

while the state treasurer as an individual, may insure himself against loss by reason of forged or raised state warrants, if he so desires, and pay the premium therefor out of his private funds, there is no statutory authority for the expenditure of public funds for such purpose.

Respectfully,
GILBERT BETTMAN,
Attorney General.

4210.

APPROVAL, NOTES OF SPRINGFIELD RURAL SCHOOL DISTRICT,
MAHONING COUNTY, OHIO—\$5,470.00.

COLUMBUS, OHIO, March 30, 1932.

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

4211.

BOARD OF EDUCATION—UNAUTHORIZED TO BORROW MONEY IN ANTICIPATION OF DIVIDENDS FROM LIQUIDATED BANK—FIFTEEN MILL LIMITATION—CONTRACTS WITH TEACHERS AND BUS DRIVERS DISCUSSED—DUTY OF BOARD TO KEEP SCHOOLS OPEN.

SYLLABUS:

1. *A board of education is without power to borrow money in anticipation of dividends to be paid by a bank in process of liquidation.*

2. *Under no circumstances may taxes be levied within a taxing district at a rate outside the limitations fixed thereon by Article XII, Section 2 of the Constitution of Ohio, unless authorization is had therefor by a vote of the people, in accordance with law.*

3. *When a teacher is employed for a definite term to teach a particular school, and the school is not lawfully suspended during that term and the teacher holds himself in readiness and offers to perform his part of the contract, the board of education which employed him is liable on said contract of employment according to its terms, and the teacher may at the expiration of the term recover on the contract according to its tenor in an action at law.*

4. *When a teacher is employed for a definite term to teach a particular school and the school is lawfully suspended, either temporarily or permanently during the term of such employment, the teacher's contract is accordingly suspended or terminated, as the case may be. Board of Education vs. Waits, 119 O. S., 310.*

5. *Where drivers are employed by a board of education for a definite term to drive the transportation equipment owned by said board, and the drivers hold themselves in readiness, and offer to perform their contracts according to their terms, the board of education employing the said drivers is liable on said contracts even though during a part of the term of said contracts the schools are suspended and there are no pupils to transport.*

6. *Where a board of education contracts for the transportation of pupils within the district for a school term of definite duration, the contractor is entitled to be paid for the full term of the contract according to its terms, providing he continues ready and willing at all times to perform his duties under the contract, even though by some act of the board of education or other contingency aside from an act of God or of the public enemy, the schools are closed and there are no pupils to transport.*

7. *It is the duty of a board of education to use every possible lawful effort to maintain the schools of its district for a period of not less than thirty-two weeks of each school year. If it fails to perform its duty in this respect, it becomes the duty of the county board of education, by virtue of Section 7610-1, General Code, to take over the schools and operate them in the same manner and to the same extent as it is the duty of the local board to do so.*

COLUMBUS, OHIO, March 31, 1932.

HON. F. H. BUCKINGHAM, *Prosecuting Attorney, Fremont, Ohio.*

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

"I have been asked to submit the following situation to you, with the request for a suggested method of solution. The Helena School District of our county, having its depository in the Helena Bank, finds itself facing a situation with the bank closed holding about \$3500.00 of their money. Prospects are reasonably good for the bank's meeting its obligations in due course of time. In the meantime, the board is without funds to pay its teachers, van drivers, and high school tuition to Gibsonburg School District.

First: May this board of education borrow money in anticipation of the bank's settlement?

Second: If this board could enter into an agreement with its creditors, so that a friendly judgment could be placed against the Helena Board, could this judgment be placed by the Auditor outside of limitation for the next tax collection?

Third: In a conflict of the law requiring a board of education to operate at least thirty-two weeks of school, the contracts already having been drawn for nine months of transportation and nine months of teachers' contracts and the limitation of the law making it impossible for a board of education to expend money not in process of collection, is this board of education required to close its schools at once without completing these contracts?

Fourth: If so, are these contracts null and void, or can the teachers and the van drivers sue for collection and obtain judgment for same?

Will you please quote each question above, and give specific answers to the same, and then give me any solution which you might suggest whereby the term of school could be completed?

This board of education has never voted an added levy and are not, therefore, eligible to participate in State Aid."

Your questions will be considered in the order asked.

First: The authority of public officers to borrow money for and on behalf

of the political subdivision which they represent, is purely statutory. The power does not exist unless extended by statute. It is fundamental that public administrative officers have such powers only as are expressly given by statute, together with such incidental powers which may be said to be included within express grants of power, as being necessary to carry out those express powers. *State ex rel. Locher vs. Menning*, 95 O. S., 97. This rule has been directly and forcefully applied to boards of education. *Schwing vs. McClure*, 120 O. S., 335, *State ex rel. Clarke vs. Cook*, 103 O. S., 465.

The only power extended to a board of education to borrow money is the power to issue bonds, as provided by Sections 2293-1, et seq., of the General Code of Ohio, and to borrow money and issue notes in anticipation of the collection of current revenues. Section 2293-4, General Code. The power to borrow money in anticipation of dividends that may be paid by a bank in process of liquidation is not extended to boards of education by statute, and therefore does not exist.

Second: The limitation on the rate that may be levied for purposes of general taxation is that fixed by Article XII, Section 2, of the Constitution of Ohio, which provides in part, as follows:

"No property, taxed according to value, shall be so taxed in excess of one and one-half per cent of its true value in money for all state and local purposes, but laws may be passed authorizing additional taxes to be levied outside of such limitation, either when approved by at least a majority of the electors of the taxing district voting on such proposition, or when provided for by the charter of the municipal corporation."

A similar limitation is embodied in Section 5625-2, of the General Code.

Since the adoption of the above constitutional provision, which became effective January 1, 1931, laws have been passed authorizing tax levies outside of the limitation fixed therein, when authorized by vote of the electors of the subdivision proposing to make such levies. A board of education is limited in the making of tax levies, regardless of the purpose for which those levies were made, by the limitation fixed in the constitutional provision quoted above, unless levies are authorized by vote of the people as provided by law. The fact that an obligation has been reduced to judgment makes no difference.

Third: In the consideration of your third inquiry, a number of questions arise. It is provided by Section 5625-33, General Code, that no subdivision or taxing unit shall make any contract involving the expenditure of money unless there is attached thereto a certificate of the fiscal officer of the subdivision to the effect that the amount required to meet the same (or in the case of a continuing contract to be performed in whole or in part, in an ensuing fiscal year, the amount to meet the same in the fiscal year in which the contract is made) has been lawfully appropriated for such purposes, and is in the treasury or in process of collection to the credit of an appropriate fund, free from any previous encumbrances. Said section also provides:

"The term 'contract' as used in this section shall be construed as exclusive of current payrolls of regular employes and officers."

By reason of the latter provision of the statute quoted above, it has been held by this office in an opinion of a former Attorney General, reported in Opinions of the Attorney General for 1927, at page 2256 that:

"The statutory requirement that no contract shall be entered into by any subdivision until the fiscal officer has certified that the money for the payment thereof is in the treasury or in process of collection, has no application to the contract of employment between boards of education and the teachers of the district."

The same rule will apply to contracts with bus drivers, where the board owns its own transportation equipment and hires drivers.

Where the board contracts for transportation extending beyond the fiscal year, a certificate must be attached thereto that the necessary funds to meet the obligation of the contract during the fiscal year the contract is made, must be attached thereto, as provided by the statute.

Assuming that proper contracts have been made with teachers and for transportation of pupils, a question arises as to the extent of the liability of a board of education when the board becomes unable, because of a lack of funds, to meet the terms of these contracts. Is it necessary or proper to formally close the schools and thereby shorten the term of school which the contracts were meant to cover, and if the schools are closed, can the teachers hold the board for their salaries for the full term for which they had been hired to teach, and may persons with whom contracts to transport pupils had been made hold the board in accordance with the terms of those contracts?

Generally speaking, the contract of a school board with a teacher must be performed by both parties, according to its tenor, in the absence of a statute providing otherwise. This is in accordance with the doctrine that a contract for personal services for a stated time at a fixed compensation for the entire time, whether to be paid in installments or not, is an entire contract and that it is a contract to do acts which in the ordinary course of events may be done. It follows that nothing but an act of God or of the public enemy or the interdiction of the law as a direct and sole cause of the failure, or a provision of the contract will excuse performance. Ruling Case Law, Volume 24, page 619; Corpus Juris, Volume 56, page 659; Opinions of the Attorney General for 1919, pages 338 and 1134; Opinion 3088 rendered under date of March 24, 1931. Nor will a shortage of funds to meet the terms of a teacher's contract ordinarily justify the dismissal of the teacher in the absence of statute or a provision of the contract covering the matter, if he holds himself in readiness to perform the terms of the contract unless the circumstances are such that the contract may be said to be ultra vires by reason of having been entered into with the knowledge beforehand that funds would not be available to carry it out. Corpus Juris, Volume 56, page 403; *Harmony School Township vs. Moore*, 80 Indiana, page 276; *Rudy vs. Poplar Bluff School District*, 30 Mo. App., page 113.

The general rule referred to above, is tersely stated in Ruling Case Law, Volume 24, page 619, supra, as follows:

"If a school board makes a contract with a teacher for a fixed time, it must pay him even though he has no teaching to do."

In support of the text there are cited, among others, the following cases: *Smith vs. School District*, 89 Kans., 225, 131 Pac., 556; *Noble vs. Williams*, 150 Ky., 439, 42 L. R. A., (N. S.), 1177; *McKay vs. Barnett*, 21 Utah, 239, 50 L. R. A., (N. S.), 371 and note; *Denny vs. Alpena School District*, 43 Mich., 480, 38 Am. Rep., 206 and note; *Cline vs. School District*, 166 Wis., 452. See also 6 A. L. R., 745 note and 17 A. L. R., 1224 note.

The general rule stated above is modified to some extent in this state by statute. The controlling provisions applying to this subject are found in Section 7730, General Code, which reads as follows:

"The board of education of any rural or village school district may suspend by resolution temporarily or permanently any school in such district because of disadvantageous location or any other cause and teachers' contracts shall thereby be terminated after such suspension."

In the case of *Board of Education vs. Waits*, 119 O. S., 310, it is held that the statutory provision quoted above applies when a school has been suspended by reason of the building in which the school was conducted having been condemned and its use prohibited by the State Department of Industrial Relations. The syllabus of the case reads as follows:

"Section 7730, General Code, provides that a teacher's contract of employment shall be terminated when a board of education suspends a school 'because of disadvantageous location or any other cause.' The quoted clause is unambiguous. 'Other' causes for suspension are not confined to disadvantageous location or the like; inability to comply with an order of the State Department of Industrial Relations may be a valid cause for suspension."

In the course of the opinion, after quoting that part of Section 7730, General Code, quoted above, it is said:

"Counsel for the defendant in error insist that said section, properly interpreted, should be construed to mean that the grant of power to suspend the school exists only because of disadvantageous location or other *like* or *similar* cause; and that, since the statute has enumerated disadvantageous location as a cause for suspension, the rule of *ejusdem generis* should be invoked, and, if invoked, the term 'or any other cause' should include only things or causes of the same general nature as that specifically enumerated. * *

When we consider the various circumstances, other than that of disadvantageous location, which might necessitate the suspension of our public schools, it is impossible to so construe this statute as empowering suspension for reasons of location only. To do so would be giving the term 'or any other cause' too narrow a meaning—one obviously not contemplated by the statute. The language is clear and unambiguous. When a board of education acting in good faith, suspends a school for any valid cause under the specific terms of this statute, the 'teachers' contracts shall thereby be terminated after such suspension."

In the light of the language indulged in by Judge Jones, who wrote the opinion of the court in the above cited case, where he says that "when the board of education, acting in good faith, suspends a school *for any valid cause*' the teachers' contracts are terminated, we must conclude that when a school is suspended either temporarily or permanently, in good faith, by reason of a lack of funds to carry on the school, the teachers' contracts are likewise suspended or terminated unless by reason of other statutes such suspension is unauthorized.

It should be noted in this connection that the terms of this statute do not apply when a school is closed owing to an epidemic or other public calamity, by reason of the terms of another positive statute, Section 7690-1, General Code, which specifically provides that under those circumstances "teachers must be paid for all time lost."

If a school is not closed or suspended, and the buildings are kept in such condition that the teachers may continue to conduct school therein and do so conduct school, even though there is no money to pay them, and they are not paid, there is no doubt in my mind but that they may later recover for those services in an action at law. Even if they merely offer to perform their part of their contracts and hold themselves in readiness to perform them and the board does not keep the building in suitable condition, that is, keep it heated and in a sanitary condition so school sessions may be held therein they may later, in my opinion, recover on their contracts as though they had been permitted to carry them out in accordance with their terms.

The question arises whether or not the lack of funds to carry on a school justifies the board under all circumstances, to close it or formally suspend it in spite of the fact that Section 7730, General Code, provides, as noted above, that schools may be suspended for disadvantageous location or any other cause.

The law does not require a board of education to maintain a high school. It simply provides that the tuition of pupils who are eligible for admission to high school, and who reside in districts in which no high school is maintained, shall be paid by the board of education of the district in which they have a legal school residence. Sections 7747 and 7748, General Code.

With respect to elementary schools, however, the law imposes a mandatory duty on boards of education to maintain such school and to maintain them for at least thirty-two weeks in each school year. The controlling statute with reference to this subject is Section 7744, General Code, which reads as follows:

"Each board of education shall establish a sufficient number of elementary schools to provide for the free education of the youth of school age within the district under its control, at such places as will be most convenient for the attendance of the largest number thereof. Every elementary day school so established shall continue not less than thirty-two nor more than forty weeks in each school year. All the elementary schools within the same school district shall be so continued."

The language of the above statute is clear, definite and mandatory in terms. By force of this statute, the legislature has fixed the term of school within certain limits and the duty of the board of education is simply to provide the details of administration so that the will of the legislature will be carried out. Provision must be made by a board of education for the schooling of all the elementary pupils within a district at some school in the district, unless provision is made for their admission into the schools of some other district, which may be done by authority of Section 7734, General Code.

In that case, of course, other provisions of law with reference to transportation would necessarily have to be complied with. In many cases this would be more burdensome than maintaining schools within the district.

All the elementary schools of a district are on the same basis, so far as funds to run them are concerned, that is to say, if there are no funds in the district treasury that may be used for school operation purposes, one school is as bad off as another. If there are some funds available, but not enough to main-

tain all the elementary schools of a district, some schools might be suspended, for purposes of economy, by authority of said Section 7730, General Code, and the pupils assigned to other schools. In that way the available funds might be sufficient to operate the remaining schools. Contracts with teachers in the particular schools suspended would, in my opinion, be terminated or suspended. But where there are no funds to operate any of the elementary schools of the district the board of education is not, in my opinion, empowered to suspend them so that they will not, theoretically, at least, be in existence for a period of thirty-two weeks within the school year.

The law clearly contemplates the keeping open for thirty-two weeks of each school year, of enough elementary schools, at convenient locations in each school district, to provide for the free education of all the youth of school age in the district and a board of education does not have the power to suspend schools so that a sufficient number of such schools as the law contemplates will not be in existence unless that schooling is provided for otherwise. I do not wish to be understood as saying that no elementary school may be suspended because of a lack of funds, or how many in any case may be suspended. Circumstances in each district must be taken into consideration. If any such schools are suspended a sufficient number of others at convenient locations must be left unsuspended for a period of at least thirty-two weeks of the school year to provide for the schooling of all the pupils in the district, or provision must be made for their admission into other schools as provided by Section 7734, General Code.

So far as high schools are concerned, there is nothing in the law limiting the right of a school board to suspend those schools, as provided by Section 7730, *supra*. However, if teachers have been employed for high schools and those teachers are willing to continue to teach until the end of the term for which they are so employed, and it is possible for the school board to maintain the school building in suitable condition, that is, to keep it heated and furnish janitor service it is not advisable to suspend these schools and deprive the pupils of the opportunity to go to school. Of course a school board can not do the impossible, and if it is impossible to provide fuel or janitor service there is probably nothing to do under some circumstances but close the school or have it operated by the county board of education in accordance with Section 7610-1, General Code. Contracts for fuel are subject to the provisions of Section 5625-33, General Code, and such contracts can not lawfully be entered into unless the proper certificate as provided by the statute, is attached thereto. Every effort should be made by a board of education to keep the schools open if it is at all possible.

From the foregoing discussion, it will readily be seen that it is almost impossible to lay down general rules that will fit all cases as to the liability of a board of education on a teacher's contract when, during a term of school, the board finds itself without funds.

About all that can be said with reference to the matter is that when a teacher is employed for a definite term to teach a particular school and the school is not lawfully suspended during the term, and the teacher holds himself in readiness and offers to perform his part of the contract, the board is liable thereon according to the terms of the contract and at the expiration of the term the teacher may recover on the contract according to its tenor, in an action at law. When the school is lawfully suspended, either temporarily or permanently, it is my opinion, based on the decision of the Supreme Court in the case of *Board of Education vs. Waits*, *supra*, that such suspension operates as a suspension or termination of the teacher's contract, as the case may be.

The same rule does not apply to contracts for transportation or with van

drivers. The rule with respect to teachers is based entirely on the statute which abrogates the common law with reference to such teachers' contracts. It will be observed that the statute refers only to the termination of teachers' contracts upon the suspension of a school. It does not mention other contracts of the board. These contracts are therefore subject to common law principles.

If a school board owns its own transportation equipment and contracts with drivers for a definite term, and the drivers hold themselves in readiness to perform their contracts during the entire period covered by the contracts, but are prevented from doing so by action of the board of education, they may recover thereon as for breach of contract.

When a board of education does not own its own transportation equipment and contracts for the transportation of pupils within the district, and the contractor offers to perform his contract according to its terms, he may recover thereon, in my opinion, even though the schools should be closed during a part of the term and there are no pupils to transport. In the case of *Montgomery vs. Board of Education of Liberty Township*, 102 O. S., 189, it is held as stated in the syllabus:

"One who entered into a contract, entire in its nature, with a board of education, providing that he should convey pupils to and from school during a school year, of eight and one-half months, at a stipulated compensation payable monthly, is entitled to such compensation during a period of suspension of the schools by the board of education, though it be upon the direction of the board of health as a precautionary health measure, there being no provision in the contract relative to such contingency and it appearing that the suspension was temporary and the person so employed was required to and did continue ready and willing at all times to perform his duties under the contract, which he in fact did upon the resumption of school after such period of suspension.

In that case the interruption in the transportation contract was temporary. I am of the opinion the same principle would apply if the suspension of the school had continued for the remainder of the school year.

Fourth: The decision under the third branch of your inquiry renders it unnecessary to comment further under this head.

That it is the intent of the law that every possible effort must be made to maintain the public schools for a period of at least thirty-two weeks of each school year is further manifested by the provisions of Section 7610-1, General Code, to the effect that when a board of education fails in its duty in any respect the county board of education shall perform those duties in the same manner and to the same extent as the local board should have performed them. The Supreme Court, in referring to this matter in the case of *State ex rel. vs. Beamer*, 109 O. S., 133, at page 139, said:

"Under Section 7610-1, General Code, the duty of the county board of education is measured by the duty of the board of education in the district."

In the particular district about which you inquire there should be no great difficulty in maintaining the schools. Inasmuch as the district will eventually share in the liquidation of the bank in question, probably in the full amount of its deposits, the district will eventually be able to meet its obligations. If the

teachers and other employes can not be induced to continue the term and wait for their pay, the schools should be taken over by the county board of education and operated as directed by Section 7610-1, General Code.

Respectfully,

GILBERT BETTMAN,

Attorney General.

4212.

APPROVAL, BONDS OF UHRICHSVILLE CITY SCHOOL DISTRICT,
TUSCARAWAS COUNTY, OHIO—\$15,000.00.

COLUMBUS, OHIO, March 31, 1932.

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

4213.

APPROVAL, BONDS OF VILLAGE OF DENNISON, TUSCARAWAS
COUNTY, OHIO—\$1,000.00.

COLUMBUS, OHIO, March 31, 1932.

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

4214.

OMITTED TAXES—COUNTY AUDITOR LIMITED TO ASSESSING FOR
LAST FIVE YEARS—WHERE OWNERSHIP OF PROPERTY HAS
CHANGED DURING THAT PERIOD, LIMITED TO TAXES DURING
LAST OWNERSHIP.

SYLLABUS:

Where, in pursuance of former sections 7232, et seq., General Code, the county commissioners have ordered the county auditor to levy upon the grand duplicate an extra tax for a certain number of years for the purpose of constructing and improving a free turnpike road upon lands within the bounds of said road and upon the personal property listed and to be listed from year to year within said bounds, and where such auditor has omitted from such levy certain tracts of land within said district, he is limited in charging the omitted taxes against said properties to the tax chargeable for not more than the five next preceding years unless such properties have changed ownership within said