

See also, in this connection, Opinions of the Attorney General for 1912, page 1265; for 1913, page 1205; for 1915, page 1381; for 1917, page 1435; for 1927, page 2692; for 1928, pages 1925, 1955 and 2613 and for 1930, page 1464.

With reference to your second question, your attention is directed to the provisions of Section 7749-1, General Code, which provides in substance, that a board of education is never required to provide high school transportation except in districts where the schools are centralized and transportation is furnished for the elementary pupils, unless such transportation is deemed and declared by the county board of education to be advisable and practicable. The provisions of Section 7749-2, General Code, to which you refer, are permissive, and apply only in those cases where a board of education is required to furnish transportation for high school pupils, by action of the county board of education, or when the board determines on its own initiative, to provide such transportation. It will be noted that this statute was enacted before Section 7749-1, General Code, was amended to provide as it now does.

In view of the facts submitted by you, when considered in the light of the law as outlined above, I am of the opinion, in specific answer to your questions:

1. The board of education in question can not be held for the tuition of the pupil who had attended school in another district, in the absence of notice to the board of education of the district of its residence prior to its attendance at the said high school, as provided by Section 7750, General Code.

2. The board of education is not liable for the board of this pupil.

I might suggest in this connection, that circumstances may be such that the pupil is entitled to attend school in the district where he is living with his aunt and uncle without the payment of tuition by anyone. You will observe from the provisions of Section 7681, General Code, that a child of school age living apart from his parents or guardian, who works to support himself by his own labor, shall be entitled to attend school free in the district in which he is employed. Whether or not that is the case in this instance is of course a question of fact.

Respectfully,

GILBERT BETTMAN,

Attorney General.

4224.

OPTOMETRY—AUTHORITY OF BOARD OF OPTOMETRY TO ISSUE
AND REVOKE LICENSES—RELATED DUTIES OF SUCH BOARD
DISCUSSED.

SYLLABUS:

1. *The State Board of Optometry has no authority to reinstate the license of a former optometrist whose license has been revoked for the non-payment of annual license fees after the expiration of the period of five years.*

2. *Former optometrists whose licenses have been revoked for non-payment of fees, or who have retired from the practice for a period of more than five years, must comply with the provisions of Section 1295-28, General Code, in order to again obtain a license to practice optometry.*

3. *Prosecutions may be instituted in the courts under Section 1295-22, General Code, against any person who practices optometry after his license has been revoked.*

4. *There is no duty on the State Board of Optometry to file with the clerk of the Court of Common Pleas a certificate setting forth the revocation of a license of an optometrist even though the original license was filed with such clerk of courts.*

COLUMBUS, OHIO, April 1, 1932.

HON. H. RILEY SPITLER, *President, The Ohio State Board of Optometry, Eaton, Ohio.*

DEAR SIR:—I am in receipt of your request for opinion which reads as follows:

"A. This Board has discovered a number of instances where Optometrists have not paid the annual renewal fee required by original Section 1295-30, and Amended Section 1295-30, for periods varying from eleven years to one year. These optometrists have all been notified by the boards in the past that their certificates were to be revoked for non-payment of fees. The certificates were then revoked by action of the board.

B. This board now discovers instances of optometrists who have not paid fees for periods *longer than five years* and who have continued in practice the entire time and have continued in practice since their certificates were revoked for non-payment of fees, never having retired from practice at any time and having remained actively in practice during the period of lapse of fee payment and subsequent to revocation.

C. Some of these men indicate that they wish to re-engage legally in the practice of Optometry and there seems little question as to procedure in cases who have not paid fees for periods LESS than five years.

From the foregoing set of facts, opinion is requested on the following:

A. Has the board power, *after the expiration of the five year limitation* on fee payment in Section 1295-30, to reinstate those whose certificates have been revoked for non-payment of fees?

B. If the answer to (a) is in the affirmative, upon what conditions?

C. In the event the board does not have such power, must delinquents whose certificates have been revoked, for *non-payment for a period longer than five years*, meet the requirements set forth in Section 1295-28?

D. Can prosecutions be instituted in the courts for illegal practice against those whose certificates have been revoked for non-payment of fees, it being the opinion of this board that individuals whose certificates have been revoked revert to the status of laymen under the provisions of the Optometry Law?

E. In view of the requirement in Section 1295-29 certificates be registered by Clerks of Courts of Common Pleas, should this board notify Clerks of Courts officially of the revocation of certificates of Optometrists?"

The questions which you present call for an interpretation of Section 1295-30 of the General Code, which, in so far as material to your inquiry, reads as follows:

"Said board shall charge the sum of twenty-five dollars for registration and examination. Every registered optometrist who desires to continue the practice of optometry shall, annually, on or before the first day of January, pay to the secretary of the board a renewal registration fee of five dollars, for which he shall receive a renewal of his certificate.

In case of neglect to pay the renewal registration fee herein specified, the board may revoke such certificate and the holder thereof may be reinstated by complying with the conditions specified in this act (G. C. §§ 1295-21 to 1295-35). No certificate or permit shall be revoked without giving sixty days' notice to the delinquent, who, within such period shall have the right of renewal of such certificate on payment of the renewal fee with a penalty of five dollars provided that retirement from practice for a period not exceeding five years shall not deprive the holder of said certificate of the right to renew his certificate on the payment of all lapsed fees."

Your letter states that the optometrists were notified prior to the revocation of their licenses. The above quoted section requires "giving sixty days' notice to the delinquent" as a condition precedent to the revocation. You do not state definitely that the notice was given sixty days prior to the revocation. However, I am assuming this to be the case. The specific provision of this section with respect to renewal of licenses is:

"Within such (sixty day) period (the delinquent) shall have the right of renewal of such certificate on payment of the renewal fee with a penalty of five dollars * *"

It is evident from the language contained in this section, that the legislative intent was to authorize the State Board of Optometry to take formal action as to the revocation of licenses and thereupon notify those delinquent of such action. The statute is not clear as to whether this action by the board should be in the form of a notification to the delinquent that his license will be revoked not less than sixty days after the receipt of such notice or whether a conditional revocation should be made by the board, to become irrevocable within a period not less than sixty days after notice to the delinquent.

I believe it would be good practice to adopt the method of placing a resolution upon the minutes of the board, which resolution should show the names of the delinquents, together with the numbers of their license certificates and such other data as is appropriate and set forth a revocation to become effective at a future date which must not be less than sixty days after notice of such action has been received by the offender. Then if the annual license fee, together with the penalty of five dollars, is paid within sixty days from receipt of the notice, such conditional revocation should be entered upon the records of the board as to the person so renewing his license.

It is evidently the legislative intent that some action should be taken by the board prior to the notice, for the language of the statute is that the delinquent "within such period shall have the right of renewal of such certificate upon payment of the renewal fee with a penalty of five dollars."

The provisions of the General Code applicable to optometrists being Sections 1295-21 to 1295-36 of the General Code, evidently contemplate that the optometrist shall pay prior to being admitted to take the examination for a license, the sum of twenty-five dollars, which is evidently intended to include the cost of

examination and registration for a period of one year, which license may be renewed for periods from year to year by payment of a fee of five dollars per annum. Section 1295-30, supra, provides that if such fee is not paid the license to practice as an optometrist may be revoked, and the statute contains no method by which this revocation of license may be vacated after the sixty day period shall have expired.

A somewhat similar situation with respect to a license to do business is contained in the Corporation Code, which requires all corporations, either foreign or domestic, to file an annual report and pay a fee to the Secretary of State. Such Code further provides that if the license fee is not paid or the report is not filed the Secretary of State shall cancel the license when the delinquency shall have existed for a period of ninety days. See Sections 5509 to 5513 of the General Code. Such sections further contain the provision by which such license may be reinstated at any time within two years from the date of such revocation by the filing of certain reports and upon the payment of certain penalties. My predecessor in office has held with respect to such corporations whose licenses have been forfeited that, if the license is not reinstated within the two year period, such license can not be reinstated. See Opinions of the Attorney General for 1923, page 443. This seems to be the universal view of the courts with reference to corporations. Like reasoning applied to the construction of Section 1295-30, General Code, leads to the conclusion that after the expiration of the sixty day period the license of an optometrist which has been forfeited for the non-payment of the annual license tax is extinct and exists for no purpose whatsoever.

You will note in such section a proviso which makes an exception to the action of such statute as follows:

“* * provided that retirement from practice for a period of not exceeding five years shall not deprive the holder of said certificate of the right to renew his certificate on the payment of all lapsed fees. * *”

In the enactment of this statute the legislature has used an ordinary word—“retirement” which, in its ordinary and popular sense, means the condition of having ceased from active endeavors. Thus, if an optometrist had been actively engaged in the pursuit of his profession and would cease such practice under the provisions of this section he has the right to reinstate his license even though it may have lapsed, by payment of all license fees for the years during which he was retired. There are, however, in such sections no provisions for the reinstatement of a license of one who has negligently failed to pay his annual license fee but has continued in practice.

In answer to your first inquiry I am of the opinion that:

1. The State Board of Optometry, under no circumstances, after the expiration of the five year period of limitation set forth in Section 1295-30, General Code, has the right to reinstate the certificate or license of an optometrist whose certificate has been revoked for non-payment of fees. Having arrived at this conclusion, it is unnecessary to discuss your second inquiry.

Your third inquiry is as to how, if at all, may such optometrist whose license has been revoked for non-payment of fees, meet the requirement set forth in Section 1295-29, General Code. Such section reads as follows:

“Every person desiring to commence the practice of optometry shall take the examination provided in this act (G. C. §§1295-21 to 1295-35) and fulfill the other requirements hereof as herein provided.

Any person over the age of twenty-one years, of good moral character, who has had a preliminary education equivalent to a four year course in a first grade high school, which shall be ascertained by examination or by acceptable certificate as to credentials for work done in such approved institution, and who has graduated from a school or college which maintains a course in optometry of not less than two years, shall be entitled to take a standard examination, provided said school or college of optometry is in good standing as determined by the board. The standard examination shall consist of tests in practical, theoretical and physiological optics, in theoretical and practical optometry and in the anatomy and physiology of the eye and in pathology as applied to optometry. Any person holding a limited certificate as provided in original section 1295-28 of the General Code, shall be entitled to take the standard examination merely upon proof to the board that he is of good moral character, and is not addicted to the intemperate use of alcohol or narcotic drugs."

Such section discusses the method of acquiring the original certificate. The intent of your inquiry is as to whether a person whose license has been revoked may be permitted to take an examination and procure a certificate under this section. I find no language in such section which would prohibit such optometrist from being admitted to the examination referred to unless the applicant shall have been guilty of practising as an optometrist after his license was revoked, in which case, by virtue of the provisions of Sections 1295-22 and 1295-31, General Code, making the practice of optometry without a license both an illegal act and a misdemeanor, such applicant might well be refused admittance to such examination under proper rules adopted by the board.

With reference to your fourth request as to whether an optometrist whose license has been revoked, may be prosecuted under Section 1295-22, General Code, this Section reads as follows:

"That on and after January 1, 1920, it shall not be lawful for any person in this state to engage in the practice of optometry or to hold himself out as a practitioner of optometry, or attempt to determine the kind of glasses needed by any person, or to hold himself out as a licensed optometrist when not so licensed, or to hold himself out as able to examine the eyes of any person for the purpose of fitting the same with glasses, excepting those hereinafter exempted, unless he has first fulfilled the requirements of this act and has received a certificate of licensure from the state board of optometry created by this act, nor shall it be lawful for any person in this state to represent that he is the lawful holder of a certificate of licensure such as is provided for in this act, when in fact he is not such lawful holder or to impersonate any licensed practitioner of optometry or to fail to register the certificate as provided in section 1295-29 of this act.

Any person violating the provisions of this section shall be guilty of a misdemeanor and, upon conviction, for his first offense shall be fined not more than five hundred dollars at the discretion of the court and upon conviction for a second or later offense shall be fined not less than five hundred dollars, nor more than one thousand dollars or imprisoned not less than six months nor more than one year at the discretion of the court."

As hereinbefore set forth, when a license has been revoked and the sixty day reinstatement period shall have expired, the former optometrist has no right to practice since his license is non-existent.

In the case of *Gobin vs. State of Oklahoma*, 131 Pac., 546, (Okla.), 44 L. R. A., N. S., 1089, it was held that a physician whose license had been revoked had no right to practice medicine within such state and that he could be convicted under a similar statute to that hereinabove set forth, for the illegal practice of medicine.

It has been uniformly held that the state has the right, under the police power, to determine who may and who may not practice optometry within such state.

Thus, where the legislature has specifically provided that the license shall cease to exist upon certain circumstances and such circumstances have been found to exist and the license revoked, it becomes illegal and a misdemeanor under the section above quoted to perform any of the acts constituting the practice of optometry as set forth in Section 1295-21, General Code.

Under Section 1295-29, General Code, referred to in your fifth request, concerning the registration of certificates of optometrists with the clerk of courts of Common Pleas, I find no provision directing the filing of a revocation of such certificate with the clerk of courts, and bearing in mind further that the statute provides no fee for the clerk of courts for the recordation or filing of such certificate it is doubtful whether a clerk of courts would be required to file such certificate of revocation when filed with him. It must also be borne in mind that executive boards, such as the State Board of Optometry, have only such powers and such duties as are placed upon them by statute. Section 1295-30, General Code, provides for the keeping of complete records of proceedings of the board and makes such records public records. I am therefore of the opinion that it is not the duty of the State Board of Optometry to file a certificate of revocation of an optometrist's license with the clerk of the Court of Common Pleas in the county in which such optometrist whose license has been revoked formerly practiced.

Respectfully,

GILBERT BETTMAN,
Attorney General.

4225.

DIRECTOR OF AGRICULTURE — ASSISTANT DIRECTOR MAY NOT EXERCISE POWERS OF DIRECTOR UNLESS DESIGNATED TO DO SO BY DIRECTOR.

SYLLABUS:

Where there is no vacancy in the office of the director of agriculture, the assistant director cannot legally exercise the functions and powers of the director during his absence or incapacity, unless such assistant be designated by the director so to do.

COLUMBUS, OHIO, April 1, 1932.

HON. GEORGE WHITE, *Governor of Ohio, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your recent communication which reads as follows: