reopen such school for the ensuing school year provided there is a suitable school building in the territory of such suspended school as it existed prior to suspension."

Section 7730-1, General Code, provides that in order to protect the rights of the petitioners mentioned in Section 7730, General Code, where a school has been suspended, the school building and real estate located in the territory of such suspended school shall not be sold by the board of education until after four years from the date of the suspension of said school unless the said building has been condemned for school use by the Director of Industrial Relations of Ohio.

The power to suspend schools extended to boards of education by virtue of said section 7730, General Code, is not dependent in any respect upon the filing of petitions by the electors or residents of the school districts. The power is extended to the board by force of the statute itself, and petitions one way or the other neither add to or take from the power so extended. The only purpose that petitions with reference to this matter would serve would be to advise the board of education of the wishes of their constituents, but they have no force whatever so far as the right of the board is concerned to suspend the schools.

A board of education may by force of this statute, suspend any or all the schools of a school district and provide for the assignment of the pupils to one or more schools that may be established by the board within the district. The fact must not be lost sight of, however, that the school buildings in the suspended school district may not be sold for a period of four years and the residents in the vicinity of the schools have a right to have them reopened upon petition as stated in that portion of Section 7730, General Code, quoted above. In this connection, your attention is directed to an opinion of the Attorney General for 1928, at page 1281, also Opinions of the Attorney General for 1929, at pages 192 and 714, where questions relating to the suspension and consolidation of schools are discussed at considerable length.

I am therefore of the opinion, in specific answer to your question, that the School Board of Goshen Township has authority to suspend any one or all of the seven schools in the district and consolidate them into two centrally located schools, subject, of course, to the possibility of being compelled to re-establish any of the schools suspended, upon petition of the residents as authorized by Section 7730, General Code.

Respectfully,
GILBERT BETTMAN,
Attorney General.

3088.

CONTRACT OF TEACHER—DOCKED FOR ABSENCE FROM DUTY—SUBJECT TO RULES AND REGULATIONS OF SCHOOL BOARD—CONDITIONS NOTED.

SYLLABUS:

1. *When teachers contract with a board of education for service in the schools of the district, the contracts so made are subject to rules and regulations of the board lawfully made and adopted, whether or not the teachers so contracting are actually cognizant of such rules and regulations.*

2. *Where at the time a teacher is employed by a board of education there is in force a rule, lawfully made and adopted by the board, to the effect that teachers*

shall not be paid for time they absent themselves from their duties for reasons other than death in their families or when the school is closed by the board of education or county health board on account of contagious or infectious disease, the teacher contracts with reference to said rule, and if at any time during the life of the contract the teacher is absent from school without leave on account of illness from a contagious disease, the board may lawfully deduct from the salary of such teacher a proportionate amount for the time of the absence.

COLUMBUS, OHIO, March 24, 1931.

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

GENTLEMEN:—I am in receipt of your communication with which you enclose a letter addressed to you from one of your examiners, wherein he requests your advice with reference to the right of a board of education to prescribe, by the adoption of rules, that teachers employed on annual salaries should have their compensation proportionately reduced in the event of their absence from their duties without leave, on account of illness from a contagious disease.

It appears that a certain board of education adopted the following resolution:

> "That all teachers employed by the new Miami School District, Butler County, Ohio, be docked for absence from their work except for death in their families or *when the school is closed* by the board of education or county health board on account of contagious or infectious disease."

This resolution was adopted and was embodied in the minutes of the board prior to entering into contracts with teachers.

A teacher in this school district, according to the statement of your examiner, was absent from school "on account of contagious disease." The school was not closed nor was the room she was teaching dismissed, a substitute teacher having been supplied. The board now refuses to pay her for the time she was absent, basing its contention on the resolution above referred to. The question as submitted by the examiner is as follows:

> "Is it mandatory that this board of education pay the teacher's salary and also the substitute's salary for the time the teacher lost on account of the contagious disease? In other words, can a board of education make rules to the effect that teachers shall lose salary for time necessarily lost on account of the contagious disease?"

By force of Section 7690, General Code, boards of education of city, village and rural school districts are granted the power to manage and control the public schools of their districts, and the power to employ the teachers therein.

Section 4750, General Code, authorizes a board of education to make such rules and regulations as it deems necessary for its government and the government of its employes.

It is clear that when rules are adopted by a board of education, contracts thereafter made, are made in the light of such rules, and any such rules will be read into the contract. The pertinent question before us, is just what the rule in question means, and whether or not, if it may be construed to mean that the salary of the teacher in question is to be reduced under the circumstances, the board was lawfully authorized to make such rule, as the teacher's contract, having been made subsequent to the adoption of the rule, must be held to be subject to the rule.

It is a familiar principle of law that all persons dealing with a public corpora-

tion are bound to take notice of the statutes creating the corporation and conferring power upon it, and of the statutes which prescribe the manner in which it may exercise that power. Page on Contracts, Second Edition, Section 1885.

In the case of *Underwood* v. *Board of Education,* 25 Ga. App., 634, 104 S. E., 90, it is held with reference to school boards:

> "All persons dealing with the board are bound by its rules and regulations lawfully made and adopted, whether or not they are actually cognizant of such rules and regulations. * * *
>
> Where one contracts with the board for employment as a teacher in a particular school under the jurisdiction of the board for the ensuing scholastic year the contract is made subject to an existing rule of the board, providing that the committee on teachers shall have the right to transfer any teacher employed in the schools from one school to another within the board's jurisdiction."

In R. C. L., Vol. 24, p. 574, it is stated:

> "In discharging the duties imposed on them by statute, school directors have the power to make rules and regulations pertaining to the school and pupils. In some cases this power is expressly conferred by statute. These rules are administrative provisions, the right to enact which for the purposes of its existence is inherent in any corporation. They are analogous to by-laws and ordinances, and are tested by the same general principles." *Hertich* v. *Michener,* 111 Ind., 472.

It is well settled in Ohio, following the general doctrine applicable to the subject, that in the absence of statutory or contractual complications contracts with teachers for a definite time at a fixed salary are regarded as entire and are not subject to deduction for time lost on account of illness from a contagious disease.

In an opinion of a former Attorney General appearing in the Reported Opinions of the Attorney General for 1918, Vol. I, page 659, it is held as stated in the syllabus:

> "Where a board of education employs a teacher for a fixed term at a definite salary and there is nothing in the contract or in the rules of the board on the question of absence on account of sickness, and such teacher is compelled to be out of school with a contagious disease and subsequently resumes teaching work for the board, the teacher is entitled to be paid for the time so necessarily lost on account of such sickness."

This opinion contains a well considered and exhaustive treatment of the subject and cites many authorities. I believe it correctly states the law, and its conclusions are sound. To the same effect are two later opinions which appear in the published opinions of the Attorney General, for 1919, at pages 338 and 1134.

The theory upon which this holding is based is that a contract for personal services for a stated time at a fixed compensation for the entire time, whether to be paid in installments or not, is an entire contract, and that it is a contract to do acts which in the ordinary course of events may be done. It follows that nothing but an act of God or of a public enemy or the interdiction of the law as a direct and sole cause of the failure or a provision of the contract will excuse performance. (R. C. L., Vol. 24, page 619. Cyc. Vol. 35, page 1099.) In the course of the 1918 opinion referred to above, the Attorney General said:

> "It was no fault of the teacher that he became ill with a contagious disease any more than it would be his fault if the schoolhouse would

burn down or if the same should be destroyed by a storm or any other casualty which might exist and which is considered an act of God and excuse part performance. I believe the legislature intended that such teacher should be paid as long as the contract was not rescinded by the board. The teaching profession is one in which the employment begins and ends at definite periods and if a teacher is not to be paid during temporary illness—in other words, if temporary illness is excuse sufficient to warrant a board in breaking the contract as to payment—then it would be sufficient to warrant the breaking of the contract as to teaching. The latter proposition surely would not be claimed; that is, it would not be claimed that because a teacher was temporarily ill for a few days that such teacher should, on that account, be permitted to break the contract and compel the board to get another teacher for the remainder of the term. The contract being an entire one, the teacher is held the same as the board would be and therefore if the contract cannot be broken by the teacher, its terms as to payment cannot be broken by the board."

The rule that when the suspension of performance under an entire contract, such as we are here considering, is temporary, and no contractual provisions or statutory regulations intervene, payment thereunder will not be affected, is recognized by the Supreme Court of Ohio in the case of *Montgomery* v. *Board of Education,* 102 O. S., 189, the syllabus of which reads as follows:

"One who entered into a contract, entire in its nature, with a board of education, providing that he should convey pupils to and from school during a school year, of eight and one-half months, at a stipulated compensation payable monthly, is entitled to such compensation during a period of suspension of the schools by the board of education, though it be upon the direction of the board of health as a precautionary health measure, there being no provision in the contract relative to such contingency and it appearing that the suspension was temporary and the person so employed was required to and did continue ready and willing at all times to perform his duties under the contract, which he in fact did upon the resumption of school after such period of suspension."

It is recognized, however, at common law, that the rule hereinbefore stated may be modified by contract and this fact is inferentially stated by the Supreme Court in the Montgomery case, supra. The court states on page 193:

"The contingency which here occurred was one which might well have been foreseen and provided against in the contract, but was not. The law will not insert by construction for the benefit of one of the parties an exception or condition which the parties either by design or neglect have omitted from their own contract."

In Cyc., Vol. 35, p. 1099, it is stated that as a general rule it is held that a contagious disease is not such an act within the meaning of the school laws as to relieve the district from paying "unless there is a stipulation in the contract of employment covering such a possible occurrence." In R. C. L., Vol. 24, p. 619, where this question is considered, it is said:

"But of course a school district may save itself from liability in such a case by a proper provision in the contract of employment."

In the present instance, however, we are confronted with reference to teachers'

contracts by the provisions of Section 7690-1, General Code, which are as follows:

> "Each board of education shall fix the salaries of all teachers which may be increased but not diminished during the term for which the appointment is made. Teachers must be paid for all time lost when the schools in which they are employed are closed owing to an epidemic or other public calamity."

It seems clear that upon a proper construction of the rule adopted by the board of education, which must be read into the teacher's contract in question, the board would be justified in deducting from the teacher's salary a proportionate amount for the time lost by the teacher on account of the illness in question, unless, by reason of the statute quoted above, it would be illegal to do so. The question arises whether or not in the light of the statute quoted above, this amounts to a reduction of the teacher's salary for the time she is employed. There is no direct holding on this question. It should be borne in mind, however, that at the time of the rendition of the 1918 opinion referred to above, the same provision with reference to the diminishing of a teacher's salary during the term for which he is appointed, as is now contained in Section 7690-1, General Code, was contained in Section 7690, General Code, as then in force. In the course of the 1918 opinion, the Attorney General said:

> "While the inquiry does not disclose the language of the contract of employment of the teacher in question, nor whether the board of education has adopted any rules regarding absence with or without leave, I assume that there is a total absence of any such rules and that the contract in question is the ordinary form, contracting for the teacher's services in conformity to law. Such a contract I think must be conceded to be an entire contract, for in the Ohio law the term of service could not be for less than one year nor more than three years. * * *
>
> While a teacher's contract is such as to make employment purely contractual, and while the parties are governed by the terms of their contract, their rights and duties being obtained and enforced under the law as other contracts, still it is plainly evident that the legislature has recognized the profession and services of teaching as of a somewhat special character, in that it has prescribed the minimum and maximum term, as well as the minimum salary, and provided that such salary, while it might be increased, could not be diminished during term of the service."

While the Attorney General did not directly hold that contracts might be made changing the common law rule with reference to these contracts with teachers, he inferentially at least, both in the body of the opinion and in the syllabus, as quoted above, held that if the contract with a teacher provided that he should not be paid for time lost on account of illness it did not amount to the diminishing of his salary during his term.

I am of the opinion that when teachers contract with a board of education for service in the schools of the district the contracts so made are subject to rules and regulations of the board lawfully made and adopted, whether or not the teachers so contracting are actually cognizant of such rules and regulations.

Where at the time a teacher is employed by a board of education there is in force a rule, lawfully made and adopted by the board to the effect that teachers shall not be paid for time they absent themselves from their duties for reasons other than death in their families or when the school is closed by the board of education or county health board on account of contagious or infectious disease

the teacher contracts with reference to said rule, and if at any time during the life of the contract the teacher is absent from school without leave on account of illness from a contagious disease, the board may lawfully deduct from the salary of such teacher a proportionate amount for the time of the absence.

Respectfully,
GILBERT BETTMAN,
Attorney General.

3089.

SHERIFF—CHARGED WITH DUTY OF CONVEYING TO PENITENTIARY, PERSONS SENTENCED FROM COUNTY—MAY DESIGNATE CRIMINAL BAILIFF TO CONDUCT SUCH TRIP.

SYLLABUS:

While the sheriff of the county is the proper official to convey to the penitentiary persons sentenced from the county, a criminal bailiff, when so directed by the sheriff, may conduct such prisoners to the penitentiary.

COLUMBUS, OHIO, March 24, 1931.

HON. CHARLES T. STAHL, *Prosecuting Attorney, Bryan, Ohio.*

DEAR SIR:—This will acknowledge the receipt of your recent communication, which reads:

> "A criminal bailiff is appointed under favor of section 1541, General Code. Section 1543 reads: 'Under the direction of the sheriff, the criminal bailiff shall convey to the penitentiary all persons sentenced thereto.'
>
> Section 13455-1, General Code, provides that all prisoners 'shall be conveyed to the penitentiary or reformatory by the sheriff of the county.'
>
> It seems to me the reasonable construction of these two sections would be to recognize that the responsibility of caring for prisoners is cast upon the sheriff primarily by numerous sections of the code, and to hold that section 13455-1 gives him the power and authority to transport prisoners to the penitentiary; and that the bailiff should act for the sheriff when directed.
>
> It seems to me any other construction tends to confusion and conflict. However, I would appreciate your opinion upon this matter."

In your letter you have quoted the pertinent part of section 1543, General Code, which first appeared in 75 O. L., p. 54.

The pertinent part of section 13455-1, General Code, reads as follows:

> "A person sentenced for felony to the penitentiary or a reformatory, unless the execution thereof is suspended, shall be conveyed to the penitentiary or such reformatory, by the sheriff of the county in which the conviction was had, within five days after such sentence. * * *"

This latter section was passed by the 88th General Assembly and is found in 113 O. L. 207.

In case of a conflict, it is a familiar rule of statutory construction that the later in time will prevail. However, as stated in Sutherland on Statutory Con-