3048.

TUITION—INTEREST ON CLAIMS FOR TUITION—SHOULD NOT BE PAID.

SYLLABUS:

In the absence of any controlling court decision on the subject, and in view of the fact that administrative officers generally have, in the past, not been claiming or paying interest on claims for tuition due from one school district to another, such practice should be continued.

COLUMBUS, OHIO, December 21, 1928.

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

GENTEMEN:—This will acknowledge receipt of your inquiry which reads as follows:

> "You are respectfully requested to furnish this department your written opinion upon the following:
>
> Section 8305 G. C., provides that when money becomes due and payable upon certain instruments of account, the creditor shall be entitled to interest at the rate of 6% per annum.
>
> Question 1. Do the provisions of this section apply to the amount due from one board of education to another board on account of tuition for high school pupils?
>
> Question 2. If the first question is answered in the affirmative, then may the creditor board of education legally release the debtor board from the payment of such interest?"

By the terms of Sections 7735, 7747 and 7748, General Code, boards of education are required under certain circumstances to pay the tuition of resident elementary and high school pupils who attend school in other districts. Section 7750, General Code, authorizes the board of education not having a high school to enter into agreements with one or more boards of education maintaining such schools for the schooling of all its high school pupils.

These statutes do not, in terms, fix the time when such tuition is due and payable. There is no particular form or method of presenting claims against a board of education, nor any provisions requiring that claims be audited by a particular officer or in any specific way before they become due and payable. In the absence of such provisions or any statutory provisions fixing the time when liability for tuition attaches, the fair and reasonable conclusion with reference thereto in my opinion would be that such tuition is due and payable when the service is complete, at the end of any school term or when the pupil ceases longer to be a pupil for whom tuition is payable, and as soon thereafter as the board holds a regular meeting when bills may be paid.

Your inquiry goes to the question of whether or not, when liability for tuition is once fixed and not forthwith paid, the creditor board of education is entitled to interest on the claim until it is paid.

Interest is defined in Corpus Juris, Volume 33, page 178, as the compensation allowed by law or fixed by the parties for the use or forbearance of money or as damages for its detention.

The law allows interest only on the ground of contract, either express or implied, for its payment, or as damages for the detention of the money, or for the breach of some contract or the violation of some duty, or when it is provided by statute.

It is very generally stated that interest is of purely statutory origin and not the creature of the common law: and that interest should be refused except in such cases as come within the terms of the statute unless it has been contracted for either expressly or impliedly, and it has been said that to determine whether interest is to be allowed in a particular case is a mere matter of statutory interpretation.

The statute in force in Ohio which fixes the right to interest in all cases other than when the same is provided for by stipulation between the parties to a bond, bill, promissory note or other instrument in writing for the forbearance or payment of money at a future time, or upon judgments, decrees or orders rendered on a bill, bond, note or other instrument in writing containing stipulations between the parties thereto with reference to interest, is Section 8305, General Code, which reads as follows:

> "In cases other than those provided for in the next two preceding sections, when money becomes due and payable upon any bond, bill, note, or other instrument of writing, upon any book account, or settlement between parties, upon all verbal contracts entered into, and upon all judgments, decrees, and orders of any judicial tribunal for the payment of money arising out of a contract, or other transaction, the creditor shall be entitled to interest at the rate of six per cent per annum, and no more."

It is a well settled rule of statutory construction that the State is not bound by the provisions of any statute, however general in terms, by which its sovereignty would be derogated from or any of its prerogatives, rights, titles or interest would be lessened, save when the act is specifically made to extend to the State or when the legislative intention in that regard is too plain to be mistaken. This rule however has not been generally extended to counties, school districts and municipal corporations. Clearly, Section 8305, supra, would not be construed so as to charge the State with interest in the absence of contract or specific legislation, but that fact alone would not in my opinion necessarily preclude its being extended to a school district.

In R. C. L., Volume 15, page 17, it is said:

> "It is well settled, both on principle and authority, that a state cannot be held to the payment of interest on its debts unless bound by the act of the Legislature or by a lawful contract of its executive officers made within the scope of their duly constituted authority. * * * The theory upon which this rule is based is that whenever interest is allowed either by statute or by common law except in cases where there has been a contract to pay interest it is allowed for delay or default of the debtor. But delay or default cannot be attributed to the government. * * * A county is generally regarded as but an agency of the State, and not liable for interest in the absence of an express agreement to pay it."

If the doctrine of the text above quoted is to be taken as controlling, it may well be made to apply to school districts as well as counties, as concededly a school district is as much an agent of the State as is a county, and the same is true of municipal corporations.

In McQuillan on Municipal Corporations, Second Edition, Section 2635, it is said:

"In the absence of legal provision therefor, the general rule is that a municipal corporation is not chargeable with interest on claims against it without express agreement therefor, the only exception being where money is wrongfully obtained and illegally withheld by it. It must be regarded as well settled that a claim against a municipality although liquidated and due at a definite date, does not draw interest until demand has been made for its payment, unless it is otherwise agreed."

In Corpus Juris, Volume 15, page 662, it is said:

"In the absence of statutory provisions therefor claims against a county do not bear interest nor is the creditor entitled to other compensation by way of penalty or damages for delay in payment."

In Corpus Juris, Volume 44, page 1451, it is said:

"Liability of a municipal corporation for interest on its debts does not ordinarily differ from that of an individual, although in some jurisdictions no interest is recoverable, in the absence of express agreement therefor, except in case of money wrongfully obtained and illegally retained by it. Of course interest is recoverable where expressly provided for by statute, and the terms of a general interest statute have been held broad enough to embrace cities. Generally, however, interest accrues only from the date of demand or presentation of the claim—not from the date of maturity of the claim—and this rule applies to the advantage and protection of the board of education of New York City, but interest is allowed from that date. * * * In some jurisdictions interest is recoverable only after money is in the treasury and the municipality refuses to pay. * * * "

Dillon, in his work on Municipal Corporations, Volume 2, page 867, supports the doctrine that a municipality is liable for the payment of interest on its obligations in the same manner and to the same extent as are individuals and cites many cases, although he states that the rule is different in many jurisdictions. In New England it seems that claims against towns are governed as to the allowance of interest by the same general rules that prevail in the settlement of accounts against individuals. *Langdon* vs. *Castleton,* 30 Vt. 285.

An examination of the cases cited in support of the texts from which the above quotations are taken, discloses a wide diversity of opinion among courts. No Ohio cases, however, are cited, and I know of no reported decisions in Ohio wherein the question of the liability of either counties or school districts has been considered.

In the case of the *Toledo Consolidated Electric Company* vs. *Toledo,* 13 O. D., 137, decided by the Common Pleas Court of Lucas County in 1902, it is held:

"When a lighting company enters into a contract with a city to furnish electric lights, and the city agrees to pay for the same at stated times, the contract price for the lights so furnished draws interest from the time when by the contract it is due and payable, although there is no express agreement on the part of the city to pay interest after default."

In the course of the opinion, the court said:

"In Illinois it has been the uniform ruling that a municipal corporation is not chargeable with interest on claims against it, in the absence of an express agreement therefor, the only exception being when money is wrongfully obtained and illegally withheld by it. * * *

But by the great weight of authority the liability of a city for interest on its debts does not differ from that of individuals. * * *

I am not aware of any reported case in Ohio in which the subject of interest on contractual claims against a municipal corporation, where there is no agreement to pay interest, has been considered.

In *Cincinnati* vs. *Whetstone,* 47 Ohio St. 196 * * * the city was held liable for interest on the compensation awarded for injury to property caused by changing the grade of a street, from the time of the change of grade. In *Toledo* vs. *Scott,* * * * (23 Bull. 236), the city was held liable for interest on awards of damages made in Probate Court for a change of grade. There are several decisions of the lower courts in similar cases to the same effect. In the absence of any controlling decision to the contrary, I am of the opinion that claims against a municipal corporation draw interest from the time when, by the contract, they are due and payable.

Applying the rule to this case which is applicable in the case of individuals, the various items of electric lighting furnished by the plaintiffs draw interest from the dates when, by the ordinance, they were payable."

A case of interest along this line is that of *Warren Brothers Company* vs. *City of Cincinnati,* which arose from the failure of the city to make a final estimate of completed work, or to take the necessary steps leading up to settlement of the claims of the contractors within a reasonable time. This case is first reported in 7 O. L. R. 542, where the court holds:

"The failure of the city to do its duty by either accepting or rejecting the work alone makes it amenable to the cause of action set out in the petition and if liable damages as interest on the money thus wrongfully withheld is a proper remedy."

The above case was carried to the Court of Appeals, which court reversed the judgment of the lower court. It was then carried to the Supreme Court and reported in 92 O. S. 514, where the judgment of the Court of Appeals was reversed and the judgment of the Court of Common Pleas affirmed.

The Ohio cases above noted have reference only to municipal corporations. I am not aware of any reported cases in Ohio in which the subject of interest on contractual claims against a county or school district, where there is no agreement to pay interest, has been considered. I am advised, however, that the universal custom with boards of education in Ohio is not to demand or to pay interest on claims for tuition due from one school district to another. It seems to have been almost universally considered by administrative officers that claims of this kind do not bear interest, and thus the interpretation, by administrative officials, of Section 8305, General Code, is that it does not include within its terms a board of education.

In this connection it is significant to note two cases recently decided by the Supreme Court of Ohio, *State ex rel. King, Prosecuting Attorney,* vs. *Sherman, County Auditor,* 104 O. S. 317, and *State ex rel. King, Prosecuting Attorney,* vs. *Eveland, Auditor,* 117 O. S. 59. Both of these cases were original actions in mandamus in the Supreme Court, instituted by the Prosecuting Attorney of Franklin County, against county auditors, seeking to compel those auditors to issue vouchers for the payment of school tuition charges due to a school district in Franklin County.

The first of these cases was against the County Auditor of Union County alleging that the Methodist Children's Home Association of Worthington, Ohio, had among its inmates, children of school age who before becoming inmates of the home, had a legal residence in Union County. One of these children attended school in the Worthington School District during the school years beginning September 1, 1917, and September 1, 1918, and four of these children attended the same school during the school year beginning September 1, 1919. It was claimed that Union County was responsible to the Worthington Board of Education for the tuition of these pupils and the suit was brought to require the said auditor to issue his warrant on the Treasurer of Union County for the amount of tuition due to Worthington School District. The suit was instituted in the Spring of 1922. No claim was made in the petition for any interest on the tuition charges which would have been due at the end of the school years beginning September 1, 1917, September 1, 1918, and September 1, 1919. The prayer of the petition in this case asked that a writ of mandamus be issued ordering the auditor to draw his warrant for the amount of said tuition and for other relief, and the costs of suit. No interest was asked for and none allowed.

The second suit referred to above was a similar action against the Auditor of Clermont County seeking to have the Auditor draw his warrant in favor of the Board of Education of the Worthington Village School District for tuition charges for certain children who were inmates of the Methodist Children's Home Association of Worthington, Ohio, formerly residents of Clermont County, and who had attended school in Worthington during the school years commencing September 1, 1921, 1922, 1923, 1924 and 1925. The suit was instituted in June, 1927, the prayer of the petition being the same as that in the former case. Here again no interest was asked for and none was allowed, although under the pleadings the court would have had jurisdiction to allow interest on the past due claims if it had seen fit to do so, and had determined that such interest was lawful.

In the absence of any controlling authority on the subject, and in view of the fact that administrative officers in Ohio have in the past almost universally not claimed or paid interest on claims for tuition due from one school district to another, you are advised that this practice should be continued, and your Bureau should act accordingly.

Respectfully,
EDWARD C. TURNER,
Attorney General.

3049.

VILLAGE COUNCIL—AUTHORIZED TO PURCHASE FIRE DEPARTMENT APPARATUS—LEASING AND RENTING APPARATUS LIMITED TO TEMPORARY USE.

SYLLABUS:

A village council is without authority to rent or lease apparatus for its fire department for other than temporary use. The authority granted to village authorities to acquire implements and apparatus for the use of its fire department extends only to purchasing the same.