679.

BOARD OF EDUCATION—MAY PRESCRIBE RULES REQUIRING PUPILS TO PAY REASONABLE INCIDENTAL FEES TO COVER BREAKAGE OF TEST TUBES AND USE OF MATERIAL—LABORATORY WORK—CANNOT CHARGE FOR APPARATUS OWNED BY BOARD— CANNOT CHARGE TUITION FEE.

SYLLABUS:

A board of education may in its discretion prescribe rules requiring pupils in the public schools to pay reasonable incidental fees to cover breakage of test tubes and use of material used in laboratory work. Such rules must be reasonable and not such as to exact tuition fees under the guise of mere incidental fees. No charge can be made for the use of any apparatus owned or used by the board of education. In the enforcement of such rules the provisions of Section 7777, General Code, should be taken into consideration.

COLUMBUS, OHIO, June 30, 1927.

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

GENTLEMEN:—I am in receipt of your communication requesting my opinion as follows:

"We respectfully request your written opinion on the following matter:

In the laboratory work at the high school of one of our city school districts, a schedule of small fees is in effect to protect against breakage, use of material and equipment.

Question: Can such board of education legally establish such schedule of small fees and collect same from its pupils, in view of the provisions of law that the schools of the state shall be free and in view of the provisions of Section 7620 G. C., which authorizes boards of education to provide necessary apparatus and make all other necessary provisions for the schools under its control?"

Section 4750 and 7620 of the General Code provide as follows:

"Sec. 4750. The board of education shall make such rules and regulations as it deems necessary for its government and the government of its employes and the pupils of the schools. No meeting of a board of education, not provided for by its rules or by law, shall be legal, unless all the members thereof have been notified, as provided in the next section."

"Sec. 7620. 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 fuel for 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."

While the statutes provide for free schools, there has not been complete unanimity among courts as to what the word "free" means, when used in this connection.

Text book writers and commentators have not discussed this subject to any great extent. Vorhees in his work on the law of the public school system of the United States in Section 97 devotes but a paragraph to the subject. He says:

> "Although a characteristic feature of public schools is that they are free of expense, it has been held that a reasonable incidental fee may be imposed upon pupils to pay for heat, in the absence of a statute creating a fund for that purpose, and any pupil failing to comply with such rule may be excluded from the school."

He cites as authority for the statement the case of *Bryant vs. Whisenant,* 167 Ala. 325.

R. C. L. Vol. 24, page 630, says:

> "There is a decided conflict in the cases wherein the right of a public school to exact an incidental fee from students has been discussed. Some cases clearly hold that such a fee cannot be charged on the theory that it is inconsistent with the public school system as planned by the constitution, while others hold that with legislative authority such a fee is proper. These cases hold that the term free, as applied to the schools means free as far as tuition is concerned and does not preclude an assessment of a reasonable sum for incidental expenses. In jurisdictions holding that such fee cannot be charged it cannot be done by indirection. So an act of the legislature permitting the renting of books to pupils cannot be made the cloak for a fee by making the renting compulsory."

Although the text says that there is a decided conflict of authority on this subject, only two cases are cited, the case of *Bryant vs. Whisenant,* supra, and the case of *Connell vs. Gray* (Okla.) 127 Pac. 417, 42 L. R. A. (N. S.) 336, both of which cases hold that incidental fees as distinguised from tuition fees may be required of pupils attending public schools. There are no cases cited to the contrary.

There are authorities, perhaps not exactly in point, which seem to support the theory that the charging of incidental fees is inconsistent with a free public school system. *Maxey vs. Oshkosh* 144 Wis. 238; *Morristown Burough School District vs. Upper Marion Township School District,* 49 Pa. Superior Court 561; *Young vs. Fountain Inn Graded School,* 64 S. C. 131, holds squarely that incidental fees can not be charged to attendants of the South Carolina Public Schools. However, in two other cases—*Haller vs. Rock Hill,* 60 S. C. 41 and *Powell vs. McLendon,* 60 S. C. 47—a statute authorizing trustees of certain special school districts in South Corolina to charge supplemental tuition fees was held to be constitutional.

In *Bryant vs. Whisenant,* supra, which is a leading case on the subject, the statute of the state of Alabama did not make provision for creating a fund for providing fuel for school houses and it was said an incidental fee might be charged for that purpose. That argument could not be used in support of the contention that incidental fees might be charged as laboratory fees in Ohio, as our statute, Section 7620 of the General Code, supra, authorizes the supplying of such necessary apparatus as the school authorities may think necessary. This case was followed and its principles somewhat extended in a later Alabama case—*Roberson vs. Oliver,* 189 Ala. 82; 66 So. 645.

In the case of *Connell vs. Gray,* supra, it was held that no incidental expenses could be charged and collected as a condition precedent to entrance to the Agricultural and Mechanical College of the state of Oklahoma which was supported from

public funds, but a reasonable sum might be required to be deposited by each student as a condition precedent to entrance to be held as earnest money for all negligent breakage or damage to the property of the institution, to be refunded at the end of the term or session, providing it is not consumed by breakage or damage to the property of the institution by such student, and that the board was authorized to prescribe a uniform and require it to be worn by the students. In the course of the opinion in this case the court referred to the Alabama cases cited herein, as well as a number of other cases, wherein the subject of incidental fees was discussed.

In the case of *State ex rel. Little vs. University of Kansas,* 55 Kansas 389, it was held that the Board of Regents had no power to collect a fee of $5.00, or any other fee for the use of the library, or to exclude students from the use of the library for the non-payment of such fee. In that case the court said:

> "It is suggested that supplies are furnished in the laboratories for the use of the students which are destroyed, that vessels and implements may be be broken and that the students should certainly be required to pay for these things. No question of that kind, however, is now presented and express provision therefor is made by chapter 226, Laws of 1895. The library is provided for permanent use. A library as a whole is subject to wear and tear but only in the same manner as furniture and other property furnished by the state."

Two other cases are cited and commented upon by the court in the Gray case, to-wit: *State ex rel Priest vs. University of Wisconsin,* 54 Wisconsin 159, and *New Orleans vs. Tulane Educational Fund,* 123 La. 550. In the Wisconsin case the question turned largely upon the construction of legislative acts, and it was held that the Board of Regents, where not prohibited either expressly or impliedly by law, have the power to collect incidental fees to bear the expenses necessary and convenient to accomplish the objects for which the institution was founded. In the Louisiana case it was held that free tuition was a bar to the collection of a registration fee but not to the collection of a laboratory fee. In the opinion the court said:

> "An amount is claimed as a laboratory fee.
>
> There is a difference between the laboratory fee and the matriculation fee. The last is general, but entirely proper; while, as relates to the laboratory fee, each student admitted to the laboratory has a direct personal interest. He is brought in direct contact with that department. He is a consumer of the articles placed before him for his use. He uses, breaks and destroys them, and he at other times keeps them in a safe and entire state.
>
> It may be said that they are in the nature of personal expenses. No student should object to paying them."

In view of the fact that such laboratory fees have been exacted by the school authorities for many years without question, I am of the opinion that a board of education may in its discretion, under the authority of Section 4750 of the General Code, prescribe rules requiring pupils in the public schools to pay reasonable incidental fees to cover the use of material and the breakage of test tubes, et cetera, used in laboratory work. Such rules must be reasonable and not such as to exact tuition fees under the guise of mere incidental fees. No charge, however, can be made for the use of any apparatus owned or used by the board of education.

In the enforcement of such rules the provisions of Section 7777 of the General Code should be taken into consideration. This section in effect requires school authorities to furnish text books and other personal necessities, including medical

care and such other relief as may be necessary to extend to children who are unable to attend school by reason of the inability of their parents or guardians to furnish the same for them. No such child should be or could be required to pay any incidental fees as a condition precedent to its receiving the benefits of a laboratory course.

Respectfully,
EDWARD C. TURNER,
Attorney General.

680.

GAME PROTECTORS—NO WAY IN WHICH FEES OR COMMISSIONS MAY BE PAID IN ABSENCE OF APPROPRIATION THEREFOR BY THE LEGISLATURE.

SYLLABUS:

There is no way in which fees or commissions may be paid to non-salaried game protectors in the absence of appropriation therefor by the legislature.

COLUMBUS, OHIO, June 30, 1927.

Department of Agriculture, Division of Fish and Game, Columbus, Ohio.

GENTLEMEN:—This will acknowledge receipt of your letter dated June 21, 1927, which reads as follows:

> "It has been the custom of the legislature in the past to set up or in other words to appropriate $10,000.00 for each of the fiscal years as commissions to non-salaried game protectors.
>
> The last General Assembly seemed (saw) fit to abolish these commissions to non-salaried game protectors, and the department would like to be advised at an early date what effect this might have on the non-salaried game protectors.
>
> It is true that no money is paid for commissions until fines are paid in the department complete, then the protector is paid his commission."

Your attention is directed to the following sections of the General Code:

> "Sec. 12378. Unless otherwise required by law, an officer who collects a fine, shall pay it into the treasury of the county in which such fine was assessed, to the credit of the county general fund within twenty days after the receipt thereof, take the treasurer's duplicate receipts therefor and forthwith deposit one of them with the county auditor."
>
> "Sec 1445. All fines, penalties and forfeitures arising from prosecution, convictions, confiscations, or otherwise under this act, unless otherwise directed by the Secretary of Agriculture shall be paid by the officer by whom the fine is collected to the Secretary of Agriculture and by him paid into the State Treasury to the credit of a fund which shall be appropriated biennially for the use of the Secretary of Agriculture. All moneys collected as license on nets in the Lake Erie fishing district under this act shall be