the statutes. There does not seem to be any inconsistency created as to these two statutes by the passage of Amended Senate Bill No. 153.

Without further extending this discussion it is my opinion in specific answer to your inquiry that a railroad policeman appointed pursuant to the provisions of Section 9150, General Code, and whose commission is recorded in the Secretary of State's office under the terms of Amended Senate Bill No. 153 (effective September 4, 1935), may carry concealed weapons if he first gives bond as required by Section 12819, General Code.

Respectfully,
JOHN W. BRICKER,
Attorney General

4445.

BOARD OF EDUCATION—CONTRACT WITH COUNTY SUPERINTENDENT OF SCHOOLS DISCUSSED—(O. A. G. 1922, P. 430 OVERRULED).

SYLLABUS:

1. *A county superintendent of schools is a public officer, the salary for whom when fixed, may not be changed during his term.*

2. *The duty of a county board of education to fix the salary of its county superintendent of schools who has been duly appointed to the office, is expressly enjoined by statute, and until such salary is fixed and the proffered appointment accepted, the appointment is not complete and no contract exists between the parties.*

3. *Where a county board of education makes an appointment of a county superintendent of schools for a period of three years, and fixes the salary for said appointee for one year only, and reserves the right to fix the salary for the remaining years at some later date, the acceptance of the appointment so made constitutes a valid appointment for one year only. (Opinions of the Attorney General, 1922, p. 430 overruled.)*

COLUMBUS, OHIO, July 22, 1935.

HON. FLOYD A. COLLER, *Prosecuting Attorney, Bowling Green, Ohio.*

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

> "The minutes of the Wood county board of education, of June 11, 1934, read in part, as follows:

'It was moved by Browne that C. D. Fox be elected County Superintendent for a term of three years, for $2500 for the first year, the salary for the second and third years to be determined at the beginning of the second and third years. The motion was seconded by Seiple.

'It was moved by Waggoner that C. S. Harkness be elected County Superintendent of the Wood county school for a term of three years, beginning August 1, 1934, at a salary of $2500 for the first year and the salary for the second and third years to be determined by the county board of education at the beginning of the second and third years.

'On ballot of these two motions, C. S. Harkness received three votes and C. D. Fox received two votes.

'It was moved by Browne and seconded by Seiple, that C. S. Harkness be elected county superintendent by unanimous vote.

'Vote on motion: Browne, aye; Seiple, aye; Apple, aye; Waggoner, aye; Powell, aye. The motion carried.'

The question is: Under the law of Ohio as set forth in sections 4744 and 4744-1 of the General Code, section 20 of Article II of the Constitution, and the rulings of the Supreme Court and of the Attorney General on those sections, can the Wood County Board of Education increase or, if they desired, decrease the salary of Mr. Harkness for the coming year or the year following?

I recognize the fact that the Supreme Court in the case of *Clark* vs. *Cook,* 103 O. S., 465, on page 470, ruled that the act of a board in attempting to change the salary of the county superintendent was illegal. It further held: 'The power to change, after once having *fixed* the term and *salary,* to employ the language of the Locker case, must be clear and distinctly granted.'

If you will note, however, in that case the board of education at the time the Superintendent was hired, fixed the salary at $3,000.00 per year.

In Opinion No. 3188, Attorney General's Opinions for 1922, Vol. 1, page 430, the Hon. John G. Price held that in cases where the board of education employed the superintendent for a term of three years and fixed the salary for one year, that the salary for the coming two years would be the same. However, I believe the facts in this case are again different.

You will note that this board specifically stated 'at a salary of $2500.00 for the first year and a salary for the second and third years to be determined by the county board of education at the *beginning* of the second and third years.' I believe that by so continuing the fixing of the salary they did not exercise all the powers granted to

them by the statutes, as is held in the above case, 103 O. S., page 465, but they expressly reserved for themselves the right to later fix that salary.

I question whether the obiter in the Clark case, that the county superintendent is an officer within the purview of Section 20 of Article II of the Constitution, is good law, but even if one is to so hold, I still believe that under section 4744-1, as effective January 1, 1934, that the right of the county board of education to fix the salary for the first year and later change the same if, as in the instant case, they expressly reserve the right to change such salary at the beginning of the second and third years, would be good law."

The provisions of present Section 4744-1, General Code, which directs that the salary of a county superintendent of schools "shall be fixed by the county board of education" are not substantially different than they were at the time of the decision of the case of *State ex rel. Clarke* vs. *Cook,* 103 O. S., 465, and at the time of the rendition of the 1922 opinion to which you refer. Section 4744, General Code, provides now as it did at the times mentioned, that the county board of education shall appoint a county superintendent of schools for a term not longer than three years. His duties are fixed by statute, and there can be no question but that the position is a public office. It has been so held in several opinions of this office in addition to the 1922 opinion referred to, and categorically so held by a number of lower courts in this state. See *State ex rel. Srofe* vs. *Vance,* 18 N. P. (N. S.) 198, approved by the Court of Appeals on the opinion of the lower court March 12, 1915.

Moreover, the Supreme Court in the cases of *Christman* vs. *Coleman,* 117 O. S., 1, and *State ex rel. Westcott* vs. *Ring,* 126 O. S., 203, both of which cases were actions in quo warranto to test the right to the office of county superintendent of schools, recognized that the position of county superintendent of schools is a public office. In neither case was it questioned that quo warranto was not the proper action for the purpose and yet it is well settled that quo warranto will not lie to test the right to a mere employment as distinguished from a public office and will lie only in such cases where the title to a public office is involved.

The writ of quo warranto owes its existence and its scope in this state to constitutional and statutory provisions. *State ex rel. Price* vs. *Columbus,* 104 O. S., 120. The authority and the only authority for bringing an action in quo warranto in Ohio is given by Section 12303 of the General Code. That section provides that quo warranto may be brought in the name of the state against a person who usurps, intrudes upon, or unlawfully holds or exercises a public office or a franchise within this state. *State ex rel. Attorney General* vs. *Hunt,* 84 O. S., 143. It has been held that quo warranto will not lie to

determine a deputy coroner's right to the position because the position is not a public office. *State ex rel.* vs. *Hauck,* 11 C. C. (N. S.) 414.

In the light of the authorities there is now no question but that the position of county superintendent of schools is a public office and the case of *State ex rel. Clarke* vs. *Cook,* 103 O. S., 465, is authority for the proposition that it is such a public office that the incumbent's salary cannot be changed during his term within the prohibition of Section 20, Article II of the Constitution of Ohio. While the language of the court in that case with respect to the matter has been said to be pure dicta, and probably was not necessary to the decision, as the conclusions of the court were based largely on the lack of power on the part of a county board of education to unfix a salary after it had once been fixed, yet the court did comment on the fact that a county superintendent of schools was a public officer whose salary could not be changed during his term, and whether this comment be dicta or not, it is an expression of opinion by the court, and has been recognized by this office, particularly in the 1922 opinion referred to, as authority for holding that the salary of a county superintendent of schools cannot be changed during his term.

A valid appointment to a public office involves something more than the mere proffering of the appointment. Before the appointment becomes complete there necessarily must be an acceptance on the part of the person to whom the appointment is offered. When an appointment to any position is made or offered by a board of education and accepted, a contract exists between the parties, by virtue of Section 7699, General Code, which reads as follows:

> "Upon the appointment of any person to any position under the control of the board of education, the clerk promptly must notify such person verbally or in writing of his appointment, the conditions thereof, and request and secure from him within a reasonable time to be determined by the board, his acceptance or rejection of such appointment. An acceptance of it within the time thus determined shall constitute a contract binding both parties thereto until such time as it may be dissolved, expires, or the appointee be dismissed for cause."

One of the essentials of a valid contract is the meeting of the minds of the parties, and to constitute a valid contract, the minds of the parties must meet on every essential element of the agreement. Obviously, there could not have been a meeting of the minds of the parties as to one of the essential elements of the contract, to wit, the salary, in the instant case, for the second and third years of the term for which the Wood County Board of Education sought by its action to appoint the said superintendent of schools. Neither the person to whom the appointment was offered nor the board of education at the time knew what the salary was to be. The situation is analogous to that which was

under consideration by the Court of Appeals for Wayne County, in the cases of *Messner* vs. *Beals, et al.,* and *Beals et al* vs. *Rutherford,* 16 Abstract, 506, decided January 8, 1934. It was there held in substance that a purported contract of a school board with a teacher and principal of a high school which neither fixed the length of term for which the teacher was to be employed nor the salary to be paid, but left both "to be determined at a later date" was, in fact, no contract at all, and bound neither party thereto. In the course of the court's opinion it was said:

> "Probably one of the most important elements of the contract to both parties concerned was the question of salary, and as to that it may not be urged that there was any meeting of the minds, for that question was expressly reserved, under the resolution passed by the board, for later determination, and nothing appears in the record before us indicating that the minds of the parties had come into agreement upon that question. * *
>
> One of the fundamental rules of contracts is that a contract which is not binding on one party because it is too indefinite and uncertain as to a material matter, is not binding on the other party thereto. * *
>
> And since we conclude that such a contract as is here urged would not be binding upon the teacher by reason of its indefiniteness upon an essential term of said contract, it necessarily follows that it could not be binding upon the school board.
>
> There having been, in our judgment, no meeting of the minds of the contracting parties upon all of the essential elements of the contract in question, we discharge our duty by dismissing the petition in case No. 926, at plaintiff's costs, and by issuing a permanent injunction in favor of the school board and against the defendant Rutherford in case No. 925, with exceptions."

By applying the doctrine of the above case, it follows that the action of the Wood County Board of Education, as outlined in your letter, amounted only to the making of an appointment to the office of county superintendent of schools for one year.

I am aware that the conclusion herein reached is not in accord with the 1922 opinion referred to; I am unable to agree with the conclusion expressed in the 1922 opinion, and that opinion is therefore disapproved.

In conclusion, I am of the opinion that the county board of education of Wood County, in the instant case, may lawfully appoint the said C. B. Fox, as county superintendent of schools for the ensuing school year or for a term of years not exceeding three, at such salary as it sees fit to fix, with due regard

to the minimum salary spoken of in Section 4744-1, General Code, or may lawfully appoint someone else to the position.

Summarizing, I am of the opinion:

1. A county superintendent of schools is a public officer, the salary for whom when fixed, may not be changed during his term.

2. The duty of a county board of education to fix the salary of its county superintendent of schools who has been duly appointed to the office, is expressly enjoined by statute, and until such salary is fixed and the proffered appointment accepted, the appointment is not complete and no contract exists between the parties.

3. Where a county board of education makes an appointment of a county superintendent of schools for a period of three years, and fixes the salary for said appointee for one year only, and reserves the right to fix the salary for the remaining years at some later date, the acceptance of the appointment so made, constitutes a valid appointment for one year only. (Opinions of the Attorney General, 1922, page 430, overruled.)

Respectfully,

JOHN W. BRICKER,

Attorney General

4446.

MUNICIPAL CORPORATION—UNAUTHORIZED TO EXPEND FUNDS FOR MEMBERSHIP IN ASSOCIATION OF MUNICIPALITIES.

SYLLABUS:

A municipal corporation is without authority to expend public funds for membership dues or fees in an association of municipalities or to appropriate funds to pay for services rendered, or information furnished on municipal affairs by such association.

COLUMBUS, OHIO, July 22, 1935.

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

GENTLEMEN:—Your recent request for my opinion reads as follows:

> "Article XVIII, Section 3, grants all powers of local self-government to municipalities. Do municipalities have the power to spend municipal funds for the purpose of obtaining information on municipal problems through the services of an association of munici-