear and distinctly granted, and, if such authority is of doubtful import, the doubt is resolved against its exercise in all cases where a financial obligation is sought to be imposed upon the county.”

See also *State, ex rel. A. Bentley & Sons Company vs. Pierce, Auditor*, 96 O. S. 44.

Therefore, in specific answer to your question it is my opinion that, there was no authority in law that permitted the Board of Education of Harrison Township Special District No. 2, to authorize the “expenditure of funds for the employment of counsel for the relators.”

Respectfully,

HERBERT S. DUFFY,
Attorney General.