209.

APPROVAL, NOTES OF ORANGE TOWNSHIP RURAL SCHOOL DISTRICT, SHELBY COUNTY—$50,000.00.

COLUMBUS, OHIO, March 18, 1929.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

210.

HOUSE BILL NO. 301—PROVIDING FOR LIABILITY INSURANCE ON SCHOOL BUSSES—UNCONSTITUTIONAL.

SYLLABUS:

House Bill No. 301, if enacted into law in its present form, would be unconstitutional.

COLUMBUS, OHIO, March 19, 1929.

HON. S. K. MARDIS, *Chairman, School Committee, House of Representatives, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion as to whether or not the terms of House Bill No. 301, will, if enacted into law, be constitutional. The title and text of said House Bill No. 301 are as follows:

"A BILL

To supplement Section 7731 of the General Code by the enactment of supplemental Section 7731-5, relative to providing liability insurance on school busses.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That Section 7731 of the General Code be supplemented by the enactment of supplemental Section 7731-5, to read as follows:

SEC. 7731-5. The board of education of each school district shall procure liability insurance covering each school wagon or motor van and all pupils transported under the authority of such board of education. This insurance shall be procured from a recognized insurance company authorized to do business of this character in the State of Ohio, and shall include compensation for injury or death to any pupil caused by any accident arising out of or in connection with the operation of such school wagon, motor van or other vehicle used in the transportation of school children. The amount of liability insurance carried on account of any school wagon or motor van shall not exceed fifty thousand dollars."

In an early case decided by the Supreme Court of Ohio, State of Ohio ex rel Cincinnati, 19 O. 178, at page 195, the court said:

"Before this court will declare any law to be unconstitutional that part of

the Constitution of the state with which it conflicts must be pointed out and the discrepancy between the law and the Constitution clearly ascertained. So long as doubts remain, whether the law conflicts with the Constitution, the law should be enforced."

In a later case, *County of Miami* vs. *City of Dayton,* 92 O. S. 215, the seventh paragraph of the syllabus reads:

"Before a court is warranted in declaring a legislative act unconstitutional, it must clearly appear that the statute is obviously repugnant and irreconcilable with some specific provision or provisions of the constitution. If there be a reasonable doubt as to such conflict the statute must be upheld."

As I view House Bill No. 301, the basic question involved, in determining whether or not its provisions would be constitutional if enacted into law, is whether or not they would contravene the provisions of Section 19 of Article I, Section 1 of Article VI, Section 4 of Article VIII, or Section 5 of Article XII of the Constitution of Ohio. By no possible construction, in my opinion, could it be said that the terms of said House Bill No. 301, conflict with any other constitutional provision, either of the Constitution of Ohio or the Constitution of the United States. The several sections of the Constitution of Ohio above referred to, read in part as follows:

Art. I, Sec. 19. "Private property shall ever be held inviolate but subservient to the public welfare. * * * "

Art. VI, Sec. 1. "The principal of all funds, arising from the sale, or other disposition of lands, or other property, granted or entrusted to this state for educational and religious purposes, shall forever be preserved inviolate, and undiminished; and, the income arising therefrom, shall be faithfully applied to the specific objects of the original grants, or appropriations."

Art. VIII, Sec. 4. "The credit of the state shall not, in any manner be given or loaned to, or in aid of, any individual association or corporation whatsoever; nor shall the state ever hereafter become a joint owner, or stockholder, in any company or association in this state, or elsewhere, formed for any purpose whatever."

Art. XII, Sec. 5. "No tax shall be levied, except in pursuance of law; and every law imposing a tax, shall state, distinctly, the object of the same, to which only, it shall be applied."

The purport of these several constitutional provisions is, succinctly stated, that public funds whether derived from taxation or held in trust for educational purposes shall under no circumstances be diverted to private uses or to any other use than the specific objects of the original grants or tax levies.

Sections 2 and 3 of Article 6 of the Constitution of Ohio are as follows:

Sec. 2. "The General Assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state; * * * "

Sec. 3. "Provision shall be made by law for the organization, administration and control of the public school system of the state supported by public funds: * * * "

The Supreme Court of Ohio, in numerous decisions, has recognized the State

control of the school system of the State. In the case of *Board of Education* vs. *Volk*, 72 O. S. 469, the court, in referring to the State control of the public school system, on page 480, said:

> "Moreover while boards of education are 'bodies politic and corporate,' as declared by statute, yet like counties, they are but *quasi corporations* and differ materially from municipal corporations as they are organized in this state. School districts are organized to promote education and carry into effect the provision of Section 2 of Article 6 of our state constitution. * * * Boards of education for these school districts, are arms or agencies of the state for the promotion of education throughout the state, while 'municipal corporations are called into existence, either at the direct solicitation or by the free consent of the people who compose them.'"

And at page 485, speaking of the property controlled by a board of education, the court said:

> "It is not the private property of the board, but it is authorized to hold it for the State for the promotion and advancement of the education of the youth of the commonwealth, and its control is limited according to the will of the sovereign power. The board is a mere instrumentality of the state to accomplish its purpose in establishing and carrying forward a system of common schools throughout the state."

Like observations are made by the court in the case of *Miller* vs. *Korns, Auditor*, 107 O. S. 287, at page 297.

In furtherance of the State's duty to secure a thorough and efficient system of common schools throughout the State, boards of education as agencies of the State are authorized, and in some instances are required, to furnish transportation for pupils attending school. These statutes lay down certain requirements to be met, in providing for transportation, with reference to the kind of vehicle to be used, schedules to be observed, and precautions to be taken for the comfort and safety of the pupils so being transported. Certain qualifications and regulations are provided with reference to the drivers of these vehicles, Sections 7731 et seq., of the General Code.

Keeping in mind the fact that the control and administration of the public school system of the State is a State function and that this function is carried out through the agency of local boards of education, it becomes important to inquire what liability is incurred by the State or the local boards of education if injuries are suffered by pupils being transported, or by other persons, attributable to the transportation of the pupils, either by reason of the carelessness or negligent performance of any of the duties devolving upon a board of education in carrying out the provisions of law with reference to the transportation of pupils, or otherwise. It is provided by Section 16 of Article I of the Constitution of Ohio:

> "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the State, in such courts and in such manner, as may be provided by law."

It has been determined, and is now a well recognized principle of law, that "remedy by due course of law" as stated in Section 16 of Article I, supra, does not inure to the benefit of a person injured in their lands, goods, person or reputation

on account of acts done or performed by the State or an arm thereof, unless the State consents thereto. Wrongs committed in a private or proprietary capacity would constitute malfeasance, but when inflicted by the State or a governmental agency are a mere neglect of corporate duty, and unless the State chooses to assume the responsibility for such acts, no right of action or remedy exists.

It is also well settled that "remedy by due course of law" does not give to a person suffering an injury a remedy or right of action for damages, even as against an individual, or private corporation, or a public corporation acting in a proprietary capacity, unless it be shown that the injury was the direct and proximate result of misfeasance, malfeasance or nonfeasance on the part of the person or corporation, or the duly authorized agent or servant of such person or corporation, causing the injury.

In the case of *Bigelow* vs. *Inhabitants of Randolph,* 14 Gray, 541, involving the right of a school pupil to recover damages for injuries suffered by reason of having fallen into a dangerous excavation in the schoolhouse yard, brought about by the negligence of school officials, Judge Metcalf said:

> "The question then is whether the defendants are answerable on the facts in this case, for the special injury sustained by the plaintiff through their neglect to provide a safe place for her attendance at school. We are of opinion that they are not. The wrong which the facts show was not malfeasance, but mere neglect of that kind of corporate duty for neglect of which, as we have seen, a town is liable to a private action only when it is given by statute."

This principle is well settled in this State. In the case of *Finch* vs. *Board of Education,* 30 O. S. 37 it is said:

> "A board of education is not liable in its corporate capacity for damages for an injury resulting to a pupil while attending a common school, from its negligence in the discharge of its official duty in the erection and maintenance of a common school building under its charge, in the absence of a statute creating a liability."

The principle laid down in the Finch case, supra, was followed and applied in *Board of Education* vs. *McHenry,* 106 O. S. 357.

As to any liability for damages for injuries which are not the result of the negligence of the board of education or its duly authorized servants or agents in the performance of its official duties there can be no question. No liability would arise under such circumstances even though the board were acting as an individual or private corporation or a public corporation carrying out a proprietary function.

Apparently the object to be attained by the Legislature in the proposed enactment is to provide a remedy whereby injuries sustained by pupils while being transported to or from school may be compensated for in money damages.

From the language used, it is not clear whether it is intended to cover only such injuries as are suffered by pupils or whether injuries suffered by other persons as well are to be included in the "liability insurance". Indeed some question might arise in construing the proposed statute whether the intention is to cover by insurance only such injuries as may be brought about by the negligence of the school authorities or their agents, or whether it is intended to cover all cases of injury, thus broadly providing for compensation or virtually accident insurance so far as the pupils are concerned. The terms of the proposed statute are mandatory, and while they require the procuring of "liability insurance" they as well provide that that insurance "shall include compensation for injury or death to any pupil caused by any accident arising out of or in connection with the operation of such school wagon, motor van or other

vehicle used in the transportation of school children." The term "liability insurance" has no technical, well defined limits, and there would be grave danger that the language of the proposed statute might be construed as including within "liability insurance" insurance to cover all injuries to the pupils whether suffered by reason of negligence of the school authorities or bus drivers or otherwise.

Under the present state of the law there is no liability on boards of education for injuries to pupils while being transported to school, whether such injuries are caused by negligence or otherwise. Obviously, insurance against a liability that does not exist would be worthless. To require a board of education to effect insurance against such a non-existent liability would be requiring the diversion of public funds to a useless purpose to the extent of the premium on such an insurance policy. In fact it would simply be giving the money to the insurance company, as no liability could arise on the policy and an injured pupil would have no remedy. In so far as the rule laid down in *Finch* vs. *Board of Education, supra,* and *Board of Education* vs. *McHenry, supra,* is concerned it is within the power of the Legislature to provide that the rules be changed.

Many states with similar constitutional provisions to those in the Ohio Constitution have enacted statutes making school boards liable in damages for negligence in the performance of its duties to the same extent as are private individuals, and so far as I know, such statutes have never been questioned.

By reference to the language of the court in the Finch case, supra, it will be observed that the court recognized the right to create, by statute, a liability on boards of education for damages for injuries to pupils attending school caused by negligence in the discharge of their official duties.

It will also be noted that the Constitution specifically authorizes the creation of such a liability in Section 16 of Article I, supra, by providing that suits may be brought against the State "in such manner as may be provided by law."

It is not within the power of the Legislature, however, to require the payment of compensation in the broad sense of the term where injuries are suffered in the course of the administration of school affairs when the injury is not the outgrowth of negligence on the part of the school authorities or their servants and agents in carrying out their corporate functions.

The terms of House Bill No. 301 do not purport to change the rule established by the Finch and McHenry cases. Its language is not, in my opinion, susceptible of being construed as evidencing an intention on the part of the Legislature to impose on boards of education liability for damages for injuries suffered by school pupils or other persons from accidents arising out of or in connection with the transportation of school children.

It does impose on boards of education the mandatory duty of paying the premium on a liability insurance policy insuring against a liability that does not exist and it does to that extent impose on those boards obligations to expend public money for a wholly useless purpose and thus to divert those funds to a purpose other than the specific purpose for which they were intended.

I am therefore of the opinion that House Bill No. 301 if enacted into law will be unconstitutional.

Respectfully,
GILBERT BETTMAN,
Attorney General.