

1117.

DOG REGISTRATION ACT—UNDER SECTION 5653 G. C. COUNTY COMMISSIONERS REQUIRED TO TRANSFER SURPLUS IN DOG AND KENNEL FUND TO COUNTY BOARD OF EDUCATION FUND IN THOSE COUNTIES IN WHICH THERE IS NO SOCIETY FOR PREVENTION OF CRUELTY TO CHILDREN AND ANIMALS—COUNTY COMMISSIONERS HAVE NO AUTHORITY OVER FUNDS TRANSFERRED—HOW SAID FUND CAN BE EXPENDED BY COUNTY BOARD OF EDUCATION—WITHOUT AUTHORITY TO TRANSFER ANY PORTION OF COUNTY BOARD OF EDUCATION FUND TO ANY OTHER FUND.

1. *Under the provisions of section 5653, G. C., it is the mandatory duty of the county commissioners to transfer the surplus in the dog and kennel fund in excess of \$1,000, to the county board of education fund in those counties in which there is no society for the prevention of cruelty to children and animals.*

2. *Where the board of county commissioners has transferred to the county board of education fund, funds from the dog and kennel fund, such funds transferred vest in the county board of education fund and the board of county commissioners has no authority over such county board of education fund.*

3. *The county board of education fund can be expended only by the county board of education and for those purposes mentioned in the statutes, but the county board of education must take into consideration and use any funds secured from the county dog and kennel fund or from any other source and which is not already appropriated, before the amount due from the rural and village school districts is prorated to any of such districts.*

4. *A county board of education is a creature of statute and the exercise of the powers granted to it is limited to those expressly given and those contained by reasonable intendment in the act creating it, and the county board of education is without authority of law to transfer any portion of the county board of education fund to any other fund.*

COLUMBUS, OHIO, April 1, 1920.

HON. FRANK B. PEARSON, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your request for an opinion upon the following statement of facts:

“Under the provision of 5653, General Code, the county commissioners of Champaign county transferred \$4,000 to the county board of education fund. The commissioners requested later that the county board of education transfer such amount of this as it might see fit to the general county fund. This was done in the summer of 1919 after the June session of the commissioners. The county board of education transferred \$3,000 to the credit of the county commissioners directing it to be done.

Can a board of county commissioners, or the county board of education, transfer any funds from the county board of education fund?”

Attention is invited to a very recent decision of the court of appeals for Cuyahoga county, treating upon the powers of county boards of education, a portion of the syllabus of which reads:

“A county board of education is a creature of statute and the exercise

of the powers granted to it is limited to those expressly given and those contained by reasonable intentment in the act creating it."

The above wording was made in the case of *Matthews vs. Board of Education*, decided November, 1917, Cuyahoga county, and appearing in the *Ohio Law Reporter* issued January 12, 1920.

Certain information has been received on this question from the auditor of Champaign county and the following entry appears on the commissioners' journal, to-wit:

"June 4, 1919.

IN THE MATTER OF TRANSFERRING FUNDS FROM THE DOG AND KENNEL FUND TO THE COUNTY BOARD OF EDUCATION FUND.

The commissioners this day ordered four thousand dollars (\$4,000.00), transferred from the dog and kennel fund to the county board of education fund. * * *. Motion carried."

The above transfer was entirely regular and in compliance with the provisions of section 5653, which at that time read as follows:

"After paying all such sheep claims, at the June session of the county commissioners, if there remain more than one thousand dollars of such fund, the excess at such June session shall be transferred and disposed of as follows: In a county in which there is a society for the prevention of cruelty to children and animals, incorporated and organized as provided by law, which has one or more agents appointed in pursuance of law, all such excess as the county commissioners deem necessary for the uses and purposes of such society by order of the commissioners and upon the warrant of the county auditor shall be paid to the treasurer of such society, and any surplus not so transferred *shall be transferred to the county board of education fund* at the direction of the county commissioners." (104 O. L., 133).

In a letter dated February 16, 1920, addressed to this department, the auditor says:

"* * * I wish to state, however, that the transfer was made with a verbal understanding that an unused portion of it was to be transferred back to the county. Of this fact I am advised by the board of county commissioners, as I have assumed the office of county auditor since the transaction was made."

The county superintendent of Champaign county, who is the secretary of the county board of education, in a letter dated February 16, 1920, makes the following statement:

"On June 21, 1919, the county board of education passed a motion directing the secretary of said board to confer with the prosecuting attorney and retain \$1,000 of the money paid into the county board of education fund from the dog and kennel fund and to pay the remainder back to the county commissioners upon an order of the court of common pleas authorizing the same to be done; * * *."

Following this action by the county board of education, the exhibits submitted show that the matter was never passed upon by the court of common pleas, presumably upon the ground that the matter should not come before that court. The records further show that on February 2d the board of county commissioners, in regular session, passed a resolution stating that it was necessary to transfer \$2,500.00 from the county board of education fund to the general county fund, and that such a necessity existed because the county fund had become depleted and overdrawn, while in the county board of education fund there was a substantial balance which would not likely be needed in the future. Thereafter, on February 9, 1920, the following resolution was passed by the board of county commissioners:

"Whereas, there is now a surplus in the treasury to the credit of the county board of education, said surplus being the unused portion of the sum of four thousand dollars (\$4,000.00), transferred from the dog and kennel fund to the county board of education fund of Champaign county, Ohio, on June 4, 1919; said sum (of \$4,000.00) being the residue of a special tax known as the dog license tax, and

Whereas, the said surplus is unused and unnecessary to use at the present time by the said board of education, and

Whereas, the general county fund of Champaign county has been so far depleted that there remains at this time a debit balance in the same. Now, therefore,

Be It Resolved by the board of county commissioners of Champaign county, Ohio, in regular session assembled, that the sum of two thousand, five hundred dollars (\$2,500.00) be transferred from the board of education fund to the general county fund of Champaign county, Ohio, in accordance with the provisions of section 5654 G. C."

The above resolution was passed by unanimous vote and appears in the minutes of the county commissioners under date of February 9, 1920.

The above action on the part of the commissioners of Champaign county is a nullity for the reason, first, that the board of county commissioners were attempting to transfer a fund which had become vested in the county board of education and over which fund the county commissioners had no authority at all; second, the resolution says that the authority was found in section 5654 G. C. and that the transfer was made under such section, which reads in part as follows:

"The proceeds of a special tax, loan or bond issue shall not be used for any other purpose than that for which the same was levied, issued or made, except as herein provided. When there is in the treasury of any city * * * county * * * or school district a surplus of the proceeds of a special tax or of the proceeds of a loan or bond issue which cannot be used, or which is not needed for the purpose for which the tax was levied, or the loan made, or the bonds issued, all of such surplus shall be transferred immediately by the officer, board or council having charge of such surplus, to the sinking fund of such * * * county * * * or school district and thereafter shall be subject to the uses of such sinking fund."

In the first instance, if the license fees required for the registration of dogs in a county were to be construed to be a special tax, even then such proceeds could not be used by a board of county commissioners for general purposes and placed in a general fund, because such fund would not cover the uses "for which the same (special tax) was levied, because the dog and kennel act itself provides as

to how the proceeds from such registration fees are to be used, to-wit: (1) In the payment of animal claims, (2) the support of a society for the prevention of cruelty to children and animals in those counties which maintain such society, and, (3) the augmenting of the county board of education fund, and proceeds from the dog and kennel fund cannot be used for other than these purposes.

Again, section 5654 provides, in the case of a school district, that such surplus shall be transferred to the sinking fund of such school district and it therefore cannot apply to a county school district, inasmuch as a county board of education has no authority to issue bonds and has no sinking fund. The school districts mentioned in section 5654 refer to those school districts which are capable of having a sinking fund and not to county school districts. Further, when such transfers are to be made under section 5654 G. C., such transfers are to be made by the "board * * * having charge of such surplus, to the sinking fund" and the board of county commissioners has no authority to transfer funds belonging to a school district or a board of education under section 5654 G. C.

That the board of county commissioners had a wrong conception as to the status of the county board of education fund, is again apparent from the language appearing in the petition which was prepared for the court of common pleas in this matter, which petition, however, was not acted upon by the court. This language occurs in such petition signed by the commissioners of the county in question, to-wit:

"* * * The county board of education fund has a substantial balance therein unused and unnecessary to use at this time, and further that there is no likelihood of any necessity arising whereby the said balance in the county board of education fund will be needed in the future."

Here the county commissioners make the statement that the county board of education fund is not likely to be used and no likelihood of a necessity arising for its use, a statement which they have no authority to make, because it is for the county board of education to say what is to be done with the county board of education fund and no other authority has any jurisdiction over such fund.

As a concrete illustration that it was the intention of the General Assembly that the county board of education fund had a real use to which it could and should be put, attention is invited to section 4744-1 G. C., as amended in 108 O. L., page 704, which section was the law in February, 1920, when the proceedings therein treated took place. Such section reads in part as follows:

"The salary of the county superintendent shall be fixed by the county board of education at not less than twelve hundred dollars per year, and shall be paid out of the county board of education fund * * *. Half of such salary up to the amount of two thousand dollars shall be paid by the state and the balance by the county school district. * * *. The part of all salaries and expenses paid by the county school district shall be prorated among the village and rural school districts in the county in proportion to the number of teachers employed in each district, *but the county board of education must take into consideration and use any funds secured from the county dog and kennel fund or from any other source and which is not already appropriated before the amount is prorated to the various rural and village districts.*"

The meaning of the above section is that before the county board of education can prorate any of its expenses to the rural and village districts composing the county school district, it must take into consideration and use the county dog

and kennel fund; therefore in the county in question, if the county dog and kennel fund were used to pay the county superintendent and other expenses of the county board of education, it is entirely likely that there would be no prorating of such county board of education expenses among the various rural and village school districts of the county, which was the contemplation of the General Assembly when it amended section 4744-1.

In the statement of facts furnished by the county superintendent of Champaign county, he advises that his salary as county superintendent is \$2,500.00, of which amount there is prorated to the districts of the county \$1,500.00. It is the intent of the law that this \$1,500.00, taking this specific case as an example, is to be paid first from the dog and kennel fund allotted to the county board of education, if it is sufficient, and if not sufficient, then and then only is any prorating to the various districts of the county to follow. Similarly, too, the other expenses of the county board of education, which might be a number of things as treated in a former opinion of this department, are to be paid, if possible, from the dog and kennel allotment made to the county board of education by the county board of commissioners. So the statement that the county board of education in this particular county would have no use for a very large portion of its allotment of the dog and kennel fund, is not true when the general assembly contemplates that such dog and kennel fund shall be used in the first instance to pay the expenses of the county board of education before any prorating shall be done to the districts in the county.

That the board of county commissioners has no authority to withhold any portion of that part of the dog and kennel fund which the law says should be paid into the county board of education fund, has already been definitely settled by the supreme court of this state in the case of *State ex rel. Mitman vs. Board of County Commissioners of Greene county*, 94 O. S., 296, the fourth branch of the syllabus of which reads:

"Under the provisions of section 5653, General Code, as amended in 104 O. L., p. 145, in counties where there is no society for the prevention of cruelty to children and animals, incorporated and organized as provided by law, it is the mandatory duty of the county commissioners to transfer the surplus in the sheep fund in excess of one thousand dollars to the county board of education fund."

In arriving at such conclusion the court said:

"Looking then to the act of which the amended section was a part, we find that it was the new school code of Ohio, passed by the general assembly in its special session of 1914, called by the governor in the main for the consideration of this very act.

We find section 5653 lifted bodily from Chapter 12, Title 1, of Part II, General Code, under the classification of 'Levying Taxes,' where it logically belonged, and transferred to the chapter of the code having to do with educational matters.

* * * * *

These sections provided that such county superintendent should be paid a salary of not less than \$1,200 and that he should be paid out of the county board of education fund.

We find that a newly created tax fund was provided for, to be a separate fund and to be known as the county board of education fund.

We also find that this amendment expressly struck out the word 'may' and inserted in its stead the word 'shall.'

We find that the four named long established funds, which under the old section might have been replenished by the surplus from the dog tax, were stricken from the act and substituted therefor was the newly created fund to be known as the county board of education fund, and from which the county superintendent's salary should be paid.

These facts we ascertain from the act itself.

Now, seeking a clear and satisfactory answer to the question, what was the object of amending section 5653? and availing ourselves of all sources of information which in their nature are capable of conveying information, we discover that the needful thing to give efficacy to this act was to select competent county superintendents. The law was an innovation; met with many criticisms and vigorous opposition, and a failure to start with effective instruments might prove fatal to its retention on the statutes of Ohio.

It is certainly within the knowledge of all men that school superintendents must be paid, and that promptly. As a general rule school teachers are not overburdened with this world's goods, and the monthly stipend is quite essential.

Looking a little further afield we find no fund available to pay these new officers and none could be made available under our system of collecting and distributing taxes until the February following. Thus nearly six months must ensue before salary could be paid.

Now, putting ourselves in a position to see the subject from the standpoint of the makers of the law, we must gather that they were somewhat at their wits' end to provide a fund to make payments to the superintendents.

It was a clear case of doing the best one could under the circumstances. So, after the law was framed and ready for final submission to the general assembly, we find its sponsors at the last moment seizing on section 5653, amending it as hereinbefore set forth and incorporating the section in the new school code as its very last section.

It was clearly the intention of the legislature not to leave the county superintendents to the mercy of the county commissioners, who, it might be said, could have given vitality to this new fund by proceeding to imburse it by following the provisions of section 2296 et seq., General Code. But realizing that since the limitation of the tax rate has been in vogue in Ohio most of the long-established funds are in steady need of reimbursement, the general assembly evidently thought best not to depend on the whim of the county commissioners, but to make certain a fund, at least in those counties wherein there was no society for the prevention of cruelty to children and animals, incorporated and organized as provided by law. Thus we arrive at the conclusion that the general assembly had a definite purpose in amending section 5653.

* * * * *

Thus it is that we arrive at the conclusion that the obvious intent and purpose of this act was to make mandatory the duty of transferring the surplus in the dog tax or sheep fund to the county board of education fund, in counties where the societies for the prevention of cruelty to children and animals have no existence. We give the amended sections this construction notwithstanding the retention in the law of the clause 'at the direction of the county commissioners.'

Attention is also invited to the decision in the case of State of Ohio ex rel. Edward C. Turner, prosecuting attorney vs. Fred M. Sayre, as auditor of Franklin

county, appearing at page 337, O. N. P. Rep., Vol. 12 (n. s.), the syllabus of which reads:

"There is no statutory authority whereby the county commissioners and auditor, for the purpose of meeting present needs by replenishing exhausted funds, may transfer to such funds either receipts in bulk from undivided taxes, or from the sale of bonds issued for a specific purpose, or from duplicate tax payments, or from the floating debt, depository interest or election funds; and an attempt so to do is void, and moneys so attempted to be transferred should be restored to the funds to which they belong; but funds arising from fees paid into county offices may be so transferred."

Reference is made to this decision because it has been indicated by those interested that it might have some bearing upon this particular case. However, this decision was rendered in 1911 and before there was such an agency as the county board of education or the county board of education fund, which was still later created, nor could relief be found in the last sentence of such holding, which says "but funds arising from fees paid into county offices may be so transferred," for the reason that while the dog and kennel fund in the first instance arises from fees paid into the office of the county auditor, yet when these fees in the aggregate later pass to the board of county commissioners to be mandatorily transferred to the county board of education fund, as an aggregate sum, they can no longer be treated as fees paid into county offices, having lost such status.

As to the question as to whether a county board of education can transfer any portion of the county board of education fund to any other fund of any kind, it must be remembered, as indicated in the beginning of this opinion, quoting the rule laid down in the Cuyahoga county decision of the court of appeals, that the board of education can do only those things for which it has direct authority, since it is a creature of statute. Nowhere in the statutes as they exist today is there found any authority for the county board of education to transfer any of the county board of education fund; it can spend such fund for the purposes in which it has an interest as they appear throughout the statutes, but up to this time the general assembly has made no provision of any kind for any transfer from this fund by the county board of education.

Attention is also invited to a very pertinent case which covers this matter, reference being made to the case of Board of Infirmary Directors of Franklin county, Ohio, vs. Board of County Commissioners of Franklin county, Ohio, appearing at page 347, Vol. 6 O. N. P. (n. s.), wherein Judge Bigger said (p. 350):

"* * * I find no statutory ground of authority to any board to transfer funds under its control to another fund not under its control, and it seems to me from the very nature of things such exercise of power was not contemplated by the legislature.

* * * It is apparent also * * * that the legislature only contemplated such transfers from one fund to another fund, both of which are under the control of the same board. * * *

That is, it is only the transfer from one fund to another fund under their respective supervision that is * * * authorized, and this lends color to the view that the legislature never contemplated the transfer by a board from one fund under its control to a fund under the control of some other board."

Based upon the statement of facts given and exhibits submitted by the several

officers of the county in question, and the law herein cited, it is therefore the opinion of the attorney-general that:

1. Under the provisions of section 5653, General Code, it is the mandatory duty of the county commissioners to transfer the surplus in the dog and kennel fund in excess of \$1,000 to the county board of education fund in those counties in which there is no society for the prevention of cruelty to children and animals.

2. Where the board of county commissioners have transferred to the county board of education fund, funds from the dog and kennel fund, such funds transferred vest in the county board of education fund and the board of county commissioners has no authority over such county board of education fund.

3. The county board of education fund can be expended only by the county board of education and for those purposes mentioned in the statutes, but the county board of education must take into consideration and use any funds secured from the county dog and kennel fund or from any other source and which is not already appropriated, before the amount due from the rural and village school districts is prorated to any of such districts.

4. A county board of education is a creature of statute and the exercise of the powers granted to it is limited to those expressly given and those contained by reasonable intentment in the act creating it, and the county board of education is without authority of law to transfer any portion of the county board of education fund to any other fund.

Respectfully,

JOHN G. PRICE,

Attorney-General.

1118.

OFFICES COMPATIBLE—MEMBER OF GENERAL ASSEMBLY—MEMBER OF COUNTY BOARD OF EDUCATION.

Under the provisions of the constitution of Ohio, a member of the general assembly can at the same time serve as a member of the county board of education.

COLUMBUS, OHIO, April 1, 1920.

HON. F. B. PEARSON, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your letter in which you desire to know whether a member of the general assembly at the same time can serve as a member of the county board of education.

Your attention is invited to a former opinion issued by this department on June 17, 1914, addressed to Hon. John H. Lowry, member of the House of Representatives, Napoleon, Ohio, and reported as Opinion No. 989 in 1914 Annual Report of the Attorney-General, Vol. I, p. 817. The holding of such opinion was that there is no provision in the constitution prohibiting a member of the general assembly from serving upon the county board of education. After quoting fully from sections 4728, 4728-1, 4729, 4730 and 4734 G. C., the attorney-general said: (pp. 818-19).

"The foregoing sections provide the manner in which the county board of education is to be elected and the length of the term of each member; it also provides for the payment of their expenses. No salary is provided for in any of these sections.

The question may arise as to whether or not the members of the county board of education are chosen by election, or by appointment. In