

1830.

## BOARD OF EDUCATION—AUTHORITY TO CREATE NEW SCHOOL DISTRICT DISCUSSED.

## SYLLABUS:

*Under the authority of Board of Education vs. Boehm, 102 O. S., 292, and the case of Board of Education of Butler Township Centralized School District vs. Campbell, 110 O. S., 48, the county board of education would have authority under the provisions of section 4736, General Code, to create a new school district from a part of a centralized school district.*

*Upon the authority of State ex rel vs. Grace, 101 O. S., 532, the unreported case of State ex rel Grace vs. Cooper, tried in the Lucas County Court of Appeals, and Board of Education vs. Boehm, 102 O. S., 292, where a county board of education, proceeded under the provisions of section 4736, General Code, to create a new school district from a part of a centralized district, a remonstrance sufficient to defeat such action must be signed by a majority of the qualified electors residing in the entire centralized district as it was before the action of the county board attempting to create the new district. The above rule would be applicable with reference to any school district under the jurisdiction of the county board of education.*

COLUMBUS, OHIO, October 14, 1924.

HON. RAY D. AVERY, *Prosecuting Attorney, Bowling Green, Ohio.*

Dear Sir:—

This will acknowledge receipt of your communication of recent date, in which you submit the following inquiry:

“Section 4736, General Code of Ohio, reads as follows:

‘The county board of education may create a school district from one or more school districts or parts thereof, and in so doing shall make an equitable division of the funds or indebtedness between the newly created district and any districts from which any portion of such newly created district is taken. Such action of the county board of education shall not take effect if a majority of the qualified electors residing in the territory affected by such order shall within thirty days from the time such action is taken file with the county board of education a written remonstrance against it. Members of the board of education of the newly created district shall be appointed by the county board of education and shall hold their office until the first election for members of a board of education held in such district after such appointment, at which said first election two members shall be elected for two years and three members shall be elected for four years, and thereafter their successors shall be elected in the same manner and for the term as is provided by section 4712 of the General Code. The board so appointed by the county board of education shall organize on the second Monday after their appointment.’

“Question No. 1. Can a county school board, without petition, create a new school district from a part of a centralized school district?”

“Question No. 2. Assuming that the above question is answered in the affirmative, is the ‘territory affected’ for the purpose of a remonstrance against the creation of such new district, the territory included within the entire centralized district or just that portion included in the newly created district?”

The power granted by section 4736, General Code, to county boards of education, has been defined by our Supreme Court in the case of *Board of Education vs Boehm*, 102 O. S., 292, the second paragraph of the syllabus reading as follows:

"Where the legislature in plain and unambiguous language within the scope of its constitutional power vests the power and discretion in a county board of education to 'create a school district from one or more school districts or parts thereof' no presumption arises that it was the intention of the legislature that the power and discretion thus vested in such board was intended to be limited or controlled by other sections of the Code theretofore enacted and unrepealed, providing for an entirely different mode of transferring territory from one district to another."

Concerning the power of a county board to transfer the territory of a centralized district, see also *Board of Education of Butler Township Darke County Centralized School District vs. J. L. Campbell*, decided April 1, 1924, 110 O. S., 48, the second paragraph of the syllabus being as follows:

"The power conferred upon townships in which there are one or more school districts to centralize the schools therein, as provided in Section 4726-1, does not supersede the power granted to the county board of education in section 4692, General Code, authorizing the transfer of school territory from one district to another. When the county board transfers to a village school district a portion of the territory contained within the township seeking to centralize, all control of school funds of such transferred territory and the issuing of school bonds, etc., is by the action of the county board exclusively vested in the board of education to which such territory has been transferred, and injunction will lie to restrain interference with such control."

Upon the authority of the above cases, your first question should be answered in the affirmative.

In considering your second question, attention is directed to the case of *Board of Education vs. Boehm et al.*, 102 O. S., 292, wherein Section 4736 is considered and where the facts were as follows:

"On and prior to the 13th day of December, 1913, there existed in Hancock County school district a village district named the Rawson Village School District, which district included the territory of the village of Rawson and a portion of the territory of Union Township, in which township the village of Rawson is located. The Rawson Village School District was not an exempted village district, but was under the supervision of the County Board of Education of Hancock County. On and prior to that date there also existed in the Hancock County School District the Eagle Township Rural School District also under the supervision of said board adjacent to the Rawson Village School District. On that day the County Board of Education of Hancock County duly passed a resolution under authority of Section 4736, General Code, creating a new school district from the Rawson Village School District and a part of the Eagle Township Rural School District and naming the new district the Rawson School District. Within thirty days thereafter a majority of the electors residing in that portion of the Eagle Township Rural District which was incorporated in the new district filed a remonstrance against the creation of the new district. The remons-

trance was not signed by a majority of the electors of the entire new district. Suit was brought by the defendants in error in behalf of themselves and others similarly situated to compel the plaintiff in error to rescind its resolution and to enjoin the Board of Education of the Rawson School District from exercising jurisdiction over the portion of the school district taken from the Eagle Township Rural District."

In the opinion of Robinson, J., at page 304, after determining that section 4736, General Code, vests in the county board of education the power to create a new school district from an existing district and a part of another existing district and in the absence of fraud, bad faith or the taking of such arbitrary, whimsical and unreasonable action by the board as amounts to an abuse of discretion, the only limitation upon such power and discretion is the limitation contained in said section, providing for a remonstrance by a majority of the qualified electors residing in the territory affected by such order, further says at page 304 of the opinion:

"Having reached this conclusion it follows that a remonstrance *signed by less than a majority of the qualified electors residing in the territory affected by the order creating the school district is not effective to defeat the action of the county board in the creation of such district.*"

Having in mind in the above case that a majority of the qualified electors, residing only in that portion of Eagle Township rural school district which was incorporated in the new district, filed a remonstrance against the creation of the new district, it is believed that the above ruling is clear authority for the proposition that the filing of a remonstrance signed by a majority of the electors residing in that part of a district which is incorporated by the county board of education under the provisions of section 4736 G. C., with another entire district in the creation of a new district, is not sufficient to defeat such action of the county board.

Further considering your second question, attention is directed to the case of *State ex rel Grace vs. Howard*, County Treasurer Lucas County, Ohio, 101 O. S., 532. The printed report of this case is very brief and does not give the facts. However, an examination of the files in the office of the clerk of the Supreme Court discloses that the same questions were first presented in the Court of Appeals of Lucas County in *State ex rel Grace vs. Cooper*, County Auditor of Lucas County, Ohio, No. 942, decided April 5, 1920. An examination of the opinion of Kinkead, Judge, in the latter case discloses that the relator sought a writ of mandamus to compel the county auditor of Lucas County to "transmit direct to the officers of the Sharples village school district No. 1, 48.687 per cent. of the money then in his possession ready for distribution, which should then have been distributed and which would be distributed in the future, and also money in the process of collection which would be distributed in the future to the Sharples village school district No. 1, which said money would otherwise go to the Sharples village school district. The petition sets up that a new school district has been formed by the county board of education in Spencer township, to be known as Sharples village school district No. 1. The proceedings of the county board of education, as set forth in the petition, appear to be regular in form and sufficient to establish the school district designed *had no remonstrance been filed with respect thereto.*

Paragraph 6 of the petition sets up the following facts:

"Your relator further shows that within thirty (30) days after November 21, 1919, or when the foregoing resolution was passed by the County Board of Education of Lucas County, Ohio, a majority of the qualified electors residing in the territory affected by such order, to wit: the territory

herein before described in the said resolution, did not file with the County Board of Education of Lucas County, Ohio, a remonstrance against the creation of Sharples Village School District number one (1) but that a petition remonstrating against the creation of Sharples Village School District number One (1) within thirty days from November 21, 1919, was however filed but this was signed by a majority of the qualified electors in the whole Sharples Village School District, including both the territory constituting Sharples Village School District Number One and the territory outside of Sharples Village School District Number One, that a very small minority of the electors residing in the territory embracing Sharples Village School District Number One signed this remonstrance."

Paragraph 7 of the petition sets forth the following facts:

"Your relator further shows that a certified copy of the foregoing resolution has been transmitted to this defendant, that this defendant knows of the existence of Sharples Village School District Number One, knows the territory constituting said district, knows the percentage of the funds going to the Sharples Village School District Number One, knows the names of the members of the Board of Education of Sharples Village School District Number One, and to whom such percentage of funds should go; that said defendant now has in his hands funds ready for distribution which should at this time be distributed; also other funds in the process of collection; for distribution to the different school districts of this county within a short time; that said auditor has been requested by this plaintiff and the other members of the Board of Education of Sharples Village School District Number One to turn over to them 48.687 per cent. of the money now in his hands otherwise going to the Sharples Village School District, and that said Auditor so refuses to do."

A general demurrer was filed to the petition setting forth the facts as above referred to and quoted. The demurrer was based upon the ground that the petition did not state facts sufficient to state a cause of action.

It will be noted by a reading of paragraph 6 of the petition that the relator undertook to state that no remonstrance was filed such as is called for in order to defeat the taking effect of the action of the county board, as provided in section 4736 of the General Code, 106 O. L., page 397, 298. The relator assuming that the only parties entitled to sign such remonstrance were the qualified electors residing in the newly constituted district.

It will be observed, however, by reference to paragraph 6 of the petition above quoted that it goes further than to allege that a majority of the qualified electors of the new district did not file a remonstrance and does allege affirmatively that a remonstrance was filed within the time limited by statute, which was signed by a majority of the qualified electors of the whole Sharples village school district, including both the territory constituting the Sharples village school district No. 1 and the territory outside the Sharples village school district No. 1, and further alleging that only a small minority of the qualified electors living within the newly constituted village school district did in fact sign the remonstrance. It was contended by counsel for the relator that the language of section 4736 of the General Code, which provides that:

"which said arrangement shall be carried into effect as proposed unless within thirty days after the filing of such notices with the board or boards of education, a majority of the qualified electors of the *territory affected* by such order of the county board, file a written remonstrance with the

county board against the arrangement of the school district as proposed,"

means only the territory embraced within the newly created school district.

Further on in the opinion of the Court of Appeals, section 4736 of the General Code, as amended in 108 O. L., page 707, is quoted, and then follows the following observation:

"We think this language of the last amendment of Section 4736 is very significant and shows very distinctly that the remonstrance contemplated relates as directly to the division of the funds as it does to the establishment of the district itself and this being true, we see no escape from the conclusion that a division of the funds necessarily affects the territory that, before the division, was possessed of the entire fund, that is to say, that the territory outside of the Sharples Village School District Number One, is quite as directly affected by the decision of the county board with respect to the division of the funds as is the territory lying within the boundary of the newly created district and that being true, it follows that the allegation of the petition in this case, that a majority of the qualified electors in the newly created district did not file a remonstrance, is not sufficient, and the further allegation found in paragraph 6 of the petition above quoted, that a majority of the qualified electors of the whole territory did, in fact, file a remonstrance, clearly disposes of the petition, and therefore the demurrer filed in this action will be sustained."

The above opinion in the Appellate Court of Lucas County was virtually affirmed by the Supreme Court in *State ex rel Grace vs. Howard*, and is clear authority in the case presented in the present inquiry for the proposition that where a county board of education, proceeding under the provision of section 4736 G. C., to create a new school district from a part of a centralized district, a remonstrance sufficient to defeat such action must be signed by a majority of the qualified electors residing in the entire centralized district as it was before the action of the county board attempting to create the new district.

Respectfully,  
C. C. CRABBE,  
*Attorney-General.*