SCHOOL LAW DECISIONS

OF

Commissioner of Education

AND

State Board of Education

1928

PREPARED BY THE
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SCHOOL LAW DECISIONS

DISMISSAL OF SUPERVISOR OF BUILDINGS

GUSTAV S. SCHWARZROCK,
Appellant,

vs.

THE BOARD OF EDUCATION OF THE CITY OF BAYONNE,
Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The Appellant, Gustav S. Schwarzrock, was appointed by the Board of Education of the City of Bayonne on May 1, 1913, as supervisor of buildings and repairs for a term of three years from July 1, 1913. While acting in such capacity, namely, on July 23, 1914, charges were preferred against the Appellant to the effect that he solicited a gift of $25 from one Nathan Baress, a junk dealer, in return for which the Appellant was to permit Nathan Baress to take away a certain amount of junk belonging to the Board of Education and under the charge of the Appellant.

Under these charges the Board of Education tried Mr. Schwarzrock and found him guilty as charged. He was dismissed from the service of the Board on November 19, 1914. From this action of the Board appeal was taken and a hearing was held by the late Assistant Commissioner of Education, J. B. Betts. Testimony was taken, but before decision was reached Mr. Betts died. Typewritten testimony was submitted to the present Assistant Commissioner of Education for consideration. Oral argument was had and written memorandums were filed bearing on the case.

An examination of the testimony shows that all the evidence given in the case bore on the question of whether or not a bribe had been solicited by Mr. Schwarzrock. This was the fundamental question to be decided in the case. The dismissal of Mr. Schwarzrock by the Board of Education was made on the charge that he did solicit of said Nathan Baress a bribe. Counsel for the Appellant in the memorandum filed with the Commissioner makes this statement: "We (the Appellant) maintain that in a case like the present where criminal charges are made against a man and not mere incapacity the charges are of such a serious nature that it is necessary to prove the charges beyond a reasonable doubt in order to sustain dismissal."

Holding that the charges were of a criminal nature, the Commissioner decided that this was not a controversy arising under the School Law and therefore dismissed the appeal. The Appellant took the case to the State Board of Education on further appeal. This body decided that inasmuch as

a contract existed between Mr. Schwarzrock and the Bayonne Board of Education it was a proper matter for adjudication by the Commissioner and remanded the case back to him for further consideration and the taking of new testimony. Counsel in the case were notified that the matter would be taken up and a re-hearing given if desired. Counsel thereupon, by agreement, submitted a stipulation which set forth that Nathan Baress, the main witness in the case, had been indicted for perjury and had pleaded non vult. This was the only new testimony in the case.

At the hearing before Commissioner Betts, Nathan Baress testified that Mr. Schwarzrock came to see him while he, Baress, was loading scrap iron at the railroad station. The following is Nathan Baress' testimony on this point:

"Schwarzrock says to me, he says: 'Can't you spare me $25?' I says, 'What for the $25?' Well, he says, 'Oh, I will straighten it up with you if you will take that stuff away.' I believe I said, 'I haven't got the money, but I will see you a little later.' Then he went away. I told him at 21st street; there are some saloons up there. *Q.* Did you meet him at Greenburg's place? *A.* I did meet him in a saloon. *Q.* And what conversation did you have with him then? *A.* I think we had a drink together, and he started to ask me again for $25, and I told him I wouldn't bother giving any money. *Q.* You told him you didn't think you would pay $25? *A.* I wouldn't bother with that matter at all, the $25. *Q.* How much stuff was there there? *A.* My estimate was $100."

William Baress, son of Nathan Baress, who was at the railroad station at the time, testified that he saw Mr. Schwarzrock talking to his father and overheard the conversation as testified to by Mr. Baress.

Mr. Schwarzrock, in his testimony, denies the charge of soliciting a bribe made by Mr. Baress. He denies being at the railroad station on the day that it is alleged the conversation took place. In his denial he is supported by his son.

It thus appears that we have to pass on the question of the veracity of the two main witnesses, Mr. Baress on the one hand and Mr. Schwarzrock on the other. Several reputable witnesses were called to testify as to the character of Mr. Schwarzrock. All gave testimony to the good character and standing in the community of Mr. Schwarzrock. On the other hand, the Court records in the case of Mr. Baress show that he was indicted for perjury and pleaded non vult. The good character of Mr. Schwarzrock on the one side and the bad character of Mr. Baress on the other side should be considered in reaching a conclusion in the case. The word of one man is as good as the word of another, provided the one man's general reputation for veracity is as good as that of the other. Then, too, the character of the testimony should be taken into consideration. Mr. Baress does not charge directly that a bribe was solicited or a bargain was made or even that a bargain was proposed that for a certain sum, namely $25, there would be delivered to him scrap iron worth $100.

Reading the testimony closely, even if it be taken to be true, there is nothing more indicated in the testimony itself than the fact that Mr. Schwarzrock

wanted to borrow $25 from Mr. Baress. "He would make it right when he came for the scrap iron" might be construed to mean that he would settle with him when he came for the scrap iron. So there is an absence of a direct charge that a bribe was solicited. That would have to be read into the testimony. There is no claim that the alleged bribe was ever consummated. Certain it is there is no evidence that any property of the Board of Education was corruptly bargained away by Mr. Schwarzrock. Assuming that the testimony of Mr. Baress is true, we have to further assume that in the corrupt bargain which was proposed Mr. Baress' character was so far above that of Mr. Schwarzrock that he repelled the corrupt proposal. This the general testimony in the case will not bear out.

I therefore must conclude that the charges were not proven to the satisfaction of any unprejudiced mind. Inasmuch as the dismissal of Mr. Schwarzrock was based upon the charge of soliciting a bribe, inasmuch as the bargain was never consummated, and inasmuch as the testimony supporting the charge is of such a doubtful character, I am clearly of the opinion that Mr. Schwarzrock's dismissal as supervisor of buildings and repairs was without cause.

The appeal is sustained.

July 13, 1916.

Decision of the State Board of Education

In this case the Appellant, Schwarzrock, while in the service of the Respondent, was accused of soliciting a bribe from a junk dealer. He was duly tried by the Respondent, found guilty, and dismissed from the service of the Respondent.

The injection of an alleged crime into the case has confused the issue. The Board of Education, the Commissioner of Education, and the State Board of Education have no jurisdiction in criminal matters. There was a contract for three years' service between Schwarzrock and the Board of Education of Bayonne, and the only pertinence of the alleged crime in the case was the furnishing of a possible excuse to the Respondent for dismissing the Appellant and thus terminating the contract. The sole question seems to be: *Is* the evidence of bribery offered sufficient to warrant the Respondent in dismissing the Appellant from service and thus terminating the contract? We do not think it is.

The decision of the Commissioner is affirmed.

October 7, 1916.

Decision of the Supreme Court

The certiorari at the suit of the Board of Education brings up the decision of the State Board affirming the Commissioner of Education and reversing the action of the local Board removing Schwarzrock from the position of supervisor of buildings and repairs.

1. I agree with the State Board that the controversy was one of which the Commissioner of Education and the State Board had jurisdiction under Section 10 of the School Law. That the controversy was whether the local Board

had rightfully removed Schwarzrock from a position existing under the School Law. The proceeding could only result in either affirming or reversing the removal. It could not result in any binding judgment as to his guilt or innocence of the charge of attempting bribery; the finding that he was guilty or innocent could only be a finding for the purpose of action by the Board, not for the purpose of the Criminal Law. Whether in such a case the Board should act before action is taken by the criminal courts is a matter resting in the discretion of the Board.

2. It necessarily results from the provision that the facts involved in any controversy or dispute shall be made known to the Commissioner by written statements verified by oath and accompanied by certified copies of documents, that the hearing before him should be a new hearing, and that he is not limited to a mere review of evidence taken before the local Board. An examination of the evidence in this case makes it clear that the Commissioner and the State Board reached a correct result. It would be intolerable to permit a public official of good repute to be dismissed from office on the testimony of one who had been convicted of perjury, in the face of the officer's denial.

3. The action of the State Board setting aside the removal of Schwarzrock has the effect of a judgment and a mandamus will issue in a proper case. Thompson *vs.* Board of Education, 57 N. J. L. 628. The alternative writ in the present case avers that Schwarzrock was appointed supervisor for three years at a salary of $1,800; that after his wrongful dismissal he was always ready and willing to perform his duties until July 1, 1916 (the expiration of his term), and that the local board refused to allow him to do so; that they refused to pay him the sum due as salary $3,000; that there are funds in the hands of the Commissioner of Finance and the Custodian of the School Funds applicable to the payment of said sum of $3,000. These averments are admitted by the demurrer. Perhaps the Defendant meant to challenge the averments by the reasons, but it is a mistake to say, as in reasons three and four, that the writ does not show that the amount claimed is in possession of Respondents, and that it does not show that the Respondents are in possession of moneys applicable to the payment required by the writ. The writ does show these facts. If the defendants meant to traverse the averments they should not have demurred. I cannot distinguish the present case from Thompson *vs.* Board of Education, supra. The writ should go. While it prays relief in the alternative, that was proper in view of the relator's uncertainty whether there were funds in hand to meet his claim. In view of the admission of that fact, I see no reason why the peremptory mandamus should not command the drawing of a salary warrant upon the custodian and the payment by the custodian, or other proper officer. The relator is entitled to costs.

July 6, 1917.

CLAIM OF CITY SUPERINTENDENT FOR EXTRA COMPENSATION

WILLIAM G. SULLIVAN,

Appellant,

vs.

BOARD OF EDUCATION OF THE CITY OF PLEASANTVILLE,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

William G. Sullivan, who for a number of years prior to July 15, 1926, had been Superintendent of Schools of the City of Pleasantville, brings this appeal to require the Board of Education of Pleasantville to pay to him the sum of $300 and interest which he claims is due him in accordance with resolutions of the Board of Education.

The case is submitted on petition of appeal, answer to the petition and stipulation of counsel which disclose the following agreement of facts:

For the school year 1922-23 the petitioner received a salary of $3,200.

On January 16, 1923, the Board of Education and Mr. Sullivan entered into a contract wherein and whereby the Appellant was employed as Superintendent of Schools of the City of Pleasantville for the term of three years from July 15, 1923, at an annual salary of $3,200.

The following appear in the minutes of the Board of Education:

April 4, 1923. "On motion the following teachers be elected for the coming year: Superintendent of Schools, William G. Sullivan, Principal Charles O. Wilson, Sara Van Gilder, Emory Helfirch———Nettie Adams, Prin.——— Charles Ingersoll, Principal———Special teachers Irma Stiles, Laura Carpenter, Anna Uzzell, Thomas F. Barnes, Roy W. Ayres." (———Used instead of naming other teachers shown in the minutes.)

April 18, 1923. "On motion all teachers now employed and re-elected for the coming year receive an increase in salary of $100 per school year."

Petitioner did not receive an increase in salary for the year 1923-24 although he protested to the secretary of the board that his salary check was not in accord with the action of the Board of Education.

May 6, 1924. "On motion the following teachers be re-elected at an increase of salary of $100, carried.

William G. Sullivan, Superintendent
High School, Charles O. Wilson, Principal
" " Charlotte Kacobs

School No. 1, Nettie Adams, Principal
" " Carrie Bowen

School No. 2, Charles Ingersoll, Principal
" " Mary Blackus
School No. 3, Hazel Haxton, Principal
" " Mina Leeds

School No. 4, Tillman Johnson, Principal
" " Helen G. Lull."
(———used instead of other teachers names.)

Petitioner received a salary of $3,300 for the year 1924-25.

The name of the Petitioner does not appear among those employed for the school year 1925-26, although he continued to serve during that year and received a salary of $3,300.

At the meeting of July 22, 1926, Petitioner made claim for $100 for each of the school years 1923-24, 1924-25, 1925-26, with interest—a total of $300 with interest.

Counsel for Appellant contends that the action of the board in January, 1923, in making a contract for three years was *ultra vires* and could not bind the board which organized February 1, 1923. It was held by the Commissioner of Education in the case of Albert S. Davis *vs.* Board of Education of the Town of Boonton, decided December 24, 1925, that a contract for three years though plainly voidable by a succeeding board is nevertheless capable of subsequent ratification either express or implied. The Commissioner is of the opinion that the minutes do not show an express or implied acceptance of the January, 1923, contract as the name of Appellant appears among the list of teachers employed by the board for the year 1923-24 and also for the year 1924-25, and therefore the superintendent's employment was from year to year; and in the absence of resolution for 1925-26, the employment is deemed to be under the same conditions as the preceding year.

Counsel for Respondent while claiming the validity of the contract, suggests that under the doctrine of estoppel that after having accepted the benefits of the contract, the Appellant is estopped from claiming it is illegal and void. The Commissioner cannot agree with counsel that Appellant accepted the benefits of the three-year contract. Mr. Sullivan did, however, accept employment and receive compensation which the board intended to be paid for his services.

Appellant made no protest to the board that the compensation was not in his opinion in full of the amount to which he was entitled. It is true that Mr. Sullivan told the secretary soon after receiving his first salary installment for the year 1923-24 that he had not drawn the check in accordance with the board's resolution. The objection to the secretary appears to be quite informal. There is no evidence that Mr. Sullivan made any protest to the board that the payments were not in full of the amounts he deemed to be due him until after the expiration of the three years referred to, when he was no longer under the employ of the board. The actual date of the protest was, in fact, July 22, 1926.

The New Jersey Supreme Court held in the case of Love *vs.* Mayor, &c., of Jersey City (40 N. J. L. 456), as follows:

> "My opinion is, that by the power of appointment and control given to this board in the case of this officer, they had such authority; but it is not necessary to decide this point, for it will never be tolerated that a municipal officer shall receive his pay at a fixed rate without dissent, hold his office for his full term, and at the end demand a higher rate named in some prior act. If he was not satisfied he should have offered his resignation, and the city would have found some one to take his place for the reduced salary. His continuance in office was an assent to

> the reduction of his salary, and his receipt of monthly warrants and payments during the whole term is an estoppel against any error in the mode of reduction, or the amount fixed by the board of finance and taxation. * * * The production of a circular of prior date with other terms of compensation did not alter the case. A public officer is no less strongly bound by his active consent to the terms of his employment, where he has every month received his salary at a reduced rate, with nothing more than an informal notice to some member of the board of finance and taxation that he shall claim greater compensation. He had the simple remedy in his own hands, if he felt aggrieved by the action of the legislature and board of finance. If he continued in office his acquiesence establishes his consent to the terms fixed by the board."

In the case of City of Lexington *vs.* Renick (105 Ky. 785), the opinion was in part as follows:

> "There is another objection to a recovery by appellees. They accepted their salaries as reduced by the ordinance of March 7, 1896, until they were discharged, on May 27th of the next year without making any objection or setting up a claim that more was due them. When they did this, they knew that if they set up such a claim, it might endanger their future tenure of office; and after accepting the smaller salary, and continuing to enjoy the office, they are estopped to claim money which they elected not to ask for.
>
> "In Alexander *vs.* Woodford Spring Lake Fishing Company, 90 Ky. 222 (14 S. W. 80), this court said: 'When a man with full knowledge, or at least with sufficient notice or means of knowledge of his rights and all the material circumstances of the case, freely and advisedly does anything which amounts to a recognition of a transaction or acts in a manner inconsistent with the repudiation, * * * the transaction although originally impeachable, becomes unimpeachable in equity.'"

In the case of City of Lexington *vs.* Renick, 105 Ky. 785, on petition for rehearing the court said:

> "The distinguished counsel also insists that there can be no estoppel in this case, because an estoppel never arises from the acceptance of part of a debt in payment of the whole. This is not the doctrine on which the opinion rests. Appellees knew at the end of each month that the city thought it was getting their services at the reduced salary. They also knew that, if they refused to serve the city at the reduced price, it might exercise its pleasure of discharging them at will. Knowing this, they accepted the reduced salary to avoid the risk of losing their places, and the city continued them in its service from month to month upon the supposition that they were willing to serve it for the amount paid. To allow them now to hold the city liable for their original salaries is to allow them to put the city in a worse position, and inflict a loss on it which it might have avoided had they not misled it by their conduct."

The cases of Boyle *vs.* Ogden, 24 Utah 443, and Commissioners *vs.* Sewell, 3 Okla. 281, seem to be to the same effect.

According to the legal authorities above cited, it is the opinion of the Commissioner that after accepting during the three years the salary paid by the Pleasantville Board of Education without a protest to the board, Appellant is now estopped from claiming that a balance of salary is due him.

The case is hereby dismissed.

November 30, 1926.

Affirmed by State Board of Education without written opinion, February 5, 1927.

REDUCTION OF SALARY OF TRUANT OFFICER

IN THE MATTER OF JOHN F. HALL,
Appellant,

vs.

THE BOARD OF EDUCATION OF ATLANTIC CITY,
Respondent.

Babcock and Champion, for the Appellant.
James H. Hayes, Jr., for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The Appellant is employed by the Respondent as a truant officer. He was first appointed on September 1, 1910, at a salary of seventy dollars per month. The following year his salary was increased to eighty-five dollars per month, and continued at that amount until October, 1912. On October 2, 1912, D. F. McDonald presented to the Respondent the following charge against the Appellant:

> "To the Board of Education of Atlantic City:
> "I desire to prefer the following charge against John F. Hall, truant officer of the City of Atlantic City, that the services he is rendering to the Board of Education of Atlantic City are not commensurate with the salary received by said truant officer, said salary being too high."

On the 16th of October, 1912, the Respondent held a hearing on the above complaint, and, at a later date, sustained the charge and adopted a resolution reducing the salary of the Appellant to sixty-five dollars per month. It is from this action that the appeal is taken.

Chapter 275, P. L. 1911, provides that "the services of all truant officers of the public schools in any school district in any city of the State shall be, during good behavior and efficiency, after the expiration of a period of employment of one year in said school district." It also provides that "no truant officer shall be dismissed or subjected to a reduction of salary except

for inefficiency, conduct unbecoming an officer or other just cause, and after a written charge of the cause or causes shall have been preferred against him or her, signed by the person or persons making the same."

No charge of "inefficiency or conduct unbecoming an officer" was made against the Appellant, and the charge, therefore, must be considered as having been made for "other just cause."

The testimony shows that, prior to the beginning of the present school year, some of the truant officers had charge of two schools and others had charge of three or four; that the Respondent at the beginning of the year appointed an additional officer and re-adjusted the work so as to give each officer supervision of about the same number of children. Such re-adjustment is assigned as the "just cause" for reducing the salary of the Appellant.

The Complainant, who is also Chairman of the Committee of the Board of Education having charge of the truant officers, testified in part as follows:

Q. And you think that because their districts have been cut down their services have been cut down, is that the idea?

A. We think each one having two schools can give more efficiency.

Q. You say that is the reason, they don't have as extended services now because they have less district?

A. The Committee felt as if they would give us better results. Often at the meetings they would say, "well, now, we didn't see such and such a man, he wasn't at home, or such and such a man, but we will go there to-morrow, and this girl we couldn't find." Now, the Committee felt as if we could get better results by having two schools. Now, Mr. Burger had to go all the way from Michigan Avenue all the way to Jackson, covering four schools. Now, that was entirely too much work for one man."

Q. Has this change in the districting affected the amount of services these persons are required to render?

A. We thought they would give us better services by having only two schools.

Surely the rendering of more efficient service cannot be considered as "just cause" for reducing officers compensation.

Relieving a truant officer of a part of his duties is not "just cause" for reducing his salary. To adopt such interpretation of the law would make it possible for a Board of Education to defeat the intent of the law by reducing his salary below a living wage, thereby forcing him to resign.

The resolution adopted by the Respondent reducing the salary of the Appellant is a violation of the statute, and is, therefore, null and void.

June 13, 1913.

NECESSITY OF SEPARATE ADVERTISEMENT FOR SCHOOL BUILDING CONSTRUCTION

THEODORE G. CLATTS,

Appellant,

vs.

BOARD OF EDUCATION OF THE BOROUGH OF SEASIDE PARK,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

This action is brought by Theodore G. Clatts, whose bid of $29,500 was the lowest by $1,309 of those received by the Seaside Park Board of Education on January 18, 1927, in response to its advertisement for general construction bids in connection with the erection of a proposed new school building. Appellant alleges the action of the Respondent to be illegal in proceeding upon receipt of the bids to reject them all and to re-advertise for new proposals.

The Assistant Commissioner of Education conducted a hearing in this case at the Toms River Court House on March 18, 1927, at which the testimony of witnesses on both sides was heard. Briefs on the legal points involved have also subsequently been filed by counsel for both Appellant and Respondent.

From all the facts in the case it appears that after the Respondent had advertised for and received bids upon general construction, together with plumbing work as one item and upon heating, ventilating and electrical work as the second item, it was discovered that preparation of separate plans and specifications and separate advertisement for bids in connection with each of the four branches of the work, namely, general construction, plumbing, heating and ventilating, and electrical work, are required by the provisions of Chapter 95, P. L. 1915, which has been construed to apply to school buildings and which reads as follows:

> "Hereafter in the preparation of plans and specifications for the erection, construction, alteration or repair of any public buildings in this State, whether the same is to be erected, altered or repaired by the State or any political sub-division thereof, when the entire cost of such work will exceed one thousand dollars in amount, it shall be the duty of the architect, engineer or other person preparing such plans and specifications, to prepare separate plans and specifications for the plumbing and gas fitting, and all work kindred thereto, and of the steam and hot water heating and ventilating apparatus, steam power plants and work kindred thereto, and electrical work; and it shall be the further duty of the board or body, person or persons authorized by law to award contracts for the erection, construction, alteration or repair of any such public building, to advertise for, in the manner provided by law, and to receive separate bids for each of the said branches of work, and to award contracts for the same to the lowest responsible bidder for each of such branches respectively."

The Respondent thereupon rejected all bids received by it on January 18, 1927, in response to its advertisement, and after separating the plans and specifications according to the several branches of work and making certain other changes in the specifications, proceeded to advertise for new proposals.

The Commissioner cannot agree with Appellant's contention that Chapter 95, P. L. 1915, which requires separate plans and specifications and separate advertisement for bids for the several branches of public building construction work, is merely permissive in its provisions. It is his opinion that such provisions are absolutely mandatory and that boards of education have no alternative but to comply with them. Had, therefore, the Seaside Park Board of Education awarded to the Appellant, as lowest bidder under its first advertisement, the general construction contract with plumbing work included, such action would have been, in the Commissioner's opinion, contrary to statutory requirements and liable to be set aside either at the suit of a taxpayer or of any bidders who might claim to have been deprived of their right under the law of bidding separately upon the general construction and plumbing work respectively. It was held, moreover, by the New Jersey Supreme Court in the case of J. L. Armitage *vs.* Mayor and Common Council of the City of Newark, etc. (in which instance the statute permitted municipalities in advertising for proposals in connection with public work to reject any and all bids), that "If, after the bids were received, the city decided that it would be better to contract only with the general contractor, it was open to the city to reject all bids and to re-advertise for bids by general contractors only." It must, of course, be assumed that new terms advertised after rejection of all bids are such as are authorized by law. While, therefore, under Chapter 95, P. L. 1915, it would be legally impossible for a Board of Education to reject bids received separately on the various branches of work and re-advertise for proposals on such work as a general contract (as was lawful in the above case) the principle involved is entirely applicable, and a school board therefore can legally, under a reservation in its advertisement, reject all proposals and then proceed to make and re-advertise any changes in the specifications which may be authorized by law. It is therefore the opinion of the Commissioner that regardless of the illegality of the terms first advertised by the Seaside Park Board of Education requiring their rejection, if the board after receiving proposals under its first advertisement on January 18th desired to make such changes in the plans and specifications as it actually did make, it was legally justified in rejecting all bids under the power reserved by it in the advertisement and in then proceeding to advertise anew for proposals upon such revised plans and specifications.

The Commissioner therefore finds no illegality in the action of the Seaside Park Board of Education complained of by the Appellant, and the appeal is accordingly hereby dismissed.

April 6, 1927.

PURCHASE OF SCHOOL FURNITURE BY SAMPLE IN COMPETITIVE BIDDING

McPherson Furniture and Carpet Company
and L. E. and E. C. Stone,
Appellants,

vs.

Bridgeton Board of Education and
N. Snellenburg and Company,
Respondents.

Rex A. Donnelly, for Appellants.
Walter H. Bacon and Leroy W. Loder, for Respondents.

Decision of the Commissioner of Education

This appeal is brought by Appellants to contest the validity of the action of the Bridgeton Board of Education on February 27, 1923, in awarding to N. Snellenburg & Company, of Philadelphia, one of the above named Respondents, a contract for supplying the board of education with 935 auditorium seats or chairs at a total cost of $3,985.50.

Appellants contend that they offered through the medium of their bids and samples goods superior in quality and lower in price than those of N. Snellenburg & Company, the Respondent; and that one of the samples presented by the Respondent, N. Snellenburg & Company, and upon which the contract was awarded, was received at least two hours after the time stated in the board's advertisement for the opening of bids and the receiving of samples. Appellants further contend that Respondent, the said N. Snellenburg & Company, afterward varied its bid by delivering with the chairs in question certain extras such as name plates, hat wires, etc., free of charge, in spite of having previously named an additional amount for such extras in its bid.

A hearing in this case was conducted by the Assistant Commissioner on Tuesday, October 9, 1923, at the Court House in Bridgeton, at which hearing testimony of witnesses on both sides was heard. Since the hearing, moreover, briefs upon the legal questions involved have been filed by counsel for both Appellants and Respondents.

From the facts in the case it appears that the following advertisement for bids and samples was made by the Bridgeton Board of Education:

"SEALED PROPOSALS

Sealed proposals will be received by the Board of Education of the City of Bridgeton for

1,000 chairs for auditorium of new high school,
200 of the same to have tablet arm rest,
6 teachers' desks,
150 pupils' study desks, No. 1 and 2
and the same number pupils' study chairs.

Samples will be received and bids will be opened at City Hall on Monday evening, February 26, 1923, at 8 o'clock. The board of education reserves the right to accept or reject any or all bids.

D. S. Blew,
Chairman of Building Committee."

It further appears that when the bids and samples were duly presented at the City Hall at 8 o'clock on February 26th for the two types of chairs mentioned in the advertisement, the only sample submitted at that hour by N. Snellenburg & Company was a chair designated by them in their bid as Chair No. 9033 with tablet arm attached. Although other samples from N. Snellenburg & Company arrived somewhat later in the evening, the testimony shows that at no time were such late-arriving samples examined or considered by the Bridgeton Board of Education.

It appears that the sample chair submitted by N. Snellenburg & Company at the time the bids were opened and designated in the bid as Chair No. 9033 with tablet arm attached was, with a slight variation on one side for the purpose of attaching the arm, precisely the same as the chair of that number without tablet arm. The board of education was consequently able to purchase both types of chair from the one sample on hand, since such sample adequately represented both types. It was, moreover, the uncontradicted testimony of all the board of education members who were present at the City Hall on the evening of February 26th that the chair actually purchased by the board of education was the chair submitted by N. Snellenburg & Company at the hour prescribed by the advertisement for the opening of bids and the receiving of samples, except that part of the chairs so purchased did not have the tablet arm as did the sample chair above referred to.

N. Snellenburg & Company's bid for the chair without tablet arm was $4.10 and for the chair with tablet arm $4.86 or a total of $3,013.50 for 735 of the former and $972.00 for 200 of the latter, while Appellants' bid for the two types respectively included $4.12 for the former and $5.12 for the latter or totals of $3,028.20 and $1,024.00 for 735 of the former and 200 of the latter respectively.

The testimony shows that the board of education contracted with N. Snellenburg & Company for both types of chairs at prices in both instances lower than those asked by Appellants without any reference whatever to extras such as hat wires, name plates, etc., which the bid merely stated might be added if desired, and with no agreement whatever for the purchase of such extras as shown by the contract offered in evidence; and it could consequently be considered no variation in the bid of N. Snellenburg & Company when such extras were afterward included upon delivery of the goods free of charge.

The testimony further shows that on February 26th, when bids and samples were received and agents of both Appellants and Respondent were heard as to the merits of their respective chairs, the board of education made a thorough examination of the samples submitted by Appellants and of the one sample practically identical for both types of chair submitted by Respondent; and the testimony also shows that the board made on the following day another examination of the same samples and then determined in the exercise of its best judg-

ment that Respondent's sample was for both types of chair superior to samples offered by Appellants from the point of view of price in relation to quality, health, comfort, durability and in fact all the essential qualifications.

In consideration, therefore, of the fact that both types of chair offered by N. Snellenburg & Company and as contracted for by the board of education were lower in price than those offered by Appellants, and in the absence of any evidence whatever of abuse of discretion in the decision made by the board of education as to the superior quality of the chairs offered by the Respondent, it is the opinion of the Commissioner of Education that the award by the Bridgeton Board of Education of the contract for 935 auditorium seats or chairs at a total cost of $3,985.50 to N. Snellenburg & Company was entirely legal and should be sustained.

The appeal is accordingly hereby dismissed.

November 5, 1923.

DECISION OF THE STATE BOARD OF EDUCATION

Unsuccessful bidders for the contract to supply the Board of Education with auditorium chairs for a new high school building in Bridgeton appeal from the action of the Board in that city in awarding the contract to Snellenburg & Company. The facts in the case are clearly and fully set forth in the opinion of the Assistant Commissioner of Education and need not be stated in detail here. At the time stated in the advertisement of the Board of Education for the opening of bids and the receiving of samples, Snellenburg & Company submitted a sample chair, which was inspected by the Board of Education along with the samples submitted by the other bidders. After careful examination it was approved by the Board of Education and as Snellenburg & Company were the lowest bidders the contract was awarded to them. Appellants charge that there were some differences in detail between the sample chair submitted by Snellenburg & Company and the chairs provided under the contract, but we find no substance in these criticisms for reasons which are contained in the opinion of the Assistant Commissioner. There is no showing whatever of any unfairness or abuse of discretion by the Board of Education. The award of the contract to Snellenburg appears to have been in all respects proper and in compliance with the law. It is therefore recommended that the decision of the Commissioner be affirmed.

LEGALITY OF BIDS FOR PURCHASE OF FURNITURE

JOSEPH M. ARNOLD, JR.,
Petitioner,
vs.
THE BOARD OF EDUCATION OF EWING TOWNSHIP,
Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

At a meeting of the Respondent held June 8, 1914, the Building Committee of the Board of Education was "authorized to receive bids and purchase the necessary furniture for the William M. Lanning School."

In accordance with this resolution, the Committee secured bids from Thomas B. Stockham & Brother Company, and from the New Jersey School-Church Furniture Company. The amount of the Stockham bid was $649.50, and that of the New Jersey Company was $650.

At a meeting of the Respondent held August 10, 1914, a resolution was offered to the effect that the specifications for the furniture were improperly drawn, that the advertisement for bids was not according to law, and directing that the bids be rejected and new specifications prepared, and "bids advertised for and awarded in a manner satisfactory to the Board." This resolution was defeated, and, later, at the same meeting, a resolution was adopted authorizing the purchase of furniture for two rooms from the Stockham Company, at a cost of $485.50.

The Petitioner prays that the action of the Board be declared null and void, for the reason that the bids were received in an irregular manner, and that proper advertisement was not made as required by Chapter 342, P. L. 1912.

The Petitioner claims that the Committee, and not the Board, awarded the contract, and that the furniture selected was "not the kind which is usually put in schools, and that it is not the most practical; besides, that it is very much more expensive than has been purchased heretofore by this Board."

The law gives to the local boards of education the power to purchase the furniture needed for the school buildings, and this power necessarily includes the selection of such furniture as, in the judgment of the Board, is best fitted to the needs of the pupils. The only limitation to the power of the board is that the purchases must not exceed the amount available for such purposes. The question as to whether or not the board acted wisely in selecting a certain type of furniture is not subject to review.

The questions to be decided are:

Were the proposals for bids illegal, and was the contract to the Stockham Company illegally awarded?

The Petitioner claims that the proposals should have been advertised in accordance with the provisions of Chapter 342, P. L. 1912. The title of this act is "An Act relating to expenditures by public county, city, town, township, borough and village bodies."

Paragraph 4, of Section VII of Article IV of the Constitution, reads in part as follows: "Every law shall embrace but one object and that shall be expressed in the title." A school district is not a "city," "town," "township," or "village," but is a separate municipal corporation. As the act under consideration does not embrace in its title the words "school district," it cannot apply to such a municipality, and the Respondent was not obliged to follow its provisions.

There is no law which requires a school district acting under the provisions of Article VII of the School Law to advertise for bids before awarding contracts for the erection of buildings or for the purchase of furniture or other supplies. The manner in which such purchases shall be made rests, therefore, in the discretion of the local board of education.

The minutes of the Respondent show that at a meeting held on August 10th, a resolution was adopted to purchase from the Stockham Company furniture for the Lanning School, at a cost of $485.50. This action was taken after a report had been rendered by the Building Committee, stating that bids had been received from the Stockham Company and from the New Jersey Company, and that the former was the lower bidder. There is nothing in the testimony to show that the Committee had attempted to award the contract to the Stockham Company prior to August 10th, except the testimony of Mr. Rittenhouse, that he visited the Stockham Company, and that he was shown furniture intended for the Lanning School. His testimony on this point was as follows:

Q. Did you find out from Mr. Stockham whether he had been ordered to furnish these goods or not?

A. Yes, he showed me where he was making them.

In view of the action of the Respondent, as shown by its minutes, I am of the opinion that the charge that the contract was awarded by the Building Committee is not sustained.

The appeal is dismissed.

October 26, 1914.

APPOINTMENT OF MEMBERS OF BOARD OF EDUCATION

In the Matter of Philip Lasher and Arthur Briesen,

Appellants,

vs.

The Board of Education of the Township of Weehawken,

Respondent.

Francis H. McCauley, for the Appellants.

William C. Asper, for the Respondent.

Decision of the Commissioner of Education

Prior to 1910 the School District of the Township of Weehawken was governed by the provisions of Article VII of the School Law, and the mem-

bers of the Board of Education were elected at the annual school meeting on the third Tuesday in March of each year. At the general election held in November, 1910, the legal voters accepted the provisions of Article VI. The method of the selection of members of the Board of Education remained the same, by virtue of Section 40 of the School Law, which provided that until the legal voters had adopted one of the methods prescribed in Sections 38 and 39, the members of the Board of Education in a district accepting the provisions of Article VI should be selected as theretofore. The School District of the Township of Weehawken never adopted the provisions of either Section 38 or Section 39.

At the annual meeting on the third Tuesday in March, 1910, the petitioners and one Thomas F. Stanley were elected members of the Board of Education of the School District of the Township of Weehawken for a term of three years from the first Monday in April then next ensuing, and at the annual meeting in March, 1911, Henry Ritter, William O'Hara and John Koeling were elected members of said Board for a like term.

Chapter 233, Laws of 1911, provided that the members of the Boards of Education in all districts governed by Article VI should be appointed by the mayors of the several municipalities in which the school districts were situate, and legislated out of office, on January 31, 1912, all members of Boards of Education in such districts who were then in office. This act was declared, by the Supreme Court, to be unconstitutional, in the case of Sheridan *vs.* Lankering, 83 Atl. Rep. 641.

Chapter 370, Laws of 1912, provides for the appointment of members of Boards of Education in districts governed by Article VI and also provides that members of such boards in office at the time of the passage of the act shall serve until the first day of February next succeeding the date on which their terms would otherwise expire.

In January, 1912, the mayor of Weehawken appointed nine persons as members of the Board of Education, in accordance with the provisions of Chapter 233 of the Laws of 1911, and on December 30, 1912, he again appointed nine persons as members of said Board.

In the case of Koven *vs.* Stanley et al., decided May 31, 1913, the Supreme Court declared that all the appointments by the mayor were null and void, but held that Stanley, Ritter and O'Hara, who were defendants by virtue of their appointment by the mayor, were members of the Board of Education by virtue of their election. The other defendants appointed by the mayor, but who had not been elected, were ousted by order of the Court.

Justice Swayze, in his decision, says: "The case, as presented to me, does not raise the question, who are the remaining members of the Board. The relator files his information as a citizen and not as a claimant to the office. The only question I can lawfully decide on this record is the right of the defendants as set forth in their answers."

The petitioners in this case had not been appointed by the mayor and were not made defendants in the case decided by Justice Swayze.

The petitioners were elected as members of the Board of Education of the School District of the Township of Weehawken at the same time and in

the same manner as Thomas Stanley, who was declared by the Supreme Court to be a member of said Board by virtue of his election. The petitioners are legal members of said Board and entitled to act as such.

The answer filed in this case denies the jurisdiction of the Commissioner of Education.

The Supreme Court held, in Jefferson *vs.* Board of Education, 35 Vr. 59, and Van Buren *vs.* Albertson, 25 Vr. 73, that a dispute as to membership in a Board of Education was a controversy arising under the School Law, and within the jurisdiction of the Commissioner. It is true that the case of Koven *vs.* Stanley was decided by the Court without first having been considered by the Commissioner of Education, but this case was a quo warranto for the purpose of ousting certain persons claiming to be members of the Board of Education. As the Commissioner of Education cannot oust a member of a Board of Education, no useful purpose would have been served by first submitting the matter for his consideration.

The case of the petitioners is entirely different, for the reason that they do not claim positions now held by other persons. The question as to whether or not the Appellants are members of the Board of Education of the Township of Weehawken is a controversy arising under the School Law and is, therefore, within the jurisdiction of the Commissioner of Education.

The Respondent claims that the Appellants never took and filed their oaths of office in the manner and form prescribed by law, and, therefore, that they are not legally qualified members of the Board of Education. It is admitted that they did take an oath of office and that they acted as members of the Board of Education from the first Monday in April, 1910, until the first day of February, 1912. The Appellants are, therefore, *de facto,* if not *dejure,* members of the Board of Education.

The Respondent also claims that the Appellants are guilty of laches in that they took no steps to assert their rights as members of the Board of Education, from February 1, 1912, until July 5, 1913.

I am of the opinion that the fact that the Appellants assumed that Chapter 233 of the Laws of 1911 was constitutional, and that they did not attempt to act as members of the Board of Education until after said act had been declared, by the Court, to be unconstitutional, did not constitute a surrender or abandonment of their offices, and that they have used reasonable diligence in vindicating their rights as members of the Board of Education.

January 29, 1914.

Affirmed by the STATE BOARD OF EDUCATION May 2, 1914.

ADEQUACY OF NOTICE OF ANNUAL SCHOOL ELECTION

GEORGE P. ECKERT,

Appellant,

vs.

LONG BEACH TOWNSHIP BOARD OF EDUCATION,

Respondent.

Maja Leon Berry, for Appellant.
William Howard Jeffery, for Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

This action has been brought by the above named Appellant, a citizen and taxpayer of the School District of Long Beach Township, Ocean County, New Jersey, to contest the legality of the election held in that district on February 13, 1923, at which the appropriation for Current Expenses, Building and Repairing and Manual Training was made by the district voters for the coming year, 1923–24, and one member of the board of education was elected.

Appellant contends that the total amount voted for such expenses for the coming year, namely, $4,000, is greatly in excess of the actual need of the school district; and that owing to the failure of the District Clerk to publish the newspaper notice of such election required by statute, many persons who would have attended the meeting and voted against such budget were deprived of knowledge thereof and consequently remained away with the result that the budget was carried and the board member was elected with only four votes cast.

A hearing was conducted by the Assistant Commissioner of Education at the Court House at Toms River on Thursday, June 7th, at which hearing witnesses were heard.

In the case under consideration the election for the voting of the annual budget was held at the same time as the annual election for members of the Board of Education, and the School Law requires that in calling both annual and special elections a newspaper notice must be published by the district at least one week in advance thereof in addition to the posting of notices in at least seven public places. The Appellant admitted at the hearing the posting by the District Clerk of the seven public notices required, but contended that the lack of publication of the newspaper notice renders the election void. Appellant contends, and the contention is not denied by the Respondent, that there are a sufficient number of voters to change the result who allege and are willing to swear that they would have attended the election had they had knowledge thereof.

Legal authorities hold, and the ruling is supported by many States, that a substantial and not an exact compliance with a statute prescribing the method of calling an election is sufficient in cases where the election is proved to have been made generally known to all the district voters by means of statute or otherwise, and where a full and fair expression of the popular will has been

demonstrated at such election (Brown *vs.* Street Lighting District, 70 N. J. L. 762). Such substantial compliance, however, is not sufficient where it can be shown that a sufficient number of persons were deprived of knowledge of such election to change the result (Cyc. page 324, N. 73). The latter situation appears to exist in the case before us where the statutory requirement as to notice was only partially complied with, where the law designates the day only of the annual election for board of education members and contains no information as the day, to time or place of the budget election, and where such budget was actually voted upon and carried and the board member elected by only four persons, while a substantial number of voters allege that they were deprived of the right to vote by lack of knowledge of the election.

In view, therefore, of the failure of the district clerk to publish a newspaper notice required by law for calling all school elections, and in view of the fact that more than a sufficient number of persons whose votes could have changed the result of the election allege that they would have attended such meeting had they had knowledge thereof, it is the opinion of the Commissioner of Education that the validity of the election at which a $4,000 appropriation was voted for the coming year, 1923–24, and a board of education member elected in the School District of Long Beach Township cannot be sustained. It is accordingly hereby ordered that such election be set aside in its entirety.

Dated: June 27, 1923.

ELIGIBILITY OF SCHOOL BOARD MEMBER

IN THE MATTER OF THE APPLICATION OF THE WEYMOUTH TOWNSHIP BOARD OF EDUCATION.

For the Appellant, Bourgeois & Coulomb.
For the Respondent, Babcock & Champion.

DECISION OF THE COMMISSIONER OF EDUCATION

There are two organizations, each claiming to be the legal Board of Education of Weymouth Township. The main point at issue is as to the eligibility of Mark Rogers and Anderson Bourgeois to membership in the Board. The legality of the appointment of certain persons as members of the Board is also before me.

At the annual meeting for the election of members of the Board of Education of Weymouth Township, held March 17, 1914, five members were to be elected, three for the term of three years each, and two for the term of one year each. The minutes of this meeting show that H. K. Lewis, E. C. Sheppard and Anderson Campbell were each elected for the term of three years, and Mark Rogers and William Garrison each for the term of one year. On the first Monday in April (April 6) the Board organized by the election of Beebe as President and Sheppard as Vice-President. The Board then was composed of Beebe, Dukes, Lewis, H. V. Rogers, Mark Rogers, Mitchell, Sheppard, Garrison and Campbell. At the next meeting of the

Board, held May 6, Anderson Bourgeois demanded that he be recognized as a member of the Board instead of Mark Rogers, assigning as a reason that Rogers was disqualified on account of his being a truant officer, and that he (Bourgeois) by reason of having received the next highest number of votes at the annual meeting on March 17 was legally elected as a member of the Board. The minutes show that Rogers was elected truant officer on September 11, 1913, for the term of six months. His term, therefore, expired March 11, 1914. An attempt was made at the hearing before me to prove that, owing to his having been ill for about a month and unable to perform his duties, he continued to be truant officer until April 11, 1914. The Board of Education took no action extending his term and if he performed any service after March 11 it was entirely voluntary. It is not necessary, however, to decide whether or not Rogers was eligible, for, after April 6, he was a *de facto,* if not a *de jure,* member of the Board. At the meeting on May 6, the President directed the Clerk to place the name of Anderson Bourgeois on the roll instead of the name of Mark Rogers. This action of the President was entirely without warrant of law. Assuming, for the purposes of this decision, that Rogers was merely a *de facto* member of the Board, he was entitled to hold the position until removed in the manner provided by law. Section 92 of the School Law gives to a local board of education power to remove a member who fails to attend three consecutive regular meetings of the Board without good cause. It cannot pass upon the eligibility of a member, nor remove him for any cause other than that stated in section 92. If a board of education cannot act in such cases, it is very evident that the President of a board cannot determine who shall be recognized as members. In the case of Du Four *vs.* State Superintendent 43 Vr. 371, the Court held that disputes and controversies as to the election of members of a board of education are to be decided by the State Superintendent. If there was any question as to eligibility of Rogers, appeal should have been made to the Commissioner of Education, as provided in section 10 of the School Law. The claim of Bourgeois that, in the event of the ineligibility of Rogers, he (Bourgeois) was entitled to act as a member of the Board is entirely without foundation. If Rogers had been removed on account of ineligibility, the result would have been a vacancy, to be filled by the Board as provided in section 95, paragraph 1, of the School Law. His removal could not possibly result in making a member of the Board a person who had been defeated by the people at the annual election. Bourgeois also claims that, even if he is not a *de jure* member of the Board, he is a *de facto* member. It is impossible for two bodies to occupy the same space at the same time; it is equally impossible for two persons to occupy the same position at the same time. Rogers, from the time he qualified on April 6, was a member of the Board of Education of Weymouth Township, until he resigned on August 21, 1914. It follows, therefore, that Bourgeois was not even a *de facto* member of the Board. He continued, however, to attend the meetings until July 21. At a meeting held on that date, Mark Rogers was present and took part in the proceedings. At a meeting held on August 21, six members were present. At said meeting, Mark Rogers resigned and Otto

Geyer, Jr., was elected to fill the vacancy. Since that date there have been two bodies, each claiming to be the legal Board of Education. One of these is composed of Lewis, Sheppard, Garrison, Geyer, and Tomlin, and the other is composed of Beebe, Dukes, Campbell, Mattison, Mitchell and Bourgeois. There is no question as to Lewis, Sheppard, Garrison, Beebe, Dukes, Campbell, and Mitchell. Geyer and Tomlin were appointed to fill vacancies by one board, and Mattison and Bourgeois, by the other.

At a meeting of what is known as the "Bourgeois Board," held August 22, there were present Beebe, Dukes, H. V. Rogers, Campbell, and Bourgeois. At this meeting, it appears those present were doubtful as to the status of Bourgeois and, having heard that Mark Rogers had resigned at a meeting of the other board the previous evening, proceeded to accept his resignation and to reappoint Bourgeois, Bourgeois himself voting on the motion to elect himself. Later, at the same meeting, H. V. Rogers resigned, and Mattison was elected to fill the vacancy. As soon as H. V. Rogers resigned, there were only four members, including Bourgeois, present. This was less than a quorum, and therefore without power to act. The appointment of Mattison was clearly null and void. A quorum of legally elected members was not present at any meeting of the so-called "Bourgeois Board," except possibly on August 25, when all the members of both boards were present at the same schoolhouse, the two boards holding meetings at the same time on opposite sides of the same room.

Geyer was elected at a meeting held August 21. The charge is made that this meeting was illegal, not having been called on the date designated by the President. The evidence shows that there was a misunderstanding between the President and Clerk as to the date for the meeting, but all the members were notified by the Clerk of a meeting for the 21st, with the possible exception of H. V. Rogers. There is some question as to whether the notice sent him gave the 21st or the 22d as the date of the meeting. The notice was not produced at the hearing. All the other members received proper notice, and six, including Mark Rogers, were present. A majority of a quorum is sufficient for the election of a member of a board of education. A quorum being present at the meeting on August 21, and a majority of those present voting to appoint Mr. Geyer, his appointment is legal.

The next vacancy was caused by the resignation of H. V. Rogers. In order that he might be sure that he was no longer a member, he presented his resignation to both boards. The Bourgeois Board acted on this resignation at a meeting held August 22, and an attempt was made to fill the vacancy by the appointment of Joseph B. Mattison. As a quorum was not present at this meeting, the appointment of Mattison is null and void. The other board accepted the resignation at a meeting held August 29. At this meeting a quorum was present. At a meeting held September 4, an attempt was made to fill the vacancy by appointment of E. L. Tomlin. As a quorum was not present, the appointment of Mr. Tomlin was ineffective, but at a meeting held September 29 there were five members present exclusive of Mr. Tomlin. At this meeting the following resolutions were adopted:

Resolved, That whereas it has been a ruling of this Board that three members constitute a quorum to do all business, except as specified in the law

requiring a vote of five members, and it now appears from the decision of the Commissioner of Education that five members is necessary, therefore, be it resolved that a quorum of five members is necessary to do any business, and that this resolution take effect immediately.

Moved by Mr. Garrison, seconded by Mr. O. Geyer, Jr., that the minutes of meetings of September 4 and 7, 1914, be and are ratified under the preceding resolution.

Mr. Tomlin became a member of the Board upon the adoption of the above resolutions.

The Board of Education of the Township of Weymouth, at the time of the filing of the petition in this case, consisted of Lewis Beebe, Anderson Campbell, George Dukes, Joshua Mitchell, Edgar Sheppard, William Garrison, Henry K. Lewis, Otto Geyer, Jr., and E. L. Tomlin.

At a meeting of the Board of Education held August 25, 1914, a resolution was adopted removing Lewis Beebe as President. On the adoption of this resolution five members voted in the affirmative and none in the negative. Section 85 of the School Law gives to a board of education power to remove its president by a majority vote of all the members of the board if he "refuses to perform any duty imposed upon him" by law. The notices calling this meeting stated that the "action of the President in calling meetings of the Board of Education on August 22 and August 25 in direct violation of the school laws" would be considered. The resolution removing Beebe as President gives a number of reasons for the action taken which were not stated in the notice calling the meeting, among them being that he refused to preside at regular meetings of the Board.

Mr. Sheppard testified that he requested Mr. Beebe to preside at the meeting of August 25 and that he refused, stating that he "recognized the Board of which Anderson Bourgeois was clerk." Mr. Garrison and Mr. Lewis both testified that they heard Mr. Beebe refuse to preside.

The refusal of Mr. Beebe to perform his duties as President justified the action taken removing him from his office.

At a meeting of the Board held April 6, 1914, Anna B. Bowen was elected principal of the school at Dorothy. The vote was five in the affirmative and four in the negative. The term for which Mrs. Bowen was elected was to begin the following September. At a meeting held May 6, a motion was made to reconsider the vote by which Mrs. Bowen was elected. This resolution was declared adopted, and the vote being again taken on the question of her election, four voted in the affirmative and five in the negative. The vote on the motion to reconsider was as follows: Ayes—Dukes, H. Rogers, Beebe, Bourgeois and Campbell; Nays—Lewis, Mitchell, Sheppard and Garrison. Section 88 of the School Law provides that "no principal or teacher shall be appointed, transferred or dismissed * * * except by a majority vote of the whole number of members of the Board of Education." The Board of Education of Weymouth Township is composed of nine members, and the motion to elect Mrs. Bowen was adopted at the meeting on April 6 by the requisite number of voters. Any motion which would affect the election of a teacher who had been legally elected, must, to be effective,

receive the vote of a majority of all the members of the Board. The motion to reconsider the vote by which Mrs. Bowen was elected received five votes, but one of these was cast by Anderson Bourgeois, who was not a member of the Board. The motion, therefore, failed to receive the required number of votes, and the election of Mrs. Bowen on April 6 is still valid and in full effect. In order that there might be no doubt as to Mrs. Bowen's election, the Board, at a meeting held August 21, by an affirmative vote of five members, again elected Mrs. Bowen as teacher of the school at Dorothy.

Subsequent to the filing of the petition and answer, the Board adopted a resolution removing Anderson Campbell, George Dukes and Lewis Beebe as members of the Board, and the Respondent in its brief asks that I pass upon the legality of their removal. This matter is not properly before me. The members affected had no notice that this matter would be considered and had no opportunity to put in a defense.

The appeal is dismissed.

February 17, 1915.

RESIDENCE QUALIFICATION FOR MEMBERSHIP ON BOARD OF EDUCATION

JOHN G. EDSALL,

Appellant,

vs.

HORACE C. GRAVES,

Respondent.

Warner M. Westervelt, for Appellant.
William B. Mackey, for Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

A petition has been filed with this department by the above named Appellant protesting against the holding of a membership on the Palisades Park Borough Board of Education by Horace C. Graves who was elected such member on February 13, 1923, on the ground that the Respondent had not been for three years immediately preceding his becoming a member of such Board of Education a citizen and resident of the district in accordance with the requirements of the School Law.

The Respondent, Horace C. Graves, in his answer denied the alleged lack of statutory qualifications for membership on the Palisades Park Board of Education, and contended that not only had he been for three years preceding his taking the oath of office as a member of such board a citizen and resident of the district, but that even at the time of his election, February 13, 1923, he had then been for more than three years such a citizen and resident, having actually resided in Palisades Park continuously since February 2, 1920.

A hearing in this case was conducted by the Assistant Commissioner of Education on May 28, 1923, at the Court House in Hackensack, at which hearing the testimony of witnesses on both sides was heard.

From the evidence in this matter, it appears that the Respondent, Horace C. Graves, had entered on January 17, 1920, into a contract for the purchase of

property in Palisades Park, including a house to be used as a residence by Respondent, and that by the terms of such contract the house, which had been under construction since October, 1919, was to have been completed on or before February 2, 1920. It further appears that although such house was not completed on the contract date, on February 2, 1920, Respondent nevertheless at once took up his residence therein for the purpose of hastening the construction work on the building, and continued to reside there until March 15, 1920, when by means of an exchange he moved to another house in Palisades Park in which he has continued to reside until the present date.

Section 117, Article VII of the 1921 Edition of the School Law requires, as has above been stated, that a Board of Education member shall have been for three years preceding becoming a member of the board a citizen and resident of the district. Residence or domicile as used in this statute has been legally determined to mean a place of fixed or permanent abode.

Domicile, according to legal definition, is always entirely a question of residence and intent and must be established from all the facts in the case. In the opinion of the Commissioner the acts of the Respondent in contracting for the purchase of a home to be completed by February 2, 1920, in the Borough of Palisades Park and his actually residing in such district from that date until the present time clearly establish his residence and his intention of permanent residence in the district aforesaid. A mere statement contained in a deed signed by Respondent in February, 1920, in which he describes himself as a resident of the Borough of Brooklyn is not sufficient to overcome the fact of Respondent's actual residence in Palisades Park, as established by various acts on his part. Legal rulings are to the effect that "declarations are of no avail when not born out by the party's acts." (Cyc., page 865, Note 29.)

The Commissioner cannot agree with Appellant's contention supported by a line of cases of limited application only to the effect that a change of domicile cannot be accomplished until such time as one's family is actually removed to the place of changed abode. According to Cyc., page 855, "When it is evident by unequivocal acts that the intention to remove existed, the change of domicile is complete although the family may remain temporarily in the place of former abode," and this ruling is supported by the following cases: Wells *vs.* People, 44 Ill. 40; Cambridge *vs.* Charleston, 13 Mass. 501 and Lankford *vs.* Gebhardt, 130 Mo. 621. The facts of Respondent and his family plainly indicate an intention of change of abode to Palisades Park as of February 2, 1920, but the circumstances of the uncompleted house account for Mr. Graves' family remaining temporarily at the place of former abode.

In view of all the facts in the case, therefore, it is the opinion of the Commissioner of Education that Horace C. Graves was fully qualified under the statute to be a member of the Palisades Park Board of Education at the time of taking the oath of office in 1923, and even at the time of his election to such office, February 13, 1923, having been since February 2, 1920, a citizen and resident of the district within the meaning of the law.

The appeal is accordingly hereby dismissed.

June 27, 1923.

RESIDENCE OF MEMBER OF BOARD OF EDUCATION

FRANK H. O'BRIEN,
Appellant,
vs.
THE BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK,
Respondent.

For the Appellant, Francis B. McCauley.
For the Respondent, Mark A. Sullivan.

DECISION OF THE COMMISSIONER OF EDUCATION

The Appellant was elected a member of the Board of Education of West New York for a term of three years from the first Monday in April, 1911, and served as such member until March 30, 1912. On that date the following preamble and resolutions were adopted by said Board of Education:

"Whereas, It has been brought to the notice of the Board of Education of the School District of West New York that Frank H. O'Brien has ceased to be a resident of the territory contained in the School District of the Town of West New York, and has thereby ceased to be a member of the Board of Education of said School District; *now, therefore,*

Be it Resolved, That a vacancy exists in the membership of said Board of Education, and be it further

Resolved, That Louis Wagner be and he is appointed a member of the Board of Education of the Town of West New York, in the County of Hudson, to take place of said Frank H. O'Brien, and to fill the vacancy caused by the non-residence of said Frank H. O'Brien."

O'Brien attended a regular meeting of the Board on Monday, March 25, 1912. This meeting was adjourned until the Thursday following, and again adjourned to Saturday, March 30, when the preamble and resolutions above quoted were adopted. O'Brien attempted to attend the meeting of March 28, but was prevented by illness. He had no knowledge of the meeting of March 30, nor had he any knowledge that there was any question as to his being a resident of West New York. In fact, he received on the very day the resolution was adopted a notice of a meeting of the Board of Education to be held the following Monday. There is nothing in the evidence to show that the question as to his residence had been before the Board at any time prior to March 30th. There was no evidence presented at that meeting, and the action appears to have been based on statements made by O'Brien that he would not be able to attend all the meetings of the Board for the reason that, owing to ill health, he was temporarily living with his wife's mother at Newburgh, New York, and for the further reason that he had broken up his home in West New York and shipped his household effects to Newburgh.

It is very clear from the evidence that O'Brien did not leave West New York with the intent of establishing a residence elsewhere, but that he fully

expected to return as soon as his health would permit. The counsel for the Respondent very ingeniously argued that the residence of a member of a board of education contemplated by section eighty-three of the School Law, is not his legal domicile, but his actual place of residence, and that a member of a board of education ceases to be a "resident of the territory contained in the school district" when he actually ceases to reside there, even though it is his intention to return. In many of our towns there are members of boards of education who have summer residences in the mountains or at the shore. The interpretation advanced by the counsel for the Respondent would create vacancies in such boards whenever members left the districts for their summer homes, and in some cases might result in leaving the boards with less than a quorum, and possibly leave a district without any board. I think that the word "resident" in section 83 must be construed as meaning domicile. Adopting this construction O'Brien has not ceased to be a resident of the School District of West New York.

But had I reached the conclusion that he had ceased to be a resident of the School District, I am of the opinion that he is still a member of the Board of Education. A public officer having been duly elected cannot be deprived of his office except by due process of law. A member of a board of education must not only be a resident of the district at the time of his election, but must continue to be a resident during the term for which he was elected. If he loses his residence he ceases to be a *de jure* member, but continues as a *de facto* member until his office has been declared vacant in the manner provided by law.

The only provision in the School Law giving to a board of education power to remove one of its members is contained in section ninety-two. This section confines the power to remove to a case when a member fails to attend three consecutive regular meetings of the board without a good cause. It is not contended that O'Brien is subject to removal for this cause.

The question as to whether or not a member of a board of education has ceased to possess the qualifications prescribed by law for membership in the board is a controversy arising under the School Law, and the Board of Education of the Town of West New York had no power to decide such controversy. O'Brien has never ceased to be a member of said Board of Education, and the action of the Board in ousting him, and in appointing a person to fill the vacancy thus created, was illegal, null and void.

June 13, 1912.

DECISION OF THE STATE BOARD OF EDUCATION

In March, 1911, Frank H. O'Brien was elected a member of the Board of Education of the Town of West New York in the County of Hudson for a term of three (3) years. On March 30, 1912, the Board declared that it had been brought to its notice that he had ceased to be a resident of West New York, and it thereupon resolved that he thereby ceased to be a member of the Board, and it elected Louis Wagner in his place. Mr. O'Brien was not present at this meeting. No notice was given to him that the Board contemplated declaring that he had forfeited his membership and no evidence was adduced at the meeting upon the question of his residence.

Mr. O'Brien appealed to the Commissioner of Education and from a decision in his favor the Board of Education of the Town of West New York appealed to the State Board of Education.

Though considerable testimony was taken, the facts are simple. Mr. O'Brien became a resident of West New York in 1898, and that he was such until March, 1912, is not disputed. For some time prior to March, 1912, his health was bad. At times he was unable to work and his physician advised him to go to Saranac Lake. At the end of February, 1912, to use his own expression, he broke up his home. His wife and child went to Newburgh to the home of her mother. His furniture was also shipped there to save, as he says, storage charges. Mr. O'Brien's mother, brothers and sisters, however, lived in an apartment in West New York. To that apartment he took all his clothing, and he and his brothers testified that after March 1 he resided therein. Prior to March, instead of going to Saranac, he spent some time with his wife's relatives in Newburgh. During March he spent part of his time at his mother's apartment in West New York, and part at the residence of his wife's mother in Newburgh. On March 25 the Board of Education of the Town of West New York held a regular meeting which Mr. O'Brien attended. At its conclusion, an adjournment was taken to the 28th. On the 28th he was at the home of his mother. He attempted to attend the meeting but his physical condition was such that he had to abandon the attempt. At the close of the meeting another adjournment was taken to the 30th. No notice was given to him of this adjourned meeting, but a few hours before the time fixed for it he received at the home of his mother written notice that on April 1 the new Board would meet to organize.

At four o'clock in the afternoon of the 30th the Board met and adjourned to 8:15 P. M. It was at this adjourned meeting that the Board resolved that Mr. O'Brien had forfeited his membership. No question has been raised as to the legality of this meeting, which commenced after 8 P. M., contrary to law, and in view of the conclusion which we have read, it is necessary for us to rule on it. Needless to say, if a Board can convene at four and then lawfully take a recess until 8:15, there would seem to be no reason why it could not do so until 9:15, 10:15, 11:15, or even midnight, and the spirit, if not the letter, of the law would be just as clearly broken if a meeting was called for any such hours. The law is very clear. Meetings of the Board of Education shall be public, and shall commence not later than 8 P. M. The object of the law, viz., full publicity, can be defeated almost as well by holding meetings when the great majority of the public is asleep as by a star chamber proceeding. We believe, however, that in this case the adjournment to 8:15, rather than to 8:00, was due to inadvertence.

No evidence was taken upon the subject of the resolution, and each member in voting in favor of it did so because of information which he had gleaned from conversations with Mr. O'Brien, with other members of the Board, and from residents of the district. This information, in brief, was that Mrs. O'Brien and child had gone to Newburgh, that their furniture had been shipped there, that Mr. O'Brien at times stated that he had come from Newburgh, at other times that he intended to return to Newburgh,

at other times that he was not sure that he could attend all the meetings of the Board, and that he had requested the Secretary to send notices to him at Newburgh. In addition to such information some of the members of the Board believed that his mother's apartment was crowded and that he could not be accommodated in it. His mother's apartment, however, was visited by two members of the Board during the very week when the resolution was adopted, and they found him there. No evidence was offered in any way tending to show that in Newburgh Mr. O'Brien had started business or that he had established a home for his family or that he had ever registered or voted, or that he had paid taxes or purchased property. We do not understand the counsel for the Board to contend that he had abandoned his citizenship in New Jersey or that he ceased to be domiciled in West New York.

The law provides that a member of a Board of Education shall be a citizen and resident of the territory contained in the school district. The Appellant Board contends that if a member ceases to be an actual as distinguished from a constructive resident of a school district he forfeits his membership. Many men live in cities except during summer. They are residents of the cities, vote and pay taxes in them, and when they return after the summer, do not always return to the same house. If any such goes to the mountains or to the seashore for a month or for the whole summer, would he, thereby, if a member of a Board of Education, cease to be one? Would a man, who because of business or illness temporarily leaves his district, forfeit his office? Such men are actually residing wherever they happen to be, but they are still constructive residents of some districts in this State. We cannot agree with the Appellant Board. Though enough has been written on citizenship, residence and domicile to fill a library, we think it is generally accepted that where a statute requires a candidate for public office to be a resident of the district or locality to be represented, the word "residence" is deemed to be identical and synonymous with "domicile."
(People *vs.* Platt, 50 Hun, 454. Affirmed 117 N. Y. 159.)

In that case it was vigorously contended that the expression "residence" in a statute prescribing a qualification of residence for office meant actual physical presence. Very many authorities were cited and examined and the Court ruled that where residence is used in such a statute it must be taken to be the equivalent of domicile. It was pointed out that throughout the country it is established that the only place where a citizen can vote is at his domicile and the Court said: "It would be absurd to say that more permanence was required in the voter than in the local officer voted for. If, by statute, one must be a resident of a town in order to vote, and by statute, also one must be a resident of the town to hold office therein, then if residence in the voter's case means domicile, so it means, also in the case of the officers. The two subjects are cognate, and the word 'residence' is used with like meaning in respect to each."

For fourteen years prior to March, 1912, Mr. O'Brien was domiciled in and an actual resident of West New York. It was there that he voted and exercised his political rights. That domicile is presumed to continue until a

change is shown, and the burden of proof is on him who alleges the change That burden the Board of Education of the Town of West New York in our opinion has not sustained. Indeed, we do not understand its counsel to even claim that Mr. O'Brien has changed his domicile to Newburgh. A change of domicile is dependent upon two things—fact and intent. We cannot find as a fact that on March 30, 1912, Mr. O'Brien's residence was at the home of his wife's mother in Newburgh rather than at the home of his own mother in West New York. Neither can we find that on March 30th he had formed any intention of abandoning West New York. He testified subsequently to that date in the proceedings before the Commissioner that when he is able to support his wife and child he intends to take them back to West New York.

The record is not such that we can disbelieve him.

We find that on March 30, 1912, Mr. O'Brien was a resident of the school district of West New York within the meaning of the statute, and that the resolution of the Board of Education of that town adopted on that day wherein his office as a member was declared vacant was without foundation.

Aside from the foregoing, it is not clear that the Board of Education of the Town of West New York could oust Mr. O'Brien from membership without giving notice, and affording him an opportunity to be heard, or that it had any authority whatever to determine that he abandoned his office, except for a failure to attend three consecutive regular meetings without good cause.

The members of the Board in voting against him, we believe, acted as they thought proper, and as they thought for the best interests of the district. We cannot find, however, that their resolution has any sound foundation. The decision of the Commissioner is affirmed.

December 9, 1912.

REMOVAL OF PRESIDENT OF BOARD OF EDUCATION BY THE BOARD

JOSEPH WILLIAMSON,
Appellant,

vs.

BOARD OF EDUCATION OF UNION TOWNSHIP, HUNTERDON COUNTY,
Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

Joseph Williamson, the Appellant in this case, was duly elected president of the Board of Education of Union Township, Hunterdon County, at its annual meeting in April, 1920. At a special meeting of the Board of Education held on August 2, 1920, Appellant was removed from the presidency of the Board by a majority vote of the members thereof. Appellant was not present at the meeting when such action was taken.

A hearing in this case before the Commissioner of Education took place on October 27 at Flemington, and at this hearing it was developed that the charge upon which Appellant was removed was to the effect that he had refused to perform the duties of his office; more specifically, that he had refused to sign orders for the payment of teachers' salaries and other orders. At the hearing Appellant testified that he had refused to sign orders for teachers' salaries and other orders at the close of the school year 1920, because there was not sufficient money on hand with which to pay the orders. This was admitted by the members of the Board of Education who had voted to depose Appellant as president.

It appeared further at the hearing that at a meeting of the Board of Education on July 28, 1920, a resolution was passed providing for the borrowing of the amount of deficit for the year 1919-20, from taxes in the hands of the Custodian which had been voted for the year 1920-21. Appellant claimed that the Board of Education had no authority to borrow money from any source to make up the deficit without first submitting the question to the voters for their sanction at a meeting legally called for that purpose. Such a meeting had been called for August 5, but the action taken by the Board of Education on July 28 authorizing the borrowing of the money from this year's budget was in anticipation of what the voters were expected to do on August 5.

The Appellant, Joseph Williamson, was therefore deposed before the voters had authorized the borrowing of the money.

The practice of meeting a deficit in the current expense funds of the district by borrowing money from funds which had been voted for the following year is a bad one, and if continued year after year would finally lead to a large amount of indebtedness to be carried indefinitely as a debt upon the district.

Mr. Williamson's action in refusing to sign orders for the payment of money when he knew there was a deficit is one for which he cannot be blamed because he was holding strictly to the legal requirements in such cases.

In addition to this, the way in which Appellant was deposed as president of the Board of Education must be considered. This was done at a special meeting of the Board, which was called, as shown in the testimony, for the purpose of determining how much money was on hand. Mr. Williamson himself ordered the meeting, and as he states, it was for the above purpose. The district clerk who called the meeting states that the notice, which was an oral one, did not state the business to be transacted at the meeting.

At this meeting the Appellant, without being present himself, was by a majority vote of the Board of Education removed as president of the Board, and removed without any knowledge that such action was contemplated and without opportunity to present a defense to the charges against him.

After reviewing all the facts in the case the Commissioner is of the opinion that the charges preferred against the Appellant, Joseph Williamson, were inadequate and that not only was Appellant justified but should be

commended for refusing to sign orders on the Custodian for moneys that were not in the Custodian's hands.

The Commissioner is further of the opinion that to remove a man from office without giving him an opportunity to meet the charges against him is contrary to all usage and fairness in such matters.

It is therefore hereby ordered that the Appellant, Joseph Williamson, be reinstated in his office as president of the Board of Education of Union Township from this date.

November 18, 1920.

REMOVAL OF MEMBER OF BOARD OF EDUCATION FOR NOT ATTENDING MEETINGS

GEORGE W. MEAD,

Appellant,

vs.

THE BOARD OF EDUCATION OF PEQUANNOCK TOWNSHIP,

Respondent.

DECISION OF COMMISSIONER OF EDUCATION

If a member of a board of education is absent from the district for a long period of time consecutively, and absent from the State, so that it is impossible to notify him, I think that notice would not be necessary. But where a man is living in the district, and can be served with a notice, notice should be given for the reason that the Board must be able to show that the member is removed for cause. It may be that a member of a board of education through indifference fails to attend, but that is not within the official knowledge of the members of the Board.

In this case notice should have been given before action was taken.

April 7, 1913.

VACANCY IN BOARD OF EDUCATION ACTING UNDER ARTICLE VII

IN THE MATTER OF THE APPEAL OF J. C. MYERS IN THE CASE OF A VACANCY IN THE BOARD OF EDUCATION OF OXFORD TOWNSHIP, WARREN COUNTY.

DECISION OF COMMISSIONER OF EDUCATION

It appears that in March, 1912, a Mr. Frome was elected a member of the Board of Education of Oxford Township, but that he has not qualified and has declined to do so, and that at a meeting of said Board of Education on May 6th the Board elected a Mr. Axman to fill the vacancy. It is contended that this appointment is illegal and that the vacancy should have been filled by an appointment by the County Superintendent of Schools. The County

Superintendent is only authorized to fill a vacancy in the Board of Education in case there is a failure to elect a member. Vacancies in a Board of Education arising from other causes than failure to elect are to be filled by the Board. There was no failure to elect in this case, but simply a failure on the part of the person elected to qualify. Under these conditions the action of the Board in appointing a person to fill the vacancy was legal.

July 24, 1912.

DECISION OF THE STATE BOARD OF EDUCATION

In March last an annual school meeting was held in Oxford Township at which Mr. James Frome was elected a member of the Board of Education for a term of three years from the 1st day of April, 1912. The Board organized on the 1st of April, but Mr. Frome did not attend. He declined to qualify and to serve as a member of the Board. On the 6th of May, the Board appointed Mr. Axman in his place. Contesting such appointment, Mr. J. C. Myers, one of the members, appealed to the Commissioner of Education on the ground that under the circumstances the power to appoint a member was conferred by statute upon the County Superintendent, and not upon the local board. From the decision of the Commissioner overruling his contention, he appealed to this Board. Mr. Myers, the Oxford Board and the Commissioner assumed that a vacancy existed in the Board because of the refusal of Mr. Frome to qualify and to serve.

Section 95 of the School Law provides that Township Boards shall have power "I. To appoint a person to fill a vacancy in the Board of Education, except a vacancy caused by a failure to elect, but the person so appointed shall serve only until the next election for members of the Board of Education."

Subd. 4 of Section 30 provides that a County Superintendent shall have power to appoint members of the Board of Education for any school district under his supervision which shall fail to elect members at the regular time, and that such appointees shall serve only until the next election in the district for members of the Board of Education.

Mr. Myers urges that as Mr. Frome could not serve as a member of the Oxford Board until he qualified, his election was not complete until he had so done. He, therefore, argues that the result was the same as if no election had been held.

What was the legal situation when, after Mr. Frome was duly elected, he refused to qualify and to serve?

In 15 Cyc. 392, it is said:

"It is a doctrine of the common law that every citizen in peace, as well as in war, owes his services to the State when they are required, and persons are liable to indictment if they refuse to take the oath and qualify themselves as public officers after having been regularly elected or duly appointed. * * * Mandamus will lie to compel one who has been duly elected to a municipal office to accept and serve in the same."

In State *vs.* Ferguson, 31 N. J. L. 107, mandamus proceedings were instituted against William Ferguson, Jr., one of the Overseers of the Highways

of the Township of Upper Alloway Creek in the County of Salem, to compel him to put in good order for public use and travel a certain part of a road.

In the course of the opinion of the Supreme Court, the Chief Justice considered at some length the right of a party elected to refuse to qualify and the right after qualification to resign at pleasure. He wrote:

"First, as to the officer's power to resign. It was insisted on the part of the defendant that an overseer of the highways has the right, in law, to resign at will, and that the mere notification of the fact that he resigns discharges him from office.

"If he possess this power to resign at pleasure, it would seem to follow, as an inevitable consequence, that he cannot be compelled to accept the office. But the books seem to furnish no warrant for his doctrine.

"To refuse an office in a public corporation connected with local jurisdiction, was a common law offence and punishable by indictment. * * * So uniformly is this doctrine maintained by an extensive series of decisions that we find it stated as the unquestionable law by all the text writers. * * * I think it undeniable, therefore, that upon general principles of law as contained in judicial decisions of the highest authority, the refusal of an office of the class to which the one under consideration belongs, was an offence punishable by proceeding in behalf of the public.

"Regarding then this doctrine of the law as established, it seems to be an unavoidable sequence that the party elected, and who is thus compelled by force of the sanctions of the criminal law to accept the office, cannot afterwards resign it *ex mero motu*. If this recusancy to accept can be punished, it cannot be that he can accept and immediately afterwards, at his pleasure, lay down the office. The law is far too practical to admit of such a frustration of one of its regulations, designed for the protection of the public interest."

From such authorities, it is clear that the taking of the oath of office is no part of the election. Unless the school meeting at which Mr. Frome was elected was not conducted in accordance with law, or unless he could point to some statute or judicial authority which would relieve him from the necessity of accepting the office, it seems as though the Oxford Township school district had the right, if it so desired, to compel him to accept. There was, therefore, no such failure to elect as would justify an appointment by the County Superintendent. The record submitted to us is very meager, but as far as we understand the facts, no attempt was made to force Mr. Frome to qualify as a member of the Board of Education, and the district acquiesced in his refusal to do so. We infer that it was assumed that Mr. Frome's refusal to qualify was substantially the same as if the resignation of a member who had qualified was accepted and a vacancy thereby created. Inasmuch as the vacancy was not caused by a failure to elect, the Board of Education had authority to appoint some one to serve until the next election.

The decision of the Commissioner is affirmed.

August, 1912.

VACANCY IN BOARD OF EDUCATION ORGANIZED UNDER ARTICLE VI

ALBERT LEULY ET AL.,
Appellants,
vs.
HENRY RITTER ET AL.,
Respondents.

William C. Asper, for Appellants.
Francis H. McCauley, for Respondents.

DECISION OF THE COMMISSIONER OF EDUCATION

Prior to 1910, the School District of the Township of Weehawken was governed by the provisions contained in Article VII of the General School Law passed at the second special session of the Legislature in 1903, and three members of the Board of Education were elected annually on the third Tuesday in March, and took office on the first Monday in April following their election. At the general election held in 1910, this district adopted the provisions of Article VI of the School Law, as authorized by Section 243. Section 38 of the School Law, being a part of Article VI, provided for a Board of Education of nine members, appointed by the Mayor, and Section 39 provided for a board of nine members elected by the people. Section 40, however, provided that until the provisions of either Section 38 or 39 had been adopted, at a regular election, the members of the Board of Education should continue to be selected in the same manner as such members had previously been selected. As the School District of Weehawken never adopted the method prescribed by either Section 38 or 39, the members of the Board of Education continued to be elected at a school election held on the third Tuesday in March, the term of office being three years.

Chapter 233, P. L. 1911, provided for a Board of Education in each district acting under Article VI, such board to consist of nine members appointed by the Mayor. The act further provided that the terms of office of all members of boards of education affected by the act should expire January 31, 1912. A Board of Education was appointed in Weehawken in accordance with the provisions of this act. Later, in the case of Koven *vs.* Stanley, the Supreme Court declared the act unconstitutional and decided that Ritter, O'Hara and Stanley, the only members of the old Board who were parties to the suit, were members of the Board of Education by virtue of their election on the third Tuesday in March.

Chapter 370, P. L. 1912, provides for a Board of Education in each district acting under Article VI, the members of such board to be appointed between the second and fifteenth days of January, to take office on the first day of February following their respective appointments. In a district having a population of less than 45,000, five members constitute the Board. In a district having a population of 45,000 or over, the Board consists of nine members. The act further provides that the members of a Board then in office

should continue to serve for the terms for which they were severally elected, and until the first day of February then next ensuing.

By virtue of this last mentioned provision, Ritter and O'Hara were continued in office until February 1, 1915, they having taken office on the first Monday in April, 1911, and Stanley was continued in office until February 1, 1914, he having taken office on the first Monday in April, 1910. In the case of Lasher and Briesen *vs.* Board of Education of Weehawken, recently decided by me, it was held that said Lasher and Briesen were members of the Board of Education of Weehawken, they having taken office on the first Monday in April, 1910. Up to February 1, 1914, the Board of Education consisted of Ritter and O'Hara, whose respective terms of office would not expire until February 1, 1915, and Stanley, Lasher and Briesen, whose terms would expire February 1, 1914. The petitioners claim that Stanley was not a member of the Board, for the reason that he was a member of the Township Committee of Weehawken and that the offices of member of the Board of Education and Township Committee are incompatible. It is unnecessary to pass on the question as to the incompatibility of these offices, for the reason that Stanley's term has expired. Stanley had acted as a member of the Board since 1910, and, therefore, was at least a *de facto* member, and was entitled to act until removed by the Court.

At a meeting of the Board held January 31st, a resolution was adopted removing John Koelin from his office as member of the Board of Education, and appointing William J. Cadwallader to fill the vacancy thus created. It is admitted by the Respondent that Koelin was not a resident of the School District of Weehawken on January 31st. Section 41 of the School Law reads, in part, as follows: "A member of a Board of Education in a city school district shall be a citizen and resident of the territory contained in said school district and shall have been such resident for at least three years immediately preceding his or her becoming a member of such board." It is evident from the above quotation that as soon as a member of a Board of Education ceases to be a resident in the district, he ceases to be a member of the Board of Education. The resolution, therefore, so far as it relates to the removal of Koelin, is without force or effect. The appointment of Cadwallader is likewise without force or effect, for the reason that Chapter 370, P. L. 1912, expressly provides that "any vacancy in such Board of Education shall be forthwith reported by the Secretary of said Board to the Mayor or other chief executive officer, who shall within thirty days thereafter appoint a person to fill such vacancy for the unexpired term." If a vacancy existed in the Board, it could only be filled by appointment by the Mayor; the Board of Education was without power in the premises. As a matter of fact, however, there was no vacancy in the Board on January 31st. Chapter 370, above referred to, contains the following proviso: "provided further, that first appointment under this supplement may be for less than full terms, if necessary; it being the intention to provide hereby that when this supplement shall take effect in a school district there shall be an immediate increase, if necessary, to five members or to nine members, according to the population of the school district, as above provided, and the gradual reduction to the prescribed membership as terms expire." The right of Koelin to retain his membership was a personal

right. As soon as he ceased to be a member, the number of members in the Board was reduced to five, the legal number for this district, and there was no power, other than the Legislature, which could again increase it.

The respondents contend that the Mayor was without authority to appoint three members to take office on the first of February, for the reason that the appointments were made on the fourteenth of January, and that there is no evidence that Koelin had lost his membership in the Board on that date. It is admitted that Koelin was not a resident on January 31st, and, as heretofore stated, he ceased to be a member of the Board as soon as he ceased to be a resident of the district. There is no doubt, therefore, that at the time of the organization of the Board on February 2d, there were three vacancies and that there were three persons holding certificates of appointment signed by the Mayor. I am of the opinion that the fact, if it be a fact, that Koelin was a member of the Board on January 14th, will not affect the case. The only point is whether or not there were three vacancies in the Board of Education at the time the certificates issued by the Mayor became operative.

As heretofore stated, Ritter, O'Hara, Stanley, Lasher, and Briesen constituted the Board of Education of Weehawken prior to February 1, 1914. On that date the terms of office of Stanley, Lasher and Briesen expired, leaving three vacancies to be filled by the Mayor in the manner provided in Chapter 370, P. L. 1912. In accordance with the authority conferred upon him, the Mayor did, on the 14th day of January, 1914, fill such vacancies by his appointment of John McFadden for the term of three years, George Liss, for the term of four years, and Albert Leuly, for the term of five years. The persons so appointed have taken the prescribed oath of office and have filed the same with the Township Clerk as required by Section 42 of the School Law. The Board of Education now consists of Ritter and O'Hara, whose terms will expire February 1, 1915, McFadden, whose term will expire February 1, 1917, Liss, whose term will expire February 1, 1918, and Leuly, whose term will expire February 1, 1919.

Chapter 370, above referred to, provides that the Board of Education shall organize on February 1st, unless such date falls on Sunday, in which case the organization shall be effected on the following day. As February 1st, this year, fell on Sunday, the Board was required to meet for organization on February 2d. It is admitted that Ritter and O'Hara were notified of the time and place of this meeting on February 2d, and that they refused to attend. The meeting, having been legally called, and a quorum being present, the election of Albert Leuly as President and George Liss as Vice-President was in accordance with the provisions of the statute.

It is difficult to believe that it was intended that the resolution directing the Secretary to post notices for an election for members of the Board of Education on the third Tuesday in March should be taken seriously. In order to make such an election legal, a decision by the Court declaring Chapter 370 of the Laws of 1912 unconstitutional would be necessary. Until such a decision is rendered, said chapter must be deemed to be in full force and effect, and the members of the Board of Education must be selected as directed therein.

I am unable to decide at this time as to the legality of the appointment of Hurley as Secretary at the meeting held on January 9, 1914, the action taken at the meeting held January 28th, in appointing Ritter and O'Hara as members of the Board of School Estimate, and the action taken at the meeting of February 2d, appointing Briesen as Secretary, for the reason that the evidence does not disclose whether the meetings of January 9th and 28th were regular or special meetings of the Board, and, if they were special meetings, whether all the members of the Board were notified of the time and place of the meetings and the purposes for which they were called. An early date will be fixed on which to take testimony covering these points.

February 24, 1914.

Affirmed by the STATE BOARD OF EDUCATION May 3, 1914.

APPOINTMENT OF SECRETARY

ALBERT LEULY ET AL.,
Appellants,
vs.
HENRY RITTER ET AL.,
Respondents.

William C. Asper, for Appellants.
Francis H. McCauley, for Respondents.

DECISION OF THE COMMISSIONER OF EDUCATION

In the decision rendered by me in this matter on February 24, 1914, three points were reserved until further evidence was submitted. These points were, the legality of the appointment of Hurley as Secretary at the meeting held on January 9, 1914; the action taken at the meeting held January 28th in appointing Ritter and O'Hara as members of the Board of School Estimate; and the action taken at the meeting of February 2d appointing Briesen as Secretary.

An agreed state of facts submitted this day contains a resolution adopted by the Board of Education of the Township of Weehawken at a meeting held February 2d, which read as follows:

"*Resolved,* That the office of the Secretary of the Board of Education and the District Clerk of the Board of Education be declared vacant, and that Arthur V. Briesen be and he is hereby appointed Secretary of the Board of Education and as District Clerk of the Board of Education in the Township of Weehawken, in the County of Hudson and State of New Jersey, for a term of one year, from the first day of February, 1914, to the first day of February, 1915, at a salary of $900.00 per annum, payable in twelve equal monthly installments of $75 each.

Dated February 2, 1914."

Section 56 of the general school law, passed at the second special session of 1903, reads in part as follows:

"A Secretary shall be appointed by the majority vote of all the members of the Board of Education; he shall be paid such salary as said board shall determine, and may be removed by a majority vote of all the members of said board."

It appears that the resolution above quoted declared the office of Secretary to be vacant, and also appointed Arthur V. Briesen as Secretary of the Board to fill the vacancy thus created. This action having been taken by the vote of a majority of all the members of the Board, William E. Hurley was removed from his office as Secretary of the Board of Education of the Township of Weehawken, and Arthur V. Briesen was regularly and legally elected as Secretary of said Board.

It is also agreed by the parties hereto that the meeting of the Board held January 28th was a regular meeting of the Board. At this meeting a resolution was adopted appointing Messrs. Ritter and O'Hara as members of the Board of School Estimate. It is well settled that when a special meeting of a municipal board is called, each member must have notice of the time and place of the meeting and the purpose for which it is called. It is not necessary that notice be sent to the members of a board of the time and place of a regular meeting for the reasons that the members of a board are presumed to know the time and place where a regular meeting will be held, and it is their duty to attend without formal notice. The meeting of January 28th was a regular meeting, and the action taken in appointing Messrs. Ritter and O'Hara was regular, and said persons are members of the Board of School Estimate for the ensuing year.

February 26, 1914.

Affirmed by the STATE BOARD OF EDUCATION May 3, 1914.

LEGALITY OF ENLARGEMENT OF DUTIES OF DISTRICT CLERK

FRED C. GASKILL, ET AL.,

Appellants,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

Testimony taken at the hearing before the Assistant Commissioner of Education at the Court House in New Brunswick on December 1, 1926, revealed the following to be the facts in this case:

For many years Everett C. Marshall has been employed by the Piscataway Township Board of Education in the capacity of district clerk at a salary which up to the school year 1925-26 at no time exceeded $1,000. For the school year 1925-26 and again for the year 1926-27 Mr. Marshall was appointed full-time district clerk at an annual salary of $3,000. On August 17, 1926, however, the Board passed a resolution limiting the duties of district clerk to those

clearly defined in the law and reducing the salary of such office to $1,000, but at the same time creating the office of business manager with various enumerated duties at a salary of $1,500 per year. On August 31, 1926, the resolution of August 17th above referred to was rescinded and a resolution adopted adding to the duties of district clerk the checking up and supervising of all supplies, looking after the business of the schools generally and the supervising of school janitors, buildings, grounds, equipment, etc. The resolution also provided that the district clerk was to act as truant officer and that his salary as district clerk with its various duties was to be $2,500 per year.

Appellants, as taxpayers of the district, contest the validity of the action of the Piscataway Township Board of Education in enlarging the duties of the district clerk beyond those prescribed by law and in employing and compensating Everett Marshall, a Board member, as clerk with power to perform such duties.

It is held in 35 Cyc., p. 900, that "Officers of school districts are public officers and like other public officers their authority and powers are generally determined by statute, and they can rightfully perform all those acts which the law expressly or impliedly authorizes * * *." And in describing the powers of public officers in the case of A. H. Andrews Co. *vs.* Delight Special School District, 95 Ark. 26, the Court held that "The rule respecting such powers is that in addition to the powers expressly given by statute to an officer or board of officers, he or it has by implication such additional powers as are necessary for the due and efficient exercise of the powers expressly granted or which may be fairly implied from the statute granting the express powers."

The question to be decided by the Commissioner therefore is whether a Board of Education can legally enlarge the duties of its district clerk. The office of district clerk must in the Commissioner's opinion be considered a public office, since it is provided for by statute and embodies certain permanent duties or functions prescribed by law. As stated in the opinions above quoted the authority of public officers is "determined by statute" and is limited to "those acts which the law expressly or impliedly authorizes" and they have only "such additional powers as are necessary for the due and efficient exercise of the powers expressly granted or which may be fairly implied from the statute granting the express powers." Since, therefore, the district clerk of a Board of Education derives his powers not from the School Board but from the statute, he will be limited to the exercise of such statutory powers express and implied, and the Board of Education is in the Commissioner's opinion without authority to enlarge or add to such powers. That the Legislature considered the duties of the office of district clerk as fixed and limited is evidenced by its having prohibited a member of a Board of Education from being interested in any contract with the Board of which he is a member and yet at the same time providing that the district clerk may be a member of the Board. Should the district clerk be able to perform and be compensated for duties and functions other than those expressly or impliedly conferred by statute upon him as clerk, then a Board member could be employed under the official title of district clerk in the very capacities in which the law intended to prevent his being employed while a Board member.

It is therefore the opinion of the Commissioner of Education that the Piscataway Township Board of Education cannot legally enlarge the statutory powers of the district clerk so as to include any function such as the supervising of the business of the schools and of buildings, grounds, equipment, janitors, etc., with the further result of enabling a Board member to engage in and be compensated for duties expressly denied him by statute. There would appear however to be nothing illegal in a district clerk's performing such duties as are logically connected with his statutory functions, such for instance as the distribution and supervision of school supplies, which duties are implied in his express power of purchasing school supplies.

It is therefore the opinion of the Commissioner of Education that the resolution of the Piscataway Township Board of Education of August 31, 1926, is illegal so far as it attempted to enlarge the duties of the district clerk to include the supervision of business generally and of buildings, grounds, equipment and janitors and also to include the duties of truant officer. It is accordingly hereby ordered that the Piscataway Township Board of Education proceed at once to take official action to confine the duties and compensation of the district clerk to those functions expressly or impliedly authorized by the School Law for that office.

January 7, 1927.

LEGALITY OF DISMISSAL OF DISTRICT CLERK

PISCATAWAY TOWNSHIP BOARD OF EDUCATION,

Appellant,

vs.

EVERETT MARSHALL,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

This action was brought by the Piscataway Township Board of Education on July 19, 1927, to secure the removal of Everett Marshall as District Clerk under the provisions of Chapter 128, P. L. 1927, approved March 22, 1927, which provided tenure protection for all district clerks who either before or after the passage of the act should attain fourteen years of service in the same district, and prohibited their removal except upon charges of "inefficiency, bad behavior or other just cause" filed with the Commissioner of Education and ascertained by him upon investigation to be true. The Respondent came within the provisions of the act at once upon its enactment, as he had already served fourteen or more years in that district.

A hearing in this case was conducted by the Assistant Commissioner on September 21, 1927, at the Court House in New Brunswick, at which both sides presented testimony.

Section 91, in Chapter 128, P. L. 1927, above referred to, in defining the duties of district clerks, provides among other things that the district clerk "shall record in a suitable book all proceedings of the Board of Education, of the

annual school meetings and of special school meetings, * * * and during the month of July in each year he shall present to the Board of Education a detailed report of the financial transactions of the board during the preceding school year and file a copy thereof with the County Superintendent of Schools."

The testimony before the Assistant Commissioner revealed that the Respondent failed in accordance with the above requirements of the law to record in a suitable book proceedings of the annual and special school meetings for the years from 1920 to 1927 inclusive, and also failed to properly record for those years the proceedings of the Board of Education meetings at which the annual budget was adopted. It was also proved that the financial report presented by the Respondent to the Piscataway Township Board of Education for each of the years 1921, 1923 and 1925 named a certain amount as constituting the total appropriation receipts for that particular year, while in reality in each case the amount was made up in part of moneys received or to be received out of the appropriation for the succeeding year for the purpose of making up a deficit for the year for which the report was rendered.

It also appears that in presenting the Board of Education with the figures upon which it was to estimate the budget for the various school years the Respondent greatly reduced the amount of the apportionment of State school moneys actually to be anticipated. A larger local appropriation was accordingly provided for in the budget and the additional amount of State moneys over and above the budget estimate was thus, when received, made available for the making up of a deficit for the preceding year.

The above acts of the Respondent were, in the Commissioner's opinion, unquestionably illegal and constituted official misconduct on his part of sufficiently grave a nature to warrant his dismissal, if performed during his present term of office. The question to be considered, however, is whether under the provisions of Chapter 128, P. L. 1927, a district clerk can be removed after coming under tenure for offenses committed during prior terms of office. None of the offenses on the part of the Respondent in this case occurred at the latest after the early part of the school year 1926, and consequently none of them occurred during his present tenure term fixed by statute.

The Commissioner cannot agree with Appellant's contention that the 1927 statute is merely remedial and simply transfers the jurisdiction of removal of district clerks from the local Board of Education to the Commissioner. The Commissioner does not under the 1927 law have jurisdiction, as contended by the Appellant, over offenses which may be committed by any district clerk, but only over offenses committed by a clerk after he has come under tenure and has begun to serve a term during good behavior and efficiency as distinguished from the limited term which he has been holding and which carried with it protection from dismissal by the Board only during the limited term fixed by the Board. There are thus presented in a case such as that under consideration two distinct terms, namely the tenure term which the incumbent is serving and the limited term which he formerly held, and consequently there arises the question of whether such clerk can now be removed for offenses committed prior to the commencement of his tenure term.

There are a number of cases which hold that a public official may be dismissed during a present term of office for offenses committed during a prior

term, but there is also an equally long line of authorities which hold the opposite view, among them being that of State *vs.* Jersey City, 25 N. J. L. 536, in which the Court, while not ruling upon the point as essential to the disposition of the case, held that "The Council have no power to expell a member for acts committed previous to his election." Moreover, there is a very vital difference between the case under consideration and those cases cited by the Appellant in support of his contention that a public official may be dismissed during his present term of office for offenses committed during prior terms. In none of the cases referred to by the Appellant did the official, who was being dismissed for prior offenses then hold his office under a statutory provision by which he was to continue to serve during good behavior and efficiency with consequent continued protection until the commission of some future offense. In the case before the Commissioner on the other hand the statute provides that "after any district clerk heretofore or hereafter elected has served as such for a period of fourteen or more years, he shall hold office during good behavior and efficiency." In the Commissioner's opinion it was thus very clearly the intent of the Legislature to create without regard to the past a new protective term for a district clerk who has served fourteen years in the district, by which he shall be continued in office as long as he shall thereafter continue to be efficient. Moreover, the prospective meaning to be given generally to language such as that in the act under consideration, namely that "No district clerk shall be dismissed or subjected to reduction of salary in said school district except for inefficiency, bad behavior or other just cause, etc.," is emphasized in the case of Holiday *vs.* Fields, 275 N. W. 642, in which occurred a statutory provision regarding removal from office for certain offenses. The Court held "As is usual in such statutes, no direct reference is made to future acts or omissions, but as there is no express declaration that it shall apply to the past offenses, and there is nothing in the words used that indicates a legislative intent that it shall do so, under the general rule of construction it must be given a prospective effect."

It is therefore the Commissioner's opinion that a district clerk such as the present Respondent, who has gained tenure under the 1927 act by fourteen or more years of service is entitled to protection thereafter during good behavior and efficiency regardless of offenses committed prior to the commencement of his tenure term. It is also the opinion of the Commissioner, contrary to Appellant's contention, that all jurisdiction over the removal of a district clerk after he has gained tenure has been transferred to the Commissioner of Education under the 1927 law and that consequently his immunity from removal by the Commissioner for past offenses is complete against any attempted removal for such offenses by the local Board of Education.

While, therefore, the acts of the Respondent above referred to are unquestionably to be condemned, the Commissioner is of the opinion that he has no authority to consider them as constituting grounds for removal from office, since they are all proved to have occurred prior to the Respondent's present term, which began on March 22d and is by statute one during good behavior and efficiency.

The appeal is accordingly hereby dismissed.

Dated, November 19, 1927.

POWERS OF A COMMITTEE OF A BOARD OF EDUCATION

IN THE MATTER OF THE APPLICATION OF WILSON TAYLOR, A CITIZEN AND TAXPAYER OF THE CITY OF HOBOKEN, AND A MEMBER OF THE BOARD OF EDUCATION OF THE CITY OF HOBOKEN, TO SET ASIDE CERTAIN RESOLUTIONS PASSED BY A BODY ASSUMING TO ACT AS A BOARD OF EDUCATION OF THE CITY OF HOBOKEN.

Merritt Lane, for the Appellant.
John J. Fallon, for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

At a meeting of the Board of Education of the City of Hoboken, held June 24th, 1912, the following resolution was adopted:

"*Resolved,* That the president appoint a committee of three, to be known as the Committee on Schools, to which committee the president of the Board of Education, until otherwise directed, may refer for examination and consideration matters concerning schools and school affairs; and, in conjunction with the president, shall have the power to act summarily in the interest of the public schools in cases of emergency. Said committee to report to the Board at its regular meetings."

This resolution gives to a committee the power to act summarily in case of emergency, and leaves to the committee, or the president, the right to decide as to the emergency. It is true that the resolution directs the committee to report to the board, but there is nothing to show that the action of the committee is not final, or that the report to the board is for any purpose except as a matter of information. In certain matters a vote of a majority of all the members of a Board of Education is required, and in all other matters the vote of a majority of a quorum is necessary. All business must be transacted in open meetings of the Board, regularly called. A committee can only consider matters referred to it and report its conclusions thereon to the board. The resolution under consideration attempts to give to a committee full power to act in certain cases and is, therefore, illegal.

August 22, 1912.

POWERS OF A COMMITTEE OF A BOARD OF EDUCATION

IN THE MATTER OF THE APPLICATION OF WILSON TAYLOR, A CITIZEN AND TAXPAYER OF THE CITY OF HOBOKEN, TO SET ASIDE CERTAIN RESOLUTIONS PASSED BY A BODY ASSUMING TO ACT AS A BOARD OF EDUCATION OF THE CITY OF HOBOKEN, HUDSON COUNTY, NEW JERSEY.

Merritt Lane, for the Appellant.
John J. Fallon, for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

At a meeting of the Board of Education held June 17th, 1912, the following resolution was adopted:

"*Resolved,* That the President appoint a committee of three to whom shall be referred the bids which may be submitted at this meeting; said committee to report thereon at next regular meeting, and said committee, until otherwise ordered, shall transact all other business in the supervision of school affairs."

The Petitioner asks that his resolution be set aside.

The resolution is clearly illegal. It attempts to confer upon a committee power to transact all the business of the board. Such power cannot be delegated to a committee.

The Petitioner also asks that the election of George W. Lankering as president of the Board be set aside.

This question has been decided in the "Matter of the application of Wilson Taylor to review certain proceedings of the Mayor of the City of Hoboken, and of persons assuming to act as members of the Board of Education of the City of Hoboken," decided this day.

August 22, 1912.

LEGALITY OF TRANSFER BY CITY BOARD OF APPROPRIATION IN BULK

BOARD OF EDUCATION OF THE CITY OF BAYONNE,

Appellant,

vs.

JOHN J. RYAN, CUSTODIAN OF SCHOOL MONEYS,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

Only issues of law are involved in the case under consideration, and it was accordingly agreed by both Appellant and Respondent that decision be ren-

dered on the pleadings and briefs of counsel without the necessity of a formal hearing.

It appears that on September 9, 1926, the Board of Education of the City of Bayonne adopted a resolution providing for the transfer of the sum of $25,000 from the Current Expense to the Building and Repair Account of the district, and that accordingly a warrant duly signed by the president and secretary of the Board of Education was forwarded to the Custodian of School Moneys together with a copy of the resolution above referred to for the purpose of effecting the transfer. On September 16th the Respondent informed the Board of Education that he could not make the transfer of funds ordered by the Board without the consent of the Board of School Estimate, which in this case had not been asked or given.

The Respondent in answering the petition of appeal defends his refusal to obey the order of the Bayonne Board of Education on the ground that he is acting in accordance with the rule of the State Board of Education adopted June 7, 1924, which reads as follows:

> "The district and State appropriation amounts are not subject to transfer from one account to another by resolution of the board of education. A transfer of any part of the district appropriation can be made only by resolution of the Board of School Estimate in Article VI districts and by vote at a regular or special district meeting in Article VII districts. Subdivisions of an 'account' or 'item' may be transferred by the board."

Article VIII of the 1925 Compilation of the School Law provides that all school moneys shall be held in trust by the Custodian of School Moneys and requires him to pay out such moneys on orders legally issued and signed by the president and district clerk or secretary of the Board of Education. In the case of The Board of Education of the City of Bayonne against the same Respondent, namely, John J. Ryan, Custodian, and Stephen J. Evans, School Auditor, decided by the Commissioner of Education on May 13, 1926, it was held that:

> "Of all school funds, except the proceeds of a bond issue, the Custodian of School Moneys is according to Section 274, Article XVIII of the School Law, merely a custodian in the most literal sense of the term and must pay out the school moneys held in trust by him by order of the Board of Education and on duly executed warrants without any exercise of discretion whatever on his part, and the responsibility is on the Board of Education alone for any illegal expenditure of school moneys made by it."

In the case under consideration therefore which does not involve the disposition of the proceeds of a bond issue but merely the transfer of annual appropriation funds from one account to another it is the opinion of the Commissioner that the Respondent has no choice but to transfer the $25,000 from the Current Expense to the Building and Repairs Account as ordered by the

Board of Education by resolution and by a duly executed warrant, and that the responsibility therefor rests not with the custodian but entirely with the Bayonne Board of Education.

Moreover, it is the opinion of the Commissioner that the Bayonne Board of Education was entirely within its legal rights in ordering the transfer of the $25,000 in question without the consent of the Board of School Estimate even though under the rule of the State Board of Education above referred to the Board of School Estimate had divided the annual appropriation for school purposes into separate items for Current Expense and Building and Repairs.

Section 94, of the 1925 Compilation of the School Law, provides that a city board of Education shall prepare and deliver to each member of the Board of School Estimate an itemized statement of the amount of money estimated to be necessary for the current expenses of and for repairing and furnishing the public schools for the ensuing school year, but Section 95 provides that between February 1st and 15th of each year "said Board of School Estimate shall fix and determine the amount of money necessary to be appropriated for the use of the public schools in such district for the ensuing school year, exclusive of the amount which shall have been apportioned to it by the County Superintendent of Schools."

In construing the above law the Commissioner of Education in the case of Hayes *vs.* Townsend, Comptroller, etc. (sustained by the State Board and reported on p. 671, 1925 Comp. School Law), held that

> "The language used clearly shows that it was the intent of the Legislature that the annual appropriation should be in bulk and not a separate appropriation for each purpose specified in the itemized statement received from the board of education. Had it been the intent of the Legislature that the appropriation should be itemized, the appropriate language would have been 'to fix and determine the several amounts needed for the several purposes specified in the certificate.'"

The Supreme Court also, when the above case reached it on appeal, followed the same line of reasoning:

> "The certificate (of the board of school estimate) is not part of the return, and we are therefore not informed whether it simply called for a lump sum or specified the items, but under Section 75 a certificate of a lump sum is plainly sufficient for all that the board of estimate has to determine is 'the amount of money necessary to be appropriated for the use of the public schools in such district for the ensuing school year * * *.' In our view, it became the duty of the board of estimate to go over the itemized statement of the board of education, and using it as a basis, determine the total amount necessary for the use of the schools. It could reach this result by striking out items or reducing them, but the result reached became a total and it is such total as modified by county appropriation that the board of estimate is to certify and the city council provide in the tax levy."

The above quoted provisions of the School Law upon the subject of the annual appropriation of the Board of School Estimate and as interpreted by the decision of the Commissioner and of the Supreme Court make it evident that after consideration of the itemized statement of the Board of Education the board of estimate must appropriate in bulk and that any attempt on the part of the latter body through its method of appropriation to control the exact disposition of school funds is a usurpation of the statutory powers of the Board of Education.

It is further the opinion of the Commissioner that the above quoted rule of the State Board of Education supporting the right of the Board of School Estimate to itemize the annual appropriation for school purposes and thus making the consent of the estimate board necessary to transfer from one item to the other is ineffective. Article I, Section 3 of the 1925 Compilation of the School Law, provides that the State Board of Education shall have power "to prescribe and enforce rules and regulations necessary to carry into effect the schools laws of the State." Any rule of the State Board of Education enlarging or extending the power of a city Board of School Estimate beyond its statutory function of appropriating in bulk the money necessary annually for school purposes is in the Commissioner's opinion inconsistent with the School Law, and hence also an ineffective enlargement of its own powers, namely, "to make rules and regulations necessary to carry into effect the school laws of the State." Appellant cites many convincing authorities among them Dillon on Municipal Corporations, to the effect that any rule or by-law of a public board or body "which is in conflict with the organic law of the State, or antagonistic to the general law, or inconsistent with the powers conferred upon the board adopting it is invalid."

In view of all the facts in the case it is therefore the opinion of the Commissioner of Education that the Bayonne Board of Education was entirely within its legal rights in ordering the transfer without the consent of the Board of School Estimate of $25,000 from the Current Expense to the Building and Repairs Account of the district, and that it was the duty of the Custodian of School Moneys to make such transfer upon receipt of a warrant duly executed as required by law. The appeal is accordingly hereby sustained and the Respondent, the Custodian of School Moneys, is directed to make the transfer of funds as directed by the Bayonne Board of Education.

December, 1926.

REFUSAL OF COMMON COUNCIL TO RAISE AMOUNT ORDERED FOR SCHOOL PURPOSES BY BOARD OF SCHOOL ESTIMATE

BOARD OF EDUCATION OF THE CITY OF LAMBERTVILLE,

Appellant,

vs.

THE COMMON COUNCIL OF THE CITY OF LAMBERTVILLE,

Respondent.

W. Holt Apgar, for the Appellant.

Walter F. Hayhurst, L. H. Sargent and George H. Large, for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The Appellant, at a meeting held on August 29, 1912, adopted resolutions requesting the Board of School Estimate to appropriate $75,000 for the purchase of land and the erection of a schoolhouse.

The Board of School Estimate, at a meeting held on September 9, 1912, fixed and determined the sum of $75,000 as necessary for the purposes named in the resolutions of the Appellant.

The Respondent has neglected and refused to provide the amount fixed and determined by the Board of School Estimate, and pleads in justification the following:

1. That the certificate of the Board of School Estimate was presented to the Common Council of 1912, and was not properly before the Common Council of 1913.

The evidence is that the resolution was presented to the Common Council in September, 1912, and that no action for raising the $75,000 certified to it by the Board of School Estimate was taken by the Common Council prior to its reorganization in January, 1913. The certificate of the Board of School Estimate is now before the Common Council, and, if the proceedings on which such certificate is based were legal, the Common Council must raise said sum of $75,000 and place it at the disposal of the Board of Education.

2. The second contention is that the Board of Education was not a legally constituted body.

The members of the Board of Education were appointed under the provisions of Chapter 233, P. L. 1911. This law was declared to be unconstitutional in the case of Sheridan *vs.* Lankering, 83 A. R. 641, but no action has been taken to remove said members, and until they have been removed by due process of law they continue to act as *de facto* members and their acts are legal.

3. The third point is that Archibald G. Smith, who acted as a member of the Board of School Estimate at the meeting of September 9, 1912, was not a member of said Board.

Smith was appointed a member of said Board on February 7, 1912. The minutes of the meeting of the Board of Education held April 24, 1912, contain the following:

> "The President named the following Committee according to the new By-laws—Board of Estimate, Mr. Malloy and Mr. Bowne."

Section 73 of the School Law provides for the appointment annually of two members of the Board of Education as members of the Board of School Estimate. These appointments are to be made during the month of January. Chapter 233, P. L. 1912, removed from office on January 31, 1912, all members of the Board of Education in office on that date. The appointment of Mr. Smith in February was, therefore, to fill a vacancy.

Section 73 further provides that "in case of any vacancy occurring in any such Board of Estimate by reason of the resignation, death or removal of any member thereof such vacancy shall be immediately filled by the body which originally appointed such member." There is nothing to show that Mr. Smith resigned and in the absence of such resignation there was no vacancy. Mr. Smith was a member of the Board of School Estimate on September 9, 1912. Even if there had been a vacancy the appointment of Mr. Bowne was null and void. The law prescribes that such vacancies shall be filled by the Board. The power cannot be delegated to the President.

There is some question as to whether Mr. Smith was notified of the meeting of the Board of School Estimate called for September 9, 1912. The Secretary of the Board testified that he notified Mr. Bowne. Mr. Smith declined to testify that a notice of the time and place of said meeting was given or sent to him. He testified, however, that he knew of the meeting, and thought he prepared the original resolution. A special meeting of a board is not legal unless all the members have had notice of the time, place and purpose of the meeting, but the law does not state how such notice shall be given. Mr. Smith was present at the meeting of the Board of Education held August 29, 1912, at which the resolution requesting the Board of Estimate to appropriate the $75,000 was adopted, and was also present at the meeting of the Board of Estimate on September 9th. Had he not been present at the meeting on September 9th, there might be a question as to the legality of the action taken on that date. The fact that he was present is sufficient proof that he received proper notice.

4. The fourth point is that the resolution adopted by the Board of Education on August 29, 1912, was irregular in that it did not state separately the sum needed for each purpose.

Section 76 of the School Law reads in part as follows:

> "Whenever a city board of education shall decide that it is necessary to raise money for the purchase of lands for school purposes, or for erecting, enlarging, repairing or furnishing a schoolhouse or schoolhouses, it shall prepare and deliver to each member of the Board of School Estimate of such school district a statement of the amount of money estimated to be necessary for such purpose or purposes."

It is evident from the language used that a statement of the total amount needed for all the purposes named in the statement is sufficient. Had it been the intention of the Legislature that the amount named for each item should be stated separately, the same language would have been used as in section 74, which provides the method of making appropriations for the current expenses of the schools. In that section it is expressly provided that the statement shall be itemized.

5. The fifth point is that the Common Council was unable to raise the money for the reason that the amount fixed and determined by the Board of School Estimate was in excess of the amount which the Common Council was authorized to raise by the issue of bonds for school purposes. The law prohibited the Common Council from issuing bonds for school purposes in excess of a sum equal to three per centum of the taxable property in the district, but the law gives to said council the option of raising the amount fixed and determined by the Board of School Estimate, by the issue of bonds, by direct tax or both. The evidence shows that the borrowing capacity was about $67,000. Bonds could be issued for that amount and the balance of $8,000 raised by direct tax. The Supreme Court in the case of Montclair *vs.* State Superintendent, 47 Vr. 68, held that it was mandatory upon the body having the power to make appropriations raised by taxes to cause the amount to be raised by tax or to borrow the same and secure its re-payment by the issue of bonds."

The Common Council further attempts to justify its refusal to act on the ground that the plot selected by the Board of Education was unsuitable, and was unsatisfactory to the people of the district. Whether the plot is or is not suitable is not to be determined by the Common Council. The law gives this power solely to the Board of Education. The Common Council has no discretion in such cases, its sole duty being to provide the amount of money fixed and determined by the Board of School Estimate.

It is ordered that the Common Council immediately take such action as will place at the disposal of the Board of Education the $75,000 fixed and determined to be necessary by the Board of School Estimate at its meeting held September 9, 1912.

April 8, 1913.

Decision of the State Board of Education

In August, 1912, the Board of Education of the City of Lambertville adopted resolutions requesting the Board of School Estimate to appropriate $75,000 for the purchase of a certain tract of land "and for constructing thereon a new school building and furnishing same and for repairs to existing school buildings."

In September, 1912, the Board of School Estimate certified to the Common Council of the City of Lambertville that it had appropriated the sum of $75,000 for the purpose of purchasing a certain site and for the purpose of erecting a school building thereon and that such sum of money was requested for such purposes, for furnishing the building and for repairs to existing school buildings.

The Common Council was requested to take proper measures to raise said sum of money for such purposes.

Section 74 of the School Law makes it the duty of the Board of Education of each City School District on or before the 15th day of May of each year to prepare for the Board of School Estimate an itemized statement of the amount of money necessary for current expenses of and for repairing and furnishing the public schools of the District for the following year.

Section 75 makes it the duty of the Board of School Estimate between the 15th of May and the first of June to fix and determine the amount of money necessary for the use of the public schools for the following year and to certify the same to the Common Council, Board of Finance or other body in the City having power to make appropriations.

By the same Section it is provided that the Common Council or other body "shall upon receipt of said notice, appropriate, in the same manner as other appropriations are made by it, the amount so certified as aforesaid."

Section 76 provides that when a City Board of Education decides that it is necessary to raise money for the purchase of land for school purposes or for erecting, enlarging and repairing or furnishing a schoolhouse, it shall prepare for the Board of School Estimate a statement of the amount of money estimated to be necessary for such purpose or purposes.

By the same Section it is made the duty of the Board of School Estimate to fix and determine the amount necessary and to certify such amount to the Common Council or other financial body.

By the same Section it is provided that:

> "said Common Council, Board of Finance or other body may appropriate such sum or sums, for such purpose or purposes, in the same manner as other appropriations are made by it."

It will be noticed that it is provided that the Common Council *shall* appropriate moneys necessary for the annual running expenses, but that for the purchase of land and erection of buildings the Common Council *may* appropriate the moneys.

In this case the Common Council evidently believed that it rested within its discretion whether to appropriate $75,000 or not for the purchase of a site and the erection thereon of a school building, for furnishing same and for repairs to other school buildings. It did not agree with the Board of Education about the site selected by the latter and for the purpose of ascertaining the wishes of the people it caused a ballot to be taken, which had no binding effect, but which was purely advisory. At such ballot 412 votes were cast, 46 of which were in favor of the site selected by the Board of Education, 353 in favor of the site preferred by the Common Council, while 13 were rejected.

Following this vote, the Common Council refrained from appropriating $75,000 requested by the Board of Education and fixed and determined by the Board of School Estimate. Proceedings were instituted before the Commissioner by the Board of Education to compel the Common Council to raise the $75,000. In such proceedings the Common Council offered to prove that the site selected by the Board of Education was not a proper site. The

Commissioner declined to receive the evidence on the ground that the Common Council had no discretionary rights or powers in the matter, that its sole duty was to raise the money, the amount of which was fixed and determined by the Board of School Estimate.

In the case of Montclair *against* Baxter, 47 Vroom 68, the Court in the course of its opinion wrote that when the Board of School Estimate has fixed and determined the amount of money necessary for the purchase of land and the erection of a schoolhouse, the Common Council, notwithstanding the use of the word "may" in Section 76, has no discretion, but must make the appropriation. While, in view of the actual decision rendered, the language of the Court might be viewed as a mere expression of opinion, still it has been assumed since 1908, when it was written, to be the law and to be binding upon Common Councils.

In view of this decision and of the peculiar facts of this case, it has been strongly urged that proceedings on the part of the Board of Education and the Board of School Estimate for the purpose of raising the money for the purchase of land and the erection of a building thereon must literally and strictly comply with the statute. In short, counsel for the Common Council herein contends that a strict rather than a substantial compliance with the Statute is necessary. We cannot ignore the fact that Boards of Education are not composed of technical lawyers and in the absence of a decision of the Court we are unwilling to lay down a rule which would require a microscopical analysis of proceedings for the raising of money for school improvements. To us it seems sufficient if the provisions of the statute, fairly construed, are complied with.

This case was very fully argued before the Committee, and while many points, chiefly of a technical nature, were presented, special stress was laid upon one. It was urged that as the resolution of the Board of Education and also of the Board of School Estimate called for the purchase of a particular site, the Common Council was justified in declining to appropriate the money in view of the decision in the case of the Board of Education *against* Montclair, 47 Vroom 59. In that case the resolution of the Board of School Estimate fixed and determined the amount of money necessary for the erection of a schoolhouse at $75,000, "on condition that a school building containing 20 units shall be erected." The Court held that the resolution by its very terms was conditional upon a certain kind of a school building being erected. The Court, therefore, held that the resolution did not fix and determine the amount as required by Statute and that the Common Council was right in refusing to appropriate the money.

In this case the Common Council of Lambertville contends that the resolution of the Board of School Estimate was conditional in that it fixes $75,000 for the purchase of a particular site, etc. As we understand its argument, it is that the resolution is the equivalent of a resolution fixing and determining $75,000 for the purchase of a site and the erection of a building thereon on condition that a particular site be secured. Its theory is that if it is conditional to fix an amount provided a certain kind of a building can be secured for it, it is just as conditional to fix an amount provided a certain site can be secured.

In this case the Board of School Estimate absolutely fixed and determined the amount of money necessary to carry out the objects of the Board of Education and such objects included the purchase of a particular site. In the Montclair case the Board of School Estimate did not, as the Court held, fix and determine the amount necessary for the objects expressed by the Board of Education. In that case the Board of School Estimate in effect said: We fix and determine the sum of $175,000 on condition that a certain result can be accomplished.

In this case the sum was fixed absolutely as required by statute and presumably the Board of School Estimate, before fixing it, ascertained that the amount of $75,000 was adequate for the purchase of the particular site and for the other purposes expressed in the resolution of the Board of Education.

The decision of the Commissioner is affirmed.

July 10, 1913.

Affirmed by the SUPREME COURT, 9 Atlantic Reporter 242.

DECISION OF THE COURT OF ERRORS AND APPEALS

We agree with the Supreme Court in the matters specifically decided by that court. We differ on one point which was probably overlooked because not emphasized in the brief, although raised in the reasons. The resolution submitted by the Board of Education to the Board of Estimate asked that $75,000 be appropriated "with which to purchase, or take and condemn the above mentioned tract of land, and for constructing thereon a new school building and furnishing same and for repairs to existing school buildings."

As pointed out by the State Board of Education in its decision, the school law makes a distinction between the appropriation for current expenses and for repairing and furnishing the schools, which is to be made under section 74, and the appropriation of money for the purchase of lands for school purposes or for erecting, enlarging, repairing or furnishing a schoolhouse or schoolhouses, which is to be made under section 76. Under section 74 an itemized statement of the amount of money estimated to be necessary must be delivered to each member of the Board of Estimate. Under section 76 the statement is not specifically required to be itemized. Repairs are provided for in both sections, but it is evident that the Legislature contemplated a distinction between repairs under section 74 and repairs under section 76. A sensible distinction is that under the former only ordinary current repairs are meant, such as would naturally form part of the current expenses of the schools; under the latter are meant those more important repairs which may properly be likened to the enlarging of a schoolhouse. The maxim *noscitur a sociis* is applicable. The repairs for which the present appropriation is sought are undoubtedly of the character of current expenses, since they are repairs to existing school buildings and it is not shown that any but ordinary necessary repairs are contemplated. The amount asked therefor should have been separately stated.

Moreover, although section 76 does not in terms require an itemized statement, it requires the Board of Education to deliver to each member of the

Board of Estimate a statement of the amount of money estimated to be necessary for the purpose or purposes. The obvious intent was to enable the Board of Estimate to act intelligently in fixing and determining the amount necessary for such purpose or purposes. It would be quite impossible for the Board of Estimate to act intelligently upon a certificate which included in a lump sum the amount necessary for purchase of land and erecting a new schoolhouse, and the amount necessary for repairs to existing schoolhouses. An appropriation made in that way would put it in the power of the Board of Education to expend the whole appropriation for repairs.

For these reasons we think the judgment should be reversed and a judgment entered in the Supreme Court setting aside the proceedings, with costs.

ANNUAL SCHOOL APPROPRIATION DISCRETIONARY WITH CITY GOVERNING BODY ABOVE STATUTORY LIMITATION

THE BOARD OF EDUCATION OF SOMERS POINT,

Appellant,

vs.

COMMON COUNCIL OF THE CITY OF SOMERS POINT,

Respondent.

Mark Townsend, Jr., for Appellant.
L. A. Higbee, for Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

This action is brought by the Board of Education of Somers Point appealing from the action of the Common Council of Somers Point, on March 6, 1923, in re-appropriating as the amount to be expended for Manual Training purposes in the schools for the coming year, 1923-1924, the unexpended balance of $500 already on hand in the Manual Training Account instead of adding such amount in accordance with the certification of the Board of School Estimate to the total appropriation of $11,475 fixed by the council as the amount to be raised by taxation.

In an earlier action brought by the Somers Point Board of Education against the Common Council of that city to contest the legality of this same annual appropriation for 1923-1924, the Common Council made in the pleadings, filed with this office the uncontradicted statement, that the ratables in the district as shown upon the Assessor's books and turned in to the County Board of Taxation for the year 1923, amounted to $825,889.96. Section 91, Article VI, of the New Jersey School Law, moreover provides that "Any amount (annual school appropriation in city districts) in excess of three-fourths of one per cent of the taxable valuation of the real and personal property, shall be appropriated only with the concurrence and consent of said common council, board of finance or other body expressed by its resolution duly passed."

In accordance with the above provision of law, it is apparent that the Board of Education of Somers Point, is entitled only to the sum of between $6,000 and $7,000 or $6,194.17, to be exact, as its annual appropriation for school purposes for 1923-1924, unless the consent of the Common Council is obtained to an amount in excess of ¾ of 1% of the $825,889.96, comprising the taxable valuations of the district.

In view of the above facts therefore and of the fact that the amount of $11,475 appropriated on March 6, 1923, by the Common Council and to be raised by taxation is already considerably in excess of $6,194.17, the maximum amount it can legally be compelled to appropriate, the Commissioner deems it unnecessary to go into the merits of the Common Council's refusal to add the desired $500 for Manual Training purposes to its appropriation of $11,475, to be raised by taxation. Since the Council has already appropriated an amount in excess of the ¾ of 1% of the taxable valuations which it is compelled to appropriate, its reasons for refusing to appropriate additional money are immaterial and its refusal cannot in the Commissioner's opinion be interfered with.

The appeal is accordingly hereby dismissed.

October 18, 1923.

Decision of the State Board of Education

In February, 1923, the Board of School Estimate of Somers Point fixed the amount to be appropriated for the current expenses for the school year, 1923-1924, and to be raised by taxation, the sum of $13,475, after deducting the estimated State school moneys to be received. This was "in excess of three-fourths of one per cent. of the taxable valuation of the real and personal property" and therefore could be "appropriated only with the concurrence and consent of the Common Council." (New Jersey School Laws, Art. 6, Sec. 91). The Common Council refused to vote this amount but passed a resolution reducing it to $11,475, stating in its resolution that an item of $500, for manual training, which was included in the resolution of the Board of School Estimate, should be taken from an unexpended balance of that amount then on hand from the previous year and placed to the credit of the appropriation for the year 1923-1924. The Board of Education appealed to the Commissioner only with respect to the direction of the Common Council concerning this particular item, claiming that the Council had no right to control the expenditure of the funds of the Board of Education.

This contention of the Board of Education is, as a matter of law, correct, but in this case it is immaterial since, inasmuch as the annual school appropriation was in excess of three-fourths of one per cent. of the taxable valuations of the City of Somers Point, no amount in excess thereof could be appropriated without the consent of the Common Council, and any reasons given by it for its action or methods used in arriving at its decision are of no consequence.

The Board of Education has not raised the question whether the Council could, by resolution, fix the amount of the school appropriation, in place

of the Board of School Estimate, which is the body designated by law to make the appropriation, and therefore that question is not before us for determination.

It is recommended that the Commissioner's decision dismissing the appeal on the ground above stated be affirmed.

OBLIGATION OF CITY GOVERNING BODY TO RAISE MONEY FOR SCHOOL PURPOSES

BOARD OF EDUCATION OF THE CITY OF LONG BRANCH,

Appellant,

vs.

BOARD OF COMMISSIONERS OF THE CITY OF LONG BRANCH,

Respondent.

John W. Slocum, for Appellant.
Thomas P. Fay, for Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

This appeal is brought from the action of the Board of Commissioners of the City of Long Branch on February 14, 1922, in repealing an ordinance passed by it on January 31, 1922, providing for the raising of $40,000, the amount certified to the Board of Commissioners by the Board of School Estimate as being necessary for the purchase of a site for a school building.

The Board of Commissioners defends its action on the ground, first, that the Commissioner of Education has no jurisdiction over a dispute of this kind arising between a board of education and the appropriating power of a city school district, and that the Commissioner could make no decision which would be binding upon the Commissioners of the City of Long Branch, and, secondly, on the ground that the Board of Commissioners is the only elective body in the district and therefore has the right before appropriating any money for a purpose such as described above to decide whether the site in question is satisfactory for such purpose. It is also contended by the Respondent that the Commissioner has lost jurisdiction in this matter by reason of having prejudged the points at issue in a letter.

It is not difficult to dispose of Respondent's latter contention. A letter upon the law which governs this case was written by this department to a citizen in Long Branch, but such letter was an informal answer to an inquiry as to the law and written more than two months in advance of the bringing of this appeal. There was, in other words, no case before this office at the time the inquiry was answered.

The right of the Commissioner of Education to assume jurisdiction in a case of this kind has been decided by the Supreme Court in the case of the Town Council of Montclair *vs.* Charles J. Baxter, State Superintendent. In

this case the same question was involved, namely, the refusal of the Common Council of a city to appropriate money certified to it by the Board of School Estimate. Justice Swayze in writing the opinion held "that this case involved a controversy arising under the school law; that the State Superintendent had jurisdiction; that the prosecutors should have exhausted their remedy by appeal to the State Board of Education, and that, as they failed to do so, the certiorari was allowed prematurely."

In this case also the second contention of the Respondent in the present case was also decided by Justice Swayze, namely, as to whether it is mandatory upon the appropriating power to raise the amount certified to it by the board of school estimate. His opinion upon this point was as follows: "Each (section of the law) authorizes the Board of School Estimate to fix and determine the amount necessary for the purposes of that section. These words, "fix and determine," seem to us intended to place the power of determining the amount in the Board of School Estimate without its being subject to review by the town council."

It has also been decided by the Commissioner of Education in a number of cases before him that it is mandatory upon the appropriating power in a city school district to raise the money certified to it by the Board of School Estimate within the 3% of the taxable valuation limitation fixed by statute. Such was the decision in "The Board of Education of the City of Bridgeton *vs.* The Common Council of the City of Bridgeton," reported on page 452, 1921 Edition of the School Law; "The Board of Education of the City of South Amboy *vs.* The Common Council of the City of South Amboy," reported on page 454, 1921 Edition, School Law, and "The Board of Education of the City of Lambertville *vs.* The Common Council of the City of Lambertville," reported on page 447, 1921 Edition, School Law. The Commissioner's decision in the latter case was affirmed by the State Board of Education, and in that case it was decided that "whether the plot is or is not suitable is not to be determined by the Common Council. The law gives this power solely to the Board of Education. The Common Council has no discretion in such cases, its sole duty being to provide the amount of money fixed and determined by the Board of School Estimate."

In view of the decisions in the cases cited it is the opinion of the Commissioner of Education that he has jurisdiction in the case at hand as being a dispute arising under the School Law, and it is further his opinion that since the amount asked for by the Board of Estimate, namely, $40,000, is within the 3% of the taxable valuations of the district fixed by statute, it is mandatory upon the Board of Commissioners to raise the money aforesaid, and that the matter of selecting the proposed site is a function solely of the Board of Education and not of the Board of Commissioners.

The appeal is accordingly hereby sustained and said Board of Commissioners of the City of Long Branch is hereby ordered to appropriate and raise at once the $40,000 fixed and determined by the Board of School Estimate as necessary for a school site and duly certified to such Board of Commissioners.

Dated June 14, 1922.

REFUSAL OF COMMON COUNCIL TO RAISE AMOUNT ORDERED FOR SCHOOL PURPOSES BY BOARD OF SCHOOL ESTIMATE

THE BOARD OF EDUCATION OF THE CITY OF BRIDGETON,

Appellant,

vs.

THE COMMON COUNCIL OF THE CITY OF BRIDGETON,

Respondent.

Jacob B. Jones, City Clerk, for the Appellant.
George W. McCowan, Secretary Board of Education, for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

It appears that the Board of Education of the City of Bridgeton requested the Board of School Estimate to appropriate the sum of $75.000 for the purpose of erecting a new High School building in said city and that the Board of School Estimate appropriated said amount and certified its action to the Common Council, the body having the power to make appropriations of money raised by the tax in said city, on August 19, 1913. The said amount has not been raised and the Board of Education has applied to the Commissioner of Education for relief.

It does not appear that there was any irregularity in the proceedings of the Board of Education or the Board of School Estimate, but the Common Council has neglected to provide the amount appropriated and has adopted a preamble and resolutions requesting certain information from the Board of Education. Said preamble and resolutions read, in part, as follows:

> 'Whereas, The City Council of the City of Bridgeton is vested with the power to make appropriations of money raised by tax, and is responsible for said appropriations when so made.
>
> "Resolved, That it is the opinion of the City Council of the City of Bridgeton that, as the body responsible for the city finances and for the tax burdens placed upon the people, the City Council is entitled to have full and accurate knowledge of a situation which demands, in addition to the large annual school expenses, an appropriation of $75,000."

It is evident from the above quotations that the City Council is mistaken as to its powers and duties with reference to the public schools. It appears to be under the impression that the Board of Education is a department of the city government and, therefore, subject to the supervision of the City Council.

There are two classes of school districts, known respectively as "City School Districts" and "Township, Incorporated Town and Borough School Districts." City School Districts are governed by the provisions contained in Article VI of the School Law.

Bridgeton, being a City School District, is governed by the provisions of said Article, and the Board of Education is incorporated under section 45 of the School Law, and is a municipal corporation separate and distinct from the city government.

The intent of the law to keep the finances of the School District entirely separate from those of the municipality in which the School District is situate is clearly shown in the provisions contained in section 185, which reads as follows:

> "Nothing in this article shall be construed as giving to the township committee, common council or other governing body of any municipality any control over moneys belonging to the school district in the hands of the custodian of the school moneys of said district, but said moneys shall be held by such custodian in trust, and shall be paid out by him only on orders legally issued and signed by the president and district clerk or secretary of the board of education; any ordinance, by-law or resolution of a township committee, common council or other governing body of any municipality attempting to control such moneys, or which shall, in any way, prevent the custodian of school moneys of the school district from paying the orders of the board of education as and when they shall be presented for payment shall be absolutely void and of no effect," and in section 246, which provides that school districts shall be governed solely by the provisions of the general school law.

It is very evident from the above quotations that the Common Council has no control over school moneys, and that whatever powers and duties it has in relation to the public schools are such as are conferred or imposed upon it by the School Law.

These powers and duties are found in sections 73, 75 and 76. Section 73 provides for the appointment of two members of the Common Council as members of the Board of School Estimate; section 75 makes it mandatory upon the Common Council to raise the amount certified to it by the Board of School Estimate as necessary for the maintenance of the schools, and section 76 directs the Common Council to raise, either by direct tax or by the issue of bonds, the amount certified to it by the Board of School Estimate as necessary for the purchase of land for school purposes and for erecting, enlarging, repairing or furnishing schoolhouses.

In the case of The Town Council of Montclair *vs.* The State Superintendent, 47 Vr. 68, the Supreme Court held that "Under section 76 of the School Law, when the Board of School Estimate has fixed and determined the amount necessary for the purchase of land and erection of a school house, it is mandatory upon the body having the power to make appropriations of money raised by tax to cause the amount to be raised by tax or to borrow the same and secure its payment by the issue of bonds."

The Board of Education and the Board of School Estimate having complied with all the requirements of the law, and the amount of the appropriation having been determined by the Board of School Estimate, the failure of

the Board of Education to forward to the Common Council the information requested in the resolutions above referred to does not constitute a valid excuse for the failure of the Common Council to perform the duty imposed upon it by section 76 of the School Law.

The Common Council has no power to increase or decrease the amount certified, the right to determine the amount necessary to be raised for school purposes being vested solely in the Board of School Estimate; neither is it in any wise responsible for expenditure of school moneys.

It is the duty, therefore, of the Respondent immediately to raise and place to the credit of the Appellant the sum of seventy-five thousand dollars for the erection of a high school building.

October 31, 1913.

REFUSAL OF COMMON COUNCIL TO RAISE MONEY ORDERED

THE BOARD OF EDUCATION OF THE CITY OF SOUTH AMBOY,

Appellant,

vs.

THE COMMON COUNCIL OF THE CITY OF SOUTH AMBOY,

Respondent.

Hon. Adrian Lyon, for the Appellant.
Leo J. Coakley, for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

This appeal is taken by the Board of Education of the City of South Amboy from the action of the Common Council of the City of South Amboy in refusing to raise the sum of $85,000 for the erection of a new schoolhouse as provided by the Board of School Estimate of the said city. A hearing in the case was given and argument of counsel was heard.

The argument offered in behalf of the Common Council was to the effect that the city was already heavily bonded and that the high cost of labor and material in the construction of buildings was such that it was not expedient to go into the matter of building at the present time. There was no contention that the action of the Board of Education in requesting the amount of money to be voted by the Board of School Estimate or that the action of the Board of School Estimate in voting the money for a new school building was in any way defective, nor was it contended that the amount asked for was in excess of 3 per cent of the ratables in the taxing district. The argument for not proceeding to raise the money ordered by the Board of School Estimate was one of expediency. There was no contention that the law under section 76 of the School Law was not fulfilled.

In the case of Montclair *vs.* State Superintendent, 47 Vr. 68, the court expressed itself as follows:

Under section 76 of the School Law when the Board of School Estimate has fixed and determined the amount necessary for the purchase of land and erection of a schoolhouse, it is mandatory upon the body having the power to make appropriations of money raised by tax, to cause the amount to be raised by tax, or to borrow the same and secure its repayment by the issue of bonds.

It thus appears that the Common Council or governing body of a city has nothing to do with the ordering of the money to be raised for the building of schoolhouses. When ordered to do so by the Board of Education, through the Board of School Estimate, the Common Council has no choice in the matter.

It is therefore hereby ordered that the Common Council of the City of South Amboy proceed to raise the amount of money ordered by the Board of School Estimate for the building of a schoolhouse either by direct tax or by borrowing the money and issuing bonds for the repayment of the same. The appeal of the Board of Education of the City of South Amboy is hereby sustained.

May 24, 1917.

REFUSAL OF CITY COMMISSIONERS TO RAISE AMOUNT CERTIFIED BY BOARD OF ESTIMATE

THE BOARD OF EDUCATION OF THE CITY OF MILLVILLE,

Appellant,

vs.

THE CITY COMMISSIONERS OF THE CITY OF MILLVILLE,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

On May 17, 1916, the Board of School Estimate of the City of Millville fixed and determined the amount of money necessary to be appropriated for the use of the public schools in the district for the ensuing year, exclusive of the amount which would be apportioned by the County Superintendent of Schools. This was in accordance with the law constituting the Board of School Estimate as the authority to determine the amount of money to be raised for the ensuing year for school purposes. It appears that at the close of the school year there was a balance of some $3,795 in the hands of the Custodian of the school district of Millville. The matter in dispute centers on this balance. In making the assessment levy for taxes the City Commissioners deducted this balance in the hands of the Custodian from the amount of money certified to them by the Board of School Estimate. There seemed to prevail an assumption that the balance of $3,795 belonged to the funds of the city because the City Treasurer was also the Custodian of School Moneys. Hence it was argued that the City Commissioners could

lapse into the moneys of the city this balance that belonged to the Board of Education of the school district of Millville.

The Board of Education appeals from this action and demands that the total amount of money certified by the Board of School Estimate shall be paid to the Custodian of School Moneys regardless of the amount of the balance remaining in the hands of the Custodian at the close of the school year.

It must be understood that a school district is a separate corporate entity. The Board of Education, representing the school district, makes up a budget needed for the current expenses and presents such budget to the Board of School Estimate, which meets each year between the 15th day of May and the 1st day of June. The amount of money needed is made up of several items and is presented by the Board of Education to the Board of School Estimate for its consideration. The Board of School Estimate makes up in bulk and certifies in bulk under the law the total amount of money to be raised. The law reads:

"The Board of School Estimate shall, on or before the last named date (June 1st), make two certificates of said amount signed by at least three of the members of said Board, one of which certificates shall be delivered to the Board of Education of said school district and the other to the common council, board of finance or other body in the city having the power to make appropriations of money raised by taxation in such city. Said common council, board of finance or other body shall upon receipt of said notice appropriate in the same manner as other appropriations are made by it the amount so certified as aforesaid and said amount shall be assessed, levied and collected in the same manner as moneys appropriated for other purposes in such city shall be assessed, levied and collected; provided that any amount in excess of three-fourths of one per centum of the taxable valuation of the real and personal property shall be appropriated only with the concurrence and consent of the said common council, board of finance or other body expressed by its resolution duly passed."

This section is mandatory in its terms. The governing body of a city has no election but to have ordered, assessed and collected the amount of money certified to it by the Board of School Estimate and to pay the full amount certified to the Board of Education through its Custodian.

In the case of Townsend *vs.* State Board of Education, 88 N. J. L. 100. the court expressed itself upon this question as follows:

Reading the act as a whole it would seem that the intent was to substitute for the city council the Board of School Estimate, a joint body, as the arbiter in fixing the annual appropriation for the schools. This amount when duly certified to the council is mandatory on it.

It will thus appear that the governing body of the city has no authority nor control over the amount of money that shall be raised for school purposes in the City of Millville, unless the amount certified for current expenses, for building and repairing, and for manual training is in excess of

three-fourths of one per centum of the taxable valuation. This question has not been raised in the petition or answer before me.

I therefore conclude in this case that the Board of Education is entitled to receive from the governing body of the city the total amount of money certified by the Board of School Estimate in May, 1916, without any deduction therefrom, notwithstanding there was failure to assess and collect the full amount.

April 24, 1917.

BOARD OF ESTIMATE CANNOT CHANGE AMOUNT ONCE CERTIFIED

BOARD OF EDUCATION OF RAHWAY,
Appellant,

vs.

BOARD OF SCHOOL ESTIMATE OF RAHWAY,
Respondent.

For the Appellant, F. C. Hyer.
For the Respondent, Francis V. Dobbins.

DECISION OF THE COMMISSIONER OF EDUCATION

On the 27th day of May, 1914, the Board of School Estimate of Rahway fixed and determined $27,830.99 as the appropriation for maintaining the schools in the School District of the City of Rahway, for the school year beginning July 1, 1914. This amount was certified to the Board of Education and the Common Council, as required by law. At a meeting of the Common Council held June 23, the ordinance providing for raising the amount of said appropriation was laid over, the Council alleging as a reason for such action that the Board of School Estimate in fixing and determining the amount of the appropriation had not taken into account an unexpended balance to the credit of the Board of Education. On August 3d, the Board of School Estimate met, reconsidered the resolution adopted May 27th, and adopted another resolution fixing and determining the amount of the appropriation for the school year beginning July 1, 1914, at $24,260.59. This meeting was held pursuant to a call signed by three members of the Board, and without any previous action by the Board of Education. At a meeting of the Common Council held August 4th, an ordinance was passed ordering that there be raised by tax the reduced amount appropriated by the Board of School Estimate.

There are three issues raised in this controversy. First. Has the Board of School Estimate the power to reduce the amount fixed and determined by it after the certificates have been filed with the Board of Education? Second. Can a legal meeting of the Board of School Estimate be held except in pursuance of a request from the Board of Education? Third. Had the Common Council power to postpone action?

Section 74 of the School Law makes it the duty of the Board of Education to deliver to each member of the Board of School Estimate, on or before the 15th day of May, "an itemized statement of the amount of money estimated to be necessary for the current expenses of and for repairing and furnishing the public schools of such district for the ensuing school year, and also the amount which shall have been apportioned to such school district by the County Superintendent," and section 75 makes it the duty of the Board of School Estimate, between the 15th day of May and the 1st day of June, to "fix and determine the amount of money necessary to be appropriated for the use of the public schools in such district for the ensuing school year, exclusive of the amount which shall have been apportioned to it by the County Superintendent of Schools." The section further provides that a certificate of said amount shall be delivered to the Common Council and to the Board of Education, and that "said Common Council, board of finance or other body shall, upon receipt of said notice, appropriate * * * the amount so certified as aforesaid."

The Board of School Estimate has fifteen days after the receipt of the statement of the Board of Education to determine the amount of the appropriation for the ensuing school year. Each member of the Board is furnished with a copy of the statement, and has ample opportunity to make such investigation of the school conditions as will enable him to act intelligently in determining the amount necessary to be appropriated. The Respondent claims that it was misled by the failure of the Board of Education to state that there would be a balance at the end of the school year on June 30th. The Secretary of the Board of Education is also the Secretary of the Board of School Estimate. As Secretary of the Board of Education he is its general accountant, and has charge of the books and financial papers of the Board. Any information as to the finances of the Board of Education could have been furnished by him. The law specifies the items which shall be included in the statement furnished by the Board of Education, and while the Appellant could have included the amount of the balance, it could not be compelled to do so. The Board of School Estimate having, prior to June 1st, certified to the Common Council and to the Board of Education the amount of the appropriation, the matter was beyond its control, and the action taken on August 3d, attempting to reduce the amount of the appropriation, is null and void.

Can a legal meeting of the Board of School Estimate be held except in pursuance of a request from the Board of Education?

The powers of the Board of School Estimate are limited to acting upon requests for appropriations by the Board of Education. Having acted upon a request of the Board of Education and adjourned, it cannot reconvene until another request is received.

Had the Common Council power to postpone action?

In the case of Montclair *vs.* State Superintendent, 47 Vr. 68, the Court held that "when the Board of School Estimate has fixed and determined the amount necessary for the purchase of land and erection of a schoolhouse, it is mandatory upon the body having the power to make appropriations of

money raised by tax to cause the amount to be raised by tax or to borrow the same." This decision construed section 76 of the School Law. The language of section 75, providing for appropriations for maintaining the schools, is quite as mandatory, and the decision of the Court applies with equal force to that section. The Common Council cannot refuse to provide the money, for the reason that, in its opinion, the amount fixed and determined is larger than necessary. Neither can it postpone action. Section 75 directs the Common Council *"upon receipt of such notice"* to appropriate the amount certified to it by the Board of School Estimate.

It is ordered that the Common Council of the City of Rahway appropriate to the use of the Board of Education the sum of $27,830.99.

December 15, 1914.

LEGALITY OF AUTHORIZATION FOR BOND ISSUE IN ARTICLE VII SCHOOL DISTRICT

STEPHEN LITTLE,

Appellant,

vs.

BOARD OF EDUCATION OF MORRISTOWN,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

On February 7, 1928, a special bonding election was held in the School District of Morristown at which the Board of Education was authorized to purchase a tract of land for school purposes at a cost not to exceed the sum of $15,000 and to erect and equip an addition to the high school building at a cost not to exceed $385,000. The above named Appellant thereupon presented this appeal as a taxpayer and resident in order to protest against any action being taken by the Morristown Board of Education under the authorization of the voters on the ground that the Board accepts some three hundred non-resident pupils and that a school district has no legal right to erect school buildings to accommodate the pupils of other districts.

It was agreed by both parties to this controversy to submit the case for decision upon briefs as an issue of law rather than of fact.

It is true that Section 193 of the School Law does specifically require each school district to "provide school facilities and accommodations for all children residing in the district and desiring to attend the public schools therein." In the Commissioner's opinion, however, this section, while imposing a clear and definite obligation upon the Board of Education of each district as to the facilities to be provided for the pupils of its own district, contains no prohibition whatever as to the extending of these facilities to the pupils of other districts as well. It Frequently hapens that a school board, anticipating rapid growth in its own schools or feeling that better grading can be accomplished and the interests of its own pupils can be generally better served by the provision of school facilities which are extensive and commodious, proceeds to

place such a proposition before the legal voters and thus upon securing their authorization to erect a school building in which there proves to be plenty of room for outside pupils. That the Legislature contemplated just such a situation is shown by the provisions of Section 180 of the School Law which states that:

"Non-residents of a school district if otherwise competent, may be admitted to the schools of said district with the consent of the Board of Education upon such terms as said Board may prescribe;" and when it further provided in Section 9 that the State Board of Education may "require any district having the necessary accommodations to receive pupils from other districts at rates agreed upon or which it may fix in the event of disagreement."

It is also very evident that the Legislature did not contemplate that every school district would maintain a school of higher grade of its own but rather that high school facilities would be secured by the pupils of districts lacking such high schools through the instrumentality of districts having the necessary accommodations, when it provided in Section 183 that:

"Any child who shall have completed the course of study pursued in the schools in the district in which he or she shall reside may, with the consent of the Board of Education of said district and of the Board of Education of a district in which he or she shall desire to attend school be admitted to a school of higher grade in said last mentioned district."

The Commissioner cannot agree with Appellant's contention that according to the Towner *vs.* Mansfield decision of the Supreme Court (p. 606, School Law), a pupil must reside in the district in which he or she actually attends school. The Court decision was merely to the effect that the pupil must through his or her parents or legal custodians reside in the district at whose expense he or she is provided with school facilities, and this whether these facilities be provided within or outside such district. In fact, in the Towner case itself the Mansfield Township School District, in which the Court held the pupil must be a resident in order to be entitled to free high school facilities, was engaged in sending its high school pupils to Hackettstown.

Neither can the Commissioner agree that the other cases cited by Appellant namely, The State, Baldwin et al., Prosecutors, *vs.* Fuller, 10 Vroom 576, and Taylor *vs.* Smith, 21 Vroom 101, are in point. While it is rightly held in these cases that the taxing power of political divisions "is for the sole purpose of enabling them to exercise the powers of government conferred upon them within their locality" and that "the assessment of one school district for the benefit of another would be a palpable trespass upon the rights of private property," it is the Commissioner's opinion that no application can be made of these principles to the present case. A school district cannot be said to be assessed for the benefit of other districts by a law which authorizes it to receive pupils from other districts upon such terms as it may impose. The district is thus authorized to charge and, as in the case of Morristown, does charge what it considers to be a proper tuition rate for the pupils it receives.

In the Commissioner's opinion therefore the statutory obligation of boards of education to provide adequate school facilities for all the pupils of school age

in their own districts in no way precludes the providing of facilities which may be ample for the purpose of accommodating pupils of other districts "upon such terms as the Board of Education may prescribe." Neither the authorization of the Morristown School District voters nor any action which the Board of Education may take in accordance therewith is in the Commissioner's opinion illegal, and the appeal is accordingly hereby dismissed.

March 23, 1928.

DECISION OF THE STATE BOARD OF EDUCATION

The Appellant, a taxpayer of Morristown, contends that the citizens of that city had no power to vote to issue bonds to the sum of $400,000 for an addition to the High School Building, and seeks to restrain the Board of Education from proceeding with the undertaking on the ground that some three hundred or more pupils from other districts attend the High School, and that if they are refused admission no new building is necessary.

It is true that the law requires each school district to provide school facilities for each child of school age in the district but it does not prohibit accommodating children from other districts and to infer such a prohibition would nullify the statute by which the Legislature has provided for the sending of pupils to High Schools in districts other than those in which they reside.

It is provided by law (Sec. 180 of the School Laws, 1925 Edition) that the legal voters of any school district may at a regular or special election by a majority vote authorize the Board of Education to issue bonds for the purpose of acquiring land and erecting schoolhouses for such sums as are directed by a majority of the votes cast. No limitation on the power of the voters is to be found in the statute and we can find no authority for interfering with the action taken at the Morristown election. In our opinion the voters of that city were the sole judges of the question presented to them by the Board of Education, acting as we find it did, according to law.

It is therefore recommended that the Commissioner's decision be affirmed.

May 5, 1928.

DECISION OF THE SUPREME COURT

The Board of Education of Morristown submitted to the electorate in February, 1928, a proposition for the enlargement of school facilities, which was passed by a large majority of a very small total vote. No copy of the ballot is before me, but I gather from other papers in the case that the proposal was to enlarge the present High School by the addition of a wing for a "Junior High School" at a total expense not to exceed $400,000. The Prosecutor objected, and appealed to the Commissioner of Education, who refused to interfere, and he appealed further to the State Board of Education, with the same result: and on application to me as Justice of this Court, a writ was allowed.

The argument throughout has been that the imposition of this large additional burden on the taxpayers is useless and unnecessary, and takes their property without warrant of law, because the proceeds of the local Board are limited

to the reasonable educational needs of the school district, and the High School needs no enlargement as it already accommodates all the local pupils and 320 from outside, who should be discharged to make room for local pupils and thereby obviate the necessity of building additional accommodations at this time. It may be noted at this point that all the out-of-town pupils are in the High School.

The fallacy of the argument as I see it, is that the proposed building is not designed to enlarge the High School, but to enlarge the common school facilities. In the explanatory pamphlet submitted to the voters and made a part of this case, it appears that the Board of Education asked for a building to take care of grammar school pupils of the two highest grades, those that are in a sense out of the grammar school class without being in the high school class. For such there is no provision except in the grammar schools, which are now practically full, whose pupils increased by 316 in the last two years, and which in two or three years more will be clearly inadequate. Some present provision to meet this imminent condition is plainly reasonable and proper: and apparently the Board, instead of adding to the present grammar schools, proposed to provide the room by taking the older pupils out of the grammar schools and collecting them into a higher grammar school or an inferior high school, as we may choose to call it. The plan seems to present certain educational advantages: but be this as it may, I can see in it no more than a timely enlargement of the general school facilities of the district, to meet fairly anticipated requirements of the immediate future.

These considerations lead in my judgment to a dismissal of the writ, without reference to the ground taken in the opinions of the Commissioner and the State Board.

June 15, 1928.

PROCEDURE FOR THE ISSUE OF BONDS BY A DISTRICT ACTING UNDER ARTICLE VII

WILLIAM B. KRUG AND BENJAMIN F. ELLISON,

Appellants,

vs.

THE BOARD OF EDUCATION OF THE TOWNSHIP OF WOODBRIDGE,

Respondent.

Ephraim Cutter, for the Appellant.
J. H. Thayer Martin, for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The complainants allege that the proceedings had at a meeting of the legal voters of the School District of the Township of Woodbridge, held on the nineteenth day of March, 1912, were illegal, so far as said proceedings relate

to the selection of a lot, the erection of a schoolhouse, and the issuing of bonds, for the following reasons:

First. Because the said resolutions were not introduced at said meeting, and no motion was made to adopt them;

Second. Because no motion was made at the said meeting to adopt the said resolutions or any of them, and there was no such motion before the meeting to be voted on;

Third. Because there were no such resolutions before the said meeting to be voted on;

Fourth. Because the said resolutions, and each of them, were not legally adopted at the said meeting;

Fifth. Because proper ballot boxes were not used at the said meeting;

Sixth. Because the first resolution does not state of whom certain lots are to be purchased, and does not properly describe the said lots.

Seventh. Because the first resolution authorizes the Board of Education to accept certain lots, as well as to purchase certain other lots, all of the lots forming one plot to be used for the erection of a schoolhouse.

Eighth. Because in the second resolution it is not specified what amount is to be expended for the erection of a schoolhouse, and what amount for the purchase of school furniture and equipment.

Ninth. Because the polls at said meeting were kept open longer than the time provided by law.

The first four reasons may be considered together.

There is nothing in the law which prescribes the method of conducting a school district meeting, other than the provision for the election of a chairman and secretary, the appointment of tellers, that the vote shall be by ballot, and the minimum time the polls shall be open. The complaints contend that the resolutions must be introduced at the meeting and a motion made to adopt them, and that in the absence of such introduction and motion the resolutions are not before the meeting. If this contention is sound it would be possible for the voters present at the time the resolutions were introduced to refuse by a *viva voce* vote to consider them and thus prevent persons who were not present at the opening of the meeting from voting. If the contention of the complainants is simply that the resolutions should be presented and a motion made to adopt them, and that the polls should immediately be declared open, without any action on the motion, such motion would be absolutely meaningless. The notices state the purpose for which the meeting is called and the resolutions which will be acted on. Any voter who presents himself during the time the polls are open has the right to cast his ballot for or against any proposition stated in the notices. He may not alter any resolution, except by reducing the amount of money to be appropriated for the purpose named in the resolution. A school district meeting is an election and not a meeting in the ordinary meaning of that word, and it is not necessary that the resolutions be offered at the meeting, or that any motion be made to adopt them.

The fifth objection is that proper ballot boxes were not used at the meeting. The law does not prescribe the kind of ballot box which shall be used

at a school district meeting. In the absence of any such provision any box may be used.

The sixth objection is that the resolution does not state from whom the lots are to be purchased and does not properly describe said lots. If the voters desire to purchase a certain plot for school purposes they may direct the Board of Education to purchase it; provided, such plant has been described in the notices. It is immaterial, so far as the voters are concerned, who is the owner of the plot. Any description in the notices which will enable the voters to locate the plot is sufficient. The description of the plot now under consideration was stated in the notices and on the ballots as follows:

"Plot about seven hundred feet west of Avenel Railroad Station on Cedar Street containing lots numbered 19, 20, 21, 22, 23, 24 and 25, for the sum of Five Hundred Dollars and to accept for the same purpose adjoining lots on the north side of Avenel Street numbered 1, 2, 3, 4, 5 and 6, from Mr. J. Blanchard Edgar, making in all a plot one hundred and fifty feet fronting on Avenel Street by two hundred feet in depth by one hundred and eigaty feet on Cedar Street in the rear."

Witnesses produced on behalf of the complainants testified that they had never heard of Cedar Street, and that there was no street about two hundred feet north of it, and parallel with, Avenel Street, but Mr. Cutter testified that he had found in the office of the County Clerk a map on which Cedar Street was shown and the property west of the railroad and along said street laid out in lots. It is also in evidence that the distance from the railroad to the first street running at right angles to Avenel Street is about fifteen hundred feet. The plot proposed to be purchased is about half way between the railroad and this street. The description of the plot as it appears in the notices and on the ballots, complies with the statute and was sufficient to enable the voters to act intelligently.

The seventh objection is that the resolution authorizes the Board of Education to accept a donation of certain lots as a part of the plot on which to erect a schoolhouse. I know of no provision of law which prohibits a school district from accepting a gift of land for school purposes.

The eighth objection is that the amount to be expended for the building and the amount to be expended for furniture and equipment were not separately stated. In the case of Stackhouse *vs.* Clark, 23 Vr. 291, the Supreme Court held that a "resolution to raise a single sum for building and furnishing a schoolhouse is not bad for uncertainty because the amount to be used for building and the amount for furnishing are not separately stated." In the case of Chamberlain *vs.* Cranbury, 29 Vr. 347, the Court of Errors held that bonds could not legally be issued for the purchase of school furniture. The law in force at the time the later decision was rendered authorized the issue of bonds for the purchase of lands and the erection or improvement of school buildings, but made no reference to the purchase of furniture, and the court decided that bonds could be issued only for the purposes designated in the law. The law now provides that bonds may be issued for the erection of a schoolhouse and for the purchase of school furniture and other necessary equipment. I think that the decision in the Chamberlain

case is not in conflict with the decision in the Stackhouse case. The resolution is not bad because it fails to state separately the amount appropriated for the building and the amount appropriated for furniture.

The ninth objection is that the polls were kept open longer than the time provided by law. The law does not fix the maximum time the polls shall be kept open, it simply provides that they "shall remain open one hour and as much longer as may be necessary to enable the legal voters present to cast their ballots." The evidence is that the polls closed about four-thirty, and that votes were cast after four o'clock. As the meeting did not convene until three o'clock and some time must have been consumed in selecting the officers, the polls would not have been open one hour had they been closed at four o'clock.

The appeal is dismissed.

June 11, 1912.

DECISION OF THE STATE BOARD OF EDUCATION

This is an appeal from a decision of the Assistant Commissioner sustaining the validity of a school meeting held in the Township of Woodbridge on March 19, 1912. On that day, by a vote of 218 out of a total of 258, the Board of Education was authorized to acquire a site, to erect a building, to purchase furniture and to issue bonds in the sum of sixteen thousand ($16,000) dollars.

The Appellants disputed the validity of such authorization and urged that the resolutions were not formally introduced and a motion made to adopt them, that the site to be acquired was not sufficiently described, that authority could not be given to acquire a site which in part was dependent on a gift. and that the resolutions did not state separately the amount to be expended for the erection of the building, and the amount to be expended for the purchase of furniture and equipment.

In the School Law are set forth certain requirements for the conduct of a school meeting called to authorize an issue of bonds. Where the Legislature has undertaken to specify the procedure to be followed at such a meeting we cannot assume that something which it has not specified is essential to its validity. The Legislature has not enacted that the resolutions which are to be voted must be read. The failure to formally read at the meeting the resolutions which were printed on the ballots, did not therefore, in our opinion. affect the validity of the proceedings. If the law were otherwise, the validity of many issues of bonds would be open to question.

For years past. the Department of Public Instruction has issued in connection with the School Law, a Code of forms and instructions which are and have been generally followed. The twenty-fourth subdivision is entitled "Order of business at a district school meeting." The reading of the notice calling a meeting is set forth in this subdivision, but no mention is made about the reading of the resolutions. At the meeting in question, the notice was read and in the notice was contained a clear and precise statement of the substance of the resolutions. The objection, therefore, that the resolutions were not read at length, in our opinion was properly overruled.

With regard to the site described in the notice and resolutions, we cannot find that there was any misconception on the part of the voters. Upon the arguments it was admitted that this entire dispute exists because the Appellants and others preferred another site. The very fact that there was a controversy about two sites is in itself a clear indication that their locations were known.

Objection is also made that the voters could not authorize the Board to couple the acquisition of seven lots by purchase, with the acceptance of a gift of six adjoining lots. In the resolution it was stated that the thirteen lots would make a plot and the resolution concluded that "the cost of said plot shall not exceed the sum of five hundred ($500) dollars." The voters authorized the acquisition of the entire plot of thirteen lots for five hundred ($500) dollars and the Board could not disburse the five hundred ($500) dollars unless it received title to the thirteen lots. That title might be acquired by two deeds, one for six purporting to be a gift and the other for seven purporting to be a sale, seems to us a matter of form rather than substance.

The remaining objection is that in the resolution the amount to be expended for the erection of a building was not stated separately from the amount to be expended for the purchase of furniture and equipment. In the law under which the meeting was held, it was provided that the voters by a vote of the majority of those present, may authorize the Board of Education to issue bonds of the district for the purpose of building a schoolhouse and of purchasing school furniture and other necessary equipment. We do not find any provision that the amount necessary for a complete school, that is for a building and furnishings, must be split up into items. It is not for us to read into the law something which is not in it.

June 9, 1912.

The Supreme Court at the November term, 1912, denied the application for a writ of certiorari.

BALANCES OF BOND ISSUES IN DISTRICT ORGANIZED UNDER ARTICLE VI

THE BOARD OF EDUCATION OF ATLANTIC CITY,

Petitioner,

vs.

ALBERT BEYER, CUSTODIAN OF SCHOOL FUNDS FOR THE DISTRICT OF ATLANTIC CITY,

Respondent.

James H. Hayes, Jr., for Petitioner.
Theodore W. Schimpf, for Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

During the years 1910 and 1911 the Board of School Estimate delivered to the Common Council of Atlantic City certain certificates appropriating

moneys for the purchase of land and the erection of school buildings in the School District of Atlantic City, and, upon the receipt of said certificates, said Common Council adopted ordinances authorizing the issue of bonds, to be known as school bonds, for the amounts stated in said certificates. Said bonds were sold and the moneys were deposited with the Custodian of School Moneys. The cost of the land and buildings, to defray which the issue of bonds was authorized, was less than the amounts stated in the certificates of the Board of School Estimate, and there is a balance of the amount received from the sale of the said bonds now in the hands of the Custodian of School Moneys.

On August 22d, 1913, the Petitioner adopted a resolution directing the Respondent "to deposit to the credit of the Building and Repair Account of the School District the balances remaining to the credit of the several Bond Issues of the District."

The Respondent has refused to make such transfer. The Petitioner asks that an order be made directing the Respondent to comply with the resolution of August 22, 1913, quoted above.

Section 185 of the General School Law, as amended by Chapter 285, P. L. 1912, provides that "the custodian of the moneys belonging to the municipality in which the school district shall be situate, or the collector when designated by the Board of Education, shall be the custodian of the school moneys of such district, and shall receive such compensation as the Board of Education of such municipality shall determine, which compensation shall be paid by said Board of Education from the funds of said Board. * * * Nothing in this article shall be construed as giving to the township committee, common council or other governing body of any municipality any control over moneys belonging to the school district in the hands of the custodian of school moneys of said district, but said moneys shall be held by said custodian in trust, and shall be paid out by him only on orders legally issued and signed by the president and district clerk or secretary of the Board of Education."

It is very evident from the above quotation that the offices of City Treasurer and Custodian of School Moneys are separate and distinct offices, although held by the same person, and as the Common Council or other governing body of the municipality in which the school district is situate is prohibited from controlling, or attempting to control, the funds of the school district, that the Custodian is under the control and direction of the Board of Education. A school district is a municipal corporation separate from the municipality in which it is situate (Landis *vs.* School District, etc., 28 Vr. 509). The Custodian of School Moneys holds an office created by the School Law, and not by any provision contained in the charter of the city, and as such officer must be governed solely by the provisions of the School Law.

Control of the finances of a school district could be given to the city only by some provision of law, and the School Law not only does not contain any such provision, but expressly prohibits it.

The intent of the Legislature to make it impossible for the city to have any control over the finances of the school district is further shown by Section 186 of the School Law, which makes it the duty of "the collector or treasurer of

each municipality in which a school district shall be situate to pay to the custodian of the school moneys of such school district the amount ordered to be assessed, levied and collected in such municipality for the use of the public schools therein, exclusive of the State school tax, on the requisition or requisitions of the Board of Education." No action by the governing body is necessary, the sole authority for such transfer being the requisition of the Board of Education. This section emphasizes the dual offices for it directs the treasurer to transfer to himself, as custodian, moneys raised for school purposes.

Section 76 of the School Law prescribes the method of raising moneys for the purchase of land and the erection of buildings in a city school district, and provides that when bonds are issued for such purposes "the proceeds of the sale of such bonds shall be deposited with the custodian of school moneys of such school district and shall be paid out only on the warrants or orders of the Board of Education."

It is clear from the above quotation that the entire proceeds of the sale of bonds, including premium, shall be placed to the credit of the school district. No action by the governing body of the city is required. The proceeds of the sale of school bonds become automatically a part of moneys of the school district as soon as received.

The Respondent claims that the balance of the proceeds of the sale of bonds issued for the purchase of land and the erection of school buildings can be used only to liquidate the debt incurred in excess of the cost of such grounds and buildings.

Section 76 of the School Law prescribes the method of raising money for the payment of principal and interest falling due on bonds issued for school purposes in a city. The burden of raising such money is cast upon the city and not upon the school district. Bonds are an indebtedness of the city and not of the school district and school moneys cannot be used to pay any part of the principal or interest due on school bonds. As soon as school bonds are sold the proceeds become school moneys, and as such can be paid out only on orders signed by the president and secretary of the Board of Education. School moneys can be paid out only on orders or warrants signed by the president and secretary of the Board of Education, and there is nothing in the law which authorizes such president and secretary to issue an order or warrant for the payment of principal or interest due on school bonds. The Respondent further claims that his powers are prescribed by the Act of 1902, directing the City Treasurer to receive all moneys belonging to the city and disburse the same according to law. He appears to have lost sight of the fact that the Act of 1902 refers solely to his powers as City Treasurer, and that it cannot in anywise affect his duties as Custodian of School Moneys. Even if the Act of 1902 could be construed as originally applying to his duties as Custodian of School Moneys, its provisions, so far as they relate to school moneys, were repealed by Section 246 of the General School Law of 1903, which reads as follows: "All school districts shall hereafter be governed solely by the provisions of this act and all acts and parts of acts, general, special or local, so far as they are inconsistent with the provisions of this act, are hereby repealed."

As has heretofore been shown, the balance of the proceeds of the sale of school bonds is not available for the payment of any part of the principal or interest of such bonds, the question as to what disposition can be made of said balance, therefore, remains to be considered. It is inconceivable that the Legislature intended that moneys received from the sale of bonds, remaining to the credit of the school district, after the payment of all indebtedness incurred for the purchase of land and the erection of the buildings, should be unavailable for any purpose. There is nothing in the law which prescribes what disposition shall be made of such balances, and in the absence of such provision, the power to transfer the balance to other school purposes must be found in the general powers possessed by municipal corporations. It is the common practice in all municipal bodies to transfer moneys from one account to another as occasion demands, and in very few instances is this power granted by express provision of law. The Petitioner was acting well within its legal powers when it adopted the resolution of May 21, 1913, directing the Respondent to transfer to the credit of the Building and Repair Account the balances remaining to the credit of the several bond issues of the district.

The Custodian is not responsible for the application the Board of Education has made of school moneys (Zimmerman *vs.* Mathe, 20 Vr. 45) and he cannot refuse to honor an order of the Board of Education on the plea that he or his bondsmen may legally be liable for a misappropriation of school moneys.

It is ordered that the Respondent transfer to the Building and Repair Account the balances now in his hands from the sale of school bonds issued for the purchase of land and the erection of buildings for the Massachusetts Avenue School, the Richmond Avenue School, and the Texas Avenue School.

May 11, 1914.

Affirmed by the STATE BOARD OF EDUCATION Nov. 7, 1914.

ISSUING OF BONDS IN CITY DISTRICT

THE BOARD OF EDUCATION OF THE CITY OF WILDWOOD,

Appellant,

vs.

THE BOARD OF COMMISSIONERS OF THE CITY OF WILDWOOD,

Respondent.

For the Appellant, Henry S. Alvord.
For the Respondent, Mr. Hand.

DECISION OF THE COMMISSIONER OF EDUCATION

In this case it appears that the Board of Education of the City of Wildwood, at a meeting held on the 7th day of October, 1914, regularly certified

to the Board of School Estimate of the City of Wildwood a requisition for an appropriation of $100,000, to be raised by the issue of bonds by said city, for the purpose of purchasing a lot of land and erecting thereon a school building. The Board of School Estimate granted, by unanimous vote, the request of the Board of Education and certified regularly to the Board of Commissioners, the duly authorized governing body of said city, the fact that it had approved the raising of $100,000 by a bond issue, for the purpose of purchasing a lot and the erection of a school building thereon. The Board of Commissioners, by ordinance, proceeded to take action to carry into effect the issuing of the bonds. This ordinance failed of passage on third reading, the Board of Commissioners holding that it was within its province to reject the proposition.

A petition and answer were filed with the Commissioner of Education, setting forth the facts as above stated, whereupon a hearing was granted and held in the City of Wildwood on the 8th day of June, 1915. Both parties to the issue appeared through counsel and agreed to the statement of facts as above set forth. The main question submitted at the hearing was as to the application of a decision by the Court of Errors and Appeals, given in the case of the Board of Education *vs.* the Common Council of the City of Lambertville. The Court held in this case that the petition of the Board of Education was defective because it set forth as the propositions, the purchase of a lot and the erection and equipment of a school building thereon, and repairs to existing school buildings. The Court held that the amount to be expended for repairs should be separated in the petition from the amount to be expended for the purchase of a lot and the erection of a school building. The Court did not appear to rule on the question of separating the amount of money to be expended for lot and that to be expended for building. By the text of the decision, it is plain that two purposes were in the mind of the Court, namely, repairs to old buildings, on the one hand, and the purchase of a lot and the erection of a building thereon, on the other, for the Court stated that the whole sum appropriated might be expended for repairs alone.

I am of the opinion that the decision of the Court in the Lambertville case does not here apply.

Statements were also made at the hearing by members of the Board of Education, the Board of School Estimate, the Board of Commissioners, and the Mayor, agreeing that there was immediate necessity for more school room.

Therefore, it is ordered hereby that the City Commissioners of the City of Wildwood immediately take such action as will furnish to the Board of Education of the City of Wildwood the $100,000 which was determined to be necessary by the Board of School Estimate.

June 15, 1915.

CONTRACTS FOR BUILDINGS BY BOARD OF EDUCATION ACTING UNDER ARTICLE VII OF THE SCHOOL LAW

ANDERSON PRICE

vs.

BOARD OF EDUCATION OF THE BOROUGH OF RUTHERFORD.

Anderson Price, *pro se.*
Luther Shafer, for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The Petitioner prays that the Commissioner of Education decide as to the legality of the action of the Respondent in making certain changes in the specifications for the erection of two school buildings after the contract had been awarded but prior to its execution.

It appears that in May, 1911, the Board of Education advertised for proposals for the erection of two school buildings; that when the proposals were opened it was found that all exceeded the amount of the appropriation; that action on the bids was deferred and an additional appropriation was secured; that later the bid of Julius Koch Company was accepted, said company being the lowest bidder, and a contract drawn, dated July 3d, 1911; that said contract was not executed on that date, the Julius Koch Company refusing to sign it for the reason that owing to the delay the cost to him would be greater by reason of the increased cost of material; that after the contract was drawn, but before it was executed, certain changes were made in the specifications, making a reduction in the cost of the building of about $2,500, and that the Koch Company signed said contract about August 14th.

The School District of the Borough of Rutherford is incorporated under Section 84 of "An Act to establish a thorough and efficient system of free public schools, and to provide for the maintenance, support and management thereof," approved October 19, 1903, and is governed by the provisions of Article VII of said act. There is nothing in Article VII prescribing the method of awarding contracts, and the action of the board of education in this respect is governed by such sections in the "Act for the punishment of crimes" and in other acts of the Legislature as relate to the awarding of contracts by municipal boards.

Section 10 of the act relating to public schools above referred to provides that the Commissioner of Education "shall decide, subject to appeal to the State Board of Education and without cost to the parties, all controversies and disputes that shall arise under the school laws."

The action of the Board of Education of Rutherford in amending the specifications for the erection of the school buildings after the contract had been awarded, is not a "controversy or dispute arising under the school laws."

The appeal is dismissed.

December 15, 1911.

CONTRACTS—CHAPTER 1, SPECIAL SESSION 1903, SECTION 53

WALLACE D. PATTERSON,

Appellant,

vs.

BOARD OF EDUCATION OF THE CITY OF HOBOKEN,

Respondent.

James A Gordon, for the Appellant.
John J. Fallon, for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The Board of Education of the City of Hoboken received and opened bids for coal and wood on July 17th, 1911. The Appellant was the lowest bidder, but the Board rejected all the bids, and, later, readvertised for bids, and on November 20th, 1911, awarded the contract for coal and wood to W. L. Kamena. The Petitioner appeals from the action of the Respondent in rejecting his bid.

It is contended on behalf of the Respondent that the bid of the Appellant was irregular.

First. Because he did not submit a sample of the coal to be furnished.

Second. Because he did not agree to bear the cost of weighing the coal.

Third. Because he did not submit a bid for furnishing wood.

The Appellant and Respondent do not agree in the identification of the specifications on which the bids submitted July 17th were based.

Mr. Clayton and Mr. Sheridan testified that the specifications marked "R 1" were the specifications on which the bids of July 17th were based and that the specifications marked "A 28" were the specifications on which the bids of November 20th were based. The testimony of Mr. Patterson, Miss Beavers and Mr. Decker is that the specifications marked "G. W. B. 2," which are identical with "A 28" were those prepared for July 17th, and those marked "G W. B. 1," which are identical with "R 1," were those prepared for November 20th.

The testimony of Mr. Patterson is supported by the fact that the copy of the specifications attached to the answer of the Respondent is the same as the copy marked "A 28;" also by the fact that the bids of Patterson and Kamena both comply with the requirements of the specifications marked "A 28." These specifications provide that the bidder "shall specify the percentage of moisture and ash contained in the coal upon which the bid is based."

The bid of Mr. Kamena states that the egg coal he proposed to furnish "would run in ash from eight to twelve per cent., stove from ten to fourteen per cent., and chestnut from twelve to sixteen per cent." Also that "the moisture will not exceed four per cent."

The bid of Mr. Patterson also gives the per cent. of moisture and ash in each size of coal. The specifications marked "R 1" provide for testing sample of coal taken from each delivery, and the method of making the test. The bid of Mr. Kamena of November 20th contains no reference whatever to the percentage of moisture and ash.

I am of the opinion that Mr. Patterson was correct in his identification of the specifications on which he based his bid of July 17th.

The specifications for the bids of July 17th do not require that a sample of the coal proposed to be furnished shall be submitted with the bid. This disposes of the first objection made to the bid of Mr. Patterson.

Second. The advertisements for proposals for coal in 1909 provide that "a weightmaster's certificate must accompany each load to be furnished by the contractor at his expense." The advertisement in 1910 contains the same provision in slightly different language.

The specifications for July 17th, 1911, provide that "Portable scales shall be furnished by the Board of Education. The contractor shall convey said scales to and from the points directed, and shall maintain them in perfect condition while they are in his custody. Coal shall be weighed at the point of delivery; the weight in each instance shall be taken by the authorized representative of the Board of Education."

The intent of this provision in the specifications of 1911 is not entirely clear, but the omission of the direct provision contained in the advertisements of 1909 and 1910, I think, justified Mr. Patterson in assuming that the contractor would not be required to pay to the representative of the Board of Education the cost of weighing the coal.

Third. The advertisements for bids for furnishing wood were identical in 1909, 1910 and 1911.

The bid submitted by Mr. Patterson in 1909 was for coal, and made no mention of wood. The contract for coal alone was awarded to him in 1909. There is nothing in the advertisment of 1911 which would lead him to believe that the conditions had been changed, and that the bidder must bid on both coal and wood.

Section 53 of Chapter 1, P. L. 1903 (Special Session), reads as follows:

"53. No bid for building or repairing schoolhouses or for supplies shall be accepted which does not conform to the specifications furnished therefor, and all contracts shall be awarded to the lowest responsible bidder."

No question has been raised as to the responsibility of Mr. Patterson, and I am of the opinion that his bid did conform to the specifications. The Respondent erred in rejecting his bid. The contract should have been awarded to him.

September 12, 1912.

DISMISSAL OF TEACHER BEFORE EXPIRATION OF CONTRACT

ALPHONSO V. BRISSON,
Appellant,
vs.
THE BOARD OF EDUCATION OF THE BOROUGH OF LEONIA,
Respondent.

McCarthy & Eagan, for the Appellant.
Louis D. Winkelman, D. C., for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

Alphonso V. Brisson was employed under contract to teach in the Leonia Public School for the term of one year from September 5, 1916, at a salary of $1,400 per annum, to be paid in ten equal installments. The following clause appeared in the contract:

It is hereby agreed that either of said parties to this contract may, at any time, terminate said contract and the employment aforesaid, by giving to the other party three months' notice in writing of its election to so terminate the same.

Mr. Brisson began his teaching on September 5, 1916, and continued teaching until he received the following notice on May 24, 1917:

Mr. A. V. Brisson, Leonia, N. J.

Dear Sir: I beg to notify you that the Board of Education at its meeting last night decided that you be relieved of your duties as teacher in the high school and teacher in charge, for the balance of the term after Friday, May 25th, 1917.

Yours truly,
L. D. WINKELMAN, D. C.

A petition of appeal has been filed with the Commissioner of Education by Mr. Brisson setting forth the above facts. Answer by the Board of Education has been given in the case of this petition. In this answer the Board of Education admits that Mr. Brisson was relieved of his duties as a teacher in the high school for the balance of the school term after May 25, 1917, and claims that he has no case against the Board because it has discharged its obligation under the contract by paying him in full his salary of $1,400. There has been no denial of the payment of his full salary. Hence it is to be assumed that the statement of the Board of Education is true in fact.

Mr. Brisson was dismissed without making charges against him, and without giving him three months' notice as stipulated in the contract. The Board of Education had the right to relieve Mr. Brisson of his duties as a teacher, but it is responsible for the legal consequence of its act; that is, the Board must pay Mr. Brisson full salary for the year. This was done and the obligation of the Board of Education has been fully discharged.

The appeal is therefore dismissed.

September 22, 1917.

RIGHT OF BOARD OF EDUCATION TO EXERCISE NOTICE CLAUSE IN TEACHER'S CONTRACT

MARY B. MANNION,

Appellant,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF NORTHAMPTON, BURLINGTON COUNTY,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

On September 18, 1919, a petition of appeal was filed in this office by the Appellant, Mary B. Mannion, of Moorestown, Burlington County, setting forth the fact that she had been employed by the Northampton Township Board of Education by written contract dated July 1, 1919, to teach in the Mount Holly public school for the term of one year from the 8th day of September, 1919; that after entering upon such agreement she was notified by the Board of Education on August 6, 1919, by letter, that a resolution had been passed by the Board demanding her resignation, and that upon her refusal to so resign, the contract between her and the Board would terminate September 6, 1919. Deponent further stated in her petition that before receiving the notification above mentioned she was asked to meet with the Board on August 5, 1919, which she did, and while there she learned of some charges that had been preferred against her, and that she was cross-examined at said meeting by several members of the Board upon said charges. Deponent also alleged that shortly after receiving the demand for her resignation mentioned above she requested from the Board of Education through her attorney a copy of the charges preferred against her, which the Board refused to furnish. Appellant concluded her petition with the request that the Commissioner of Education set aside the action of the Northampton Township Board of Education in so dismissing her from its service.

On October 14, 1919, answer was filed by the Northampton Township Board of Education with this office, alleging as its defence to the above petition the fact that the Appellant was not dismissed by Respondent in accordance with the provisions of the statute relating to the dismissal of teachers for cause, but that said contract was terminated by notice as authorized by its terms, namely: "It is hereby agreed that either of said parties to this contract may, at any time, terminate said contract and the employment aforesaid, by giving to the other party one month's notice in writing of its election to so terminate the same," with which provision of the contract the Respondent maintained it had strictly complied.

Hearing was not demanded in this case by either side, but it was decided to submit the matter to the Commissioner of Education to be decided on the

pleadings and on briefs, which were filed by counsel for Appellant and Respondent on June 9 and June 18, 1920, respectively.

Inasmuch as the contract between the parties provided for its termination by either party at any time by the giving of one month's notice in writing, and inasmuch as Respondent admits that the dismissal of Appellant was not for cause but merely in the exercise by the Board of its alleged right to so terminate the agreement in conformity with the terms of the contract, the whole case clearly hinges upon the question of whether the parties to such an agreement may arbitrarily exercise the privilege given them by it of terminating said contract by giving the prescribed notice without the necessity of establishing any reason or cause for so terminating it.

Counsel for the Appellant argues at some length in his brief that such a provision in a teacher's contract allowing its termination by notice is against the public policy of the State, since the statute (Sec. 149 of the School Law) provides that "in case the dismissal of any teacher before the expiration of any contract entered into between such teacher and a board of education shall, upon appeal, be decided to have been without good cause, such teacher shall be entitled to compensation for the full term for which said contract shall have been made." Counsel for Appellant cites a number of authorities, including Encyclopedias of Law and decisions from States other than New Jersey, in support of his contention that even though contracts may provide in their terms for termination by either party by notice to the other, such provision assumes by implication that the parties shall have just cause for exercising such privilege.

Counsel for Respondent, on the other hand, cites in his brief authorities in the shape of decisions from still other States to the effect that provision in contracts for their termination upon notice by either party is entirely legal, inasmuch as such provision is bilateral in its effect and is a privilege that may be exercised by either party and a contingency contemplated by both parties when the agreement is made and entered into.

Counsel for the Appellant further contends that the agreement made in July for services that were to commence in September could not be terminated by the Board of Education by notice before the services began, inasmuch as no cause for dissatisfaction with such teacher could have arisen before she commenced her term of service with the Board.

The above outline embraces the facts in this case and the contentions of counsel for both sides as to the application of the law to these facts.

As to the Appellant's claim that she cannot legally be dismissed before the commencement of her services, it is my opinion that if the contract is to be interpreted according to its very plain language, namely, "it is hereby agreed that either of said parties to this contract may, at any time, terminate said contract, and the employment aforesaid, etc.," no other conclusion can be reached as to the intention of the parties than that the agreement might be terminated at any time after it was entered into. Terms cannot be read into a contract or others substituted for those contained in it, and nowhere does this particular contract provide that it may be terminated only after the services began, but on the contrary, provides for its termination "at any

time," which must mean in the absence of any qualifying clause at any time after the agreement is entered into. It has been held furthermore in 146 Michigan, 64, that: "Where a contract between a school district and a teacher provided that she might be dismissed at any time on thirty days' notice, a notice to terminate is effectual, although given before the commencement of the services."

As to the Appellant's other contention, that a notice clause in a teacher's contract is not effectual in terminating it, unless there be at the same time just cause for the Board's action in so doing, this is a matter upon which the New Jersey courts have never rendered a decision. While in some States outside of New Jersey the courts have held that teachers' contracts cannot be terminated without just cause even though the contracts contained provision for their termination at the option of the parties, it is held in an equal number of other States that such bilateral provision for termination is entirely legal.

In view, therefore, of the fact that the matter has never been judicially determined in New Jersey and that legal opinion in other States seems fairly divided on the subject, and in view of the fact that it is a well recognized principle of law that agreements may contain provision making them determinable at the option of either of the parties, a principle which this Department has frequently upheld and sanctioned in matters involving teachers' contracts, it is the opinion of the Commissioner of Education that the Board of Education of Northampton Township committed no illegal act in exercising the privilege given it by contract of dismissing the said Mary B. Mannion from its service.

It is further the opinion of the Commissioner that the exercise of such privilege by the said Board of Education was justified at any time after the contract was entered into, whether before the actual services began or not.

The appeal is accordingly hereby dismissed.

July 2, 1920.

TERMINATION OF TEACHER'S CONTRACT BY NOTICE CLAUSE

HELEN M. GOBLE,

Appellant,

vs.

EASTHAMPTON TOWNSHIP BOARD OF EDUCATION,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

This action is brought by Appellant, whose services as a teacher in the schools of Easthampton Township, Burlington County, were terminated by the Board of Education on July 7, 1926, to secure her reinstatement in the schools of that district on the ground that she has already been employed as a teacher for three consecutive years in the Township of Easthampton and is

therefore under tenure, and also on the ground that she is duly employed by the Respondent under a teaching contract for the present school year of 1926-27.

A hearing in this case was conducted by the Assistant Commissioner of Education on Thursday, September 2, 1926, at Mount Holly, at which testimony of witnesses on both sides was heard.

The Commissioner is unable to agree with Appellant's contention that she is employed under a valid contract to teach in the Easthampton schools for the year 1926-27. Although it appears that a contract for one year from September 7, 1926, was duly executed by the Appellant and the president and district clerk of the Easthampton Township Board of Education on May 14, 1926, it was also shown by the testimony that the vote by which such contract was authorized by the Easthampton Township board at its meeting on May 4, 1926, was only 2 to 1 and not accordingly the majority vote of the five member board which, according to the provisions of Section 130, Article VII, page 84 of the 1925 Compilation of the School Law, is essential for the valid employment of teachers. Such contract, moreover, according to the testimony, was never subsequently ratified by the Easthampton Township Board of Education.

There remains to be considered the question as to whether Appellant has already been employed as a teacher in the Easthampton School District for the three consecutive calendar years required by law to attain tenure.

The facts indicate that Appellant under the terms of her first contract for the year 1923-24 was employed for one year from September 4, 1923, under the terms of her second contract for one year from September 2, 1924, and according to the terms of her 1925-26 contract was employed for one year from the 1st or 7th of September, 1925. On June 7, 1926, the Board of Education notified Mrs. Goble of the termination of her services thirty days from such date under the clause in the 1925-26 contract, which provided that "This contract may terminate by both parties giving thirty days' notice in writing."

The Appellant now denies the legality of termination of the contract by notice except by action of both parties, and there therefore arises the question of what was the actual intention of the contracting parties as expressed by such notice clause.

According to 9 Cyc. 577, "The words of a contract will be given a reasonable construction, where that is possible, rather than an unreasonable one" * * * and "Greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent." (Page 577.)

Anson in his work on Contracts holds that "An agreement ought to receive that construction which will best effectuate the intention of the parties to be collected from the whole of the agreement; 'greater regard is to be had to the clear intention of the parties than to any particular words which they may have used in the expression of their intent.'"

Moreover, Chief Justice Beasley in an opinion contained in 51 N. J. L., page 1, quoted the rule that "The best construction is that which is made by viewing the subject of the contract as the mass of mankind would view it, for it may be safely assumed that such was the aspect in which the parties themselves

viewed it. * * * There is no more important rule of construction than that which requires that words shall be interpreted in the reflected light of the context in which they are found."

In the Commissioner's opinion it was clearly the intent of the parties in the use of the above quoted termination clause that both parties should have the right to terminate such contract by one giving to the other thirty days' notice, and such a construction would seem to be the only one possible in view of the fact that the idea of termination by mutual consent within thirty days' time cannot be reconciled with the usual conception of the term "notice," which is that of an ultimatum by one party to the other. Moreover, nothing is more universally recognized than that termination clauses in contracts are bi-lateral in their operation and thus give to each party the privilege of terminating the agreement upon a given number of days' notice to the other. That such was the intention of Mrs. Goble, the Appellant, when she entered into the 1925-26 contract, is evidenced by a letter written by her on April 23, 1926 (forming a part of the testimony), in reference to an earlier notice which she had received under the same contract, in which she gave no indication of any understanding on her part of the termination clause in question other than that it might be legally exercised at any time by either party to the agreement. Her evident interpretation at that time does not bear out her present contention.

Even were the Commissioner to hold that the thirty days' notice served by the Board upon the Appellant was contrary to the intention of both parties and therefore void, and that the 1925-26 contract must consequently be deemed to run for its full time, the Appellant has still failed in the Commissioner's opinion to sustain the burden resting upon her to prove that tenure would accrue upon the completion of such 1925-26 contract. As above set forth, the services according to the provisions of the contract were to begin September 1st or 7th, 1925, and it was necessary for Appellant to show that such services actually began on the latter, rather than on the former date, in order for her to come under tenure on September 4, 1926, three consecutive calendar years from the date of her first employment. According to Appellant's own testimony she received her first month's salary for the year 1925-26 on the twenty-fifth day of September, which on the basis of four school weeks of five days each would indicate that her services began on September 1st, and no testimony whatever was introduced by Appellant to indicate either by salary payments or otherwise that her services under such contract actually began on September 7th rather than September 1st.

For the above reasons therefore, namely, the legal exercise by the Easthampton Township Board of Education of the termination clause in the 1925-26 contract, thus definitely ending Appellant's services prior to the completion of three calendar years, and the failure on the part of the Appellant, regardless of the notice clause, to prove that tenure protection would accrue upon the completion of the 1925-26 contract or to prove that she has any valid contract for the year 1926-27, the appeal is hereby dismissed.

September 16, 1926.

LEGALITY OF DISMISSAL OF SCHOOL JANITORS WITHOUT CHARGES AND HEARING

JOSEPH MCCABE ET AL.,

Appellants,

vs.

BOARD OF EDUCATION OF THE CITY OF PATERSON,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The facts of this case as disclosed by the pleadings and at the hearing conducted by the Assistant Commissioner on November 12 in the City of Paterson are as follows:

At a regular meeting of the Board of Education of the City of Paterson on December 13, 1923, the following resolution was adopted by a majority vote of the Board:

> *"Resolved,* That the rule concerning the appointment of janitors and engineers be rescinded for this meeting only."

The following resolutions were thereupon adopted by a majority vote of the Board:

> *"Resolved,* That the following-named persons be and the same are hereby permanently appointed to the positions as janitors in the public schools of this city, as of the dates indicated at the scheduled salary of $1,200 per annum:
>
> Mr. Joseph McCabe, School No. 3, December 1, 1923.
> Mr. Joseph McGarry, School No. 9, December 15, 1923.
> Mr. William Verholst, School No. 5, December 1, 1923.
> Mr. Richard Cubby, School No. 20, December 1, 1923.
> Mr. James J. Connolly, School No. 24, December 15, 1923.
> Mr. James Rickaby, School No. 4, December 15, 1923."

And

> *"Resolved,* That the following-named persons be and the same are hereby permanently appointed to the positions as janitresses in the public schools of this city dating from December 15, 1923, at the scheduled salary of $1,200 per annum:
>
> Miss Alice Corrigan, Mrs. William McClosky, Mrs. Margaret Dougherty, Miss Jennie Cleary, Miss Alice Mackay, Miss Rose Millar."

Appellants entered upon the duties of their positions and served until February 15, 1924, when they were notified of the following resolution, adopted by the Board of Education at its meeting on February 14, 1924:

> "WHEREAS, The attempted suspension at the December meeting of this board of the rules relative to the appointment of janitors was illegal and void, not being in conformity with the rules of this board and Cushing's Manual of Parliamentary Procedure, and

WHEREAS, By reason thereof the attempted appointment of Joseph McCabe, Joseph McGarry, William Verholst, Richard Cubby, Joseph J. Connolly, James Rickaby, Alice Corrigan, Mrs. William McClosky, Mrs. Margaret Dougherty, Jennie Cleary, Alice Mackay and Rose Millar as janitors and janitresses in the public schools of this city was illegal and void, the said appointees not having complied with the rules of this Board governing the appointment of janitors; therefore be it

Resolved, That this Board hereby rescinds and sets aside the said attempted appointment of janitors and janitresses for the public schools of this city, this resolution to be effective immediately."

The rule alleged by Respondent to have been violated by the appointment of Appellants on December 13, 1923, was that which provided that appointments of janitors should be temporary and for three months only, after which time the appointments, if proved satisfactory, should be made permanent.

The Commissioner, as held in the case of the appeals of Kathryn D. Noonan and Lida A. Arnot, cannot agree with Appellants' contention that the Paterson Board of Education was not governed at the time of the appointments in question in December, 1923, by the rules relating to employment of janitors alleged to have been violated. While the Board of Education of the City of Paterson in office in 1923 had never specifically adopted the rules in question, it had apparently, by constant reference to them, accepted them. Moreover, the Board's very reference in its resolution of December 13, 1923, to the rules relating to janitors in voting to suspend them "for this meeting only" admitted the existence and control of such rules.

As held, however, in the Noonan and Arnot cases the Commissioner is convinced by such authorities as Barnert *vs.* Mayor and Board of Aldermen of the City of Paterson, 48 N. J. L. 395, and Michaelis *vs.* Board of Fire Commissioners of Jersey City, 49 N. J. L. 154, and others that a suspension of rules may be legally accomplished if done according to law without regard to a violation of the Board's own adopted parliamentary procedure regarding the suspension of rules; and that qualifications and requirements imposed by rules of a Board may be legally ignored by such Board providing the appointments are made according to the qualifications or requirements prescribed by law.

In the case under consideration, therefore, the rules of the Paterson Board of Education requiring temporary appointments of three months for its janitors were, in the Commissioner's opinion, legally suspended by a majority vote of the Board in spite of the Board's parliamentary procedure requiring an unanimous vote; nor would there have been anything illegal in the Board's ignoring the temporary appointment requirement contained in such rules, if in existence, had the appointment of Appellants on December 13, 1923, been made according to law. Such appointments were not legal, however, in the Commissioner's opinion, since they were definitely declared by the resolution to be permanent. A Board of Education cannot, under the existing authorities of this State (Serina M. Brown *vs.* Oakland Board of Education, page 623 of the School Law) or according to the authorities of other States cited in the

Brown case, make an appointment so as to bind succeeding boards and thus deprive them of the rights or prerogatives in the way of appointments.

Nevertheless, Appellants were at the time of the recission of their appointments by the Paterson Board of Education in February, 1924, under the protection afforded public school janitors during their terms of appointment by Section 355, page 174 of the School Law, so as to prevent their discharge for any cause without the preferring of charges and a hearing. According to the case, therefore, of O'Neill *vs.* Bayonne, 1 Misc. 475, cited by Appellants' brief in the Noonan and Arnot appeals the Appellants in this case were protected under the Janitors' Protection Act from the time of their appointments on December 13, 1923, and were entitled to hold their positions until any illegality in connection with their appointments was proved upon the preferring of charges and a hearing duly granted under the provisions of Section 355 of the act above referred to.

Upon the ground alone, therefore, of statutory protection until the illegality in connection with their appointments was duly proved in the statutory manner. the appointments of Appellants on December 13, 1923, are hereby sustained and the attempted recission of such appointments by the Paterson Board of Education at its February meeting is hereby declared to be illegal and void.

It is hereby ordered that Appellants be reinstated in their positions and their salaries paid from the date of dismissal in February, 1924.

January 7, 1925.

DECISION OF THE STATE BOARD OF EDUCATION

This case is similar in its facts to the case of Noonan et al. *vs.* The Paterson Board of Education decided herewith, and is subject to the application of the same principles.

At the meeting of the Paterson Board of Education held on December 13, 1923, Joseph McCabe and ten other persons now Respondents in this proceeding were appointed janitors in the Paterson school system. In making their appointment, the rules of the Paterson Board relating to the appointments of janitors and engineers were "rescinded for this meeting only." On February 14, 1924, the Board of Education passed a resolution to the effect that the attempted suspension of the rules at the meeting of December 13, 1923, was illegal and void; that the appointments of the Respondents were illegal and void, and said appointments were thereby rescinded and set aside, the resolution to take effect immediately. Thereupon the Respondents who had entered upon their duties after the meeting of December 13, and had been paid their salaries, were notified of the rescinding resolution and thereupon ceased to perform their duties. They brought this proceeding before the Commissioner alleging that the action of the Board of Education on February 14, 1924. was a violation of the Tenure of Office Act relating to janitors, and unlawful, and asked that they be reinstated. The Commissioner after a hearing sustained their appeal and ordered that they be reinstated in their positions and their salaries paid from the date of their dismissal in February, 1924. It seems to us that on the same grounds as those stated in our opinion in the cases of Miss Noonan and Miss Arnot filed herewith, the dismissal of the Respondents on the grounds stated

in the resolution of February 14, 1924, and without a hearing, was contrary to law. The School Law provides (edition of 1921, p. 174, Sec. 355) that no public school janitor shall be discharged, dismissed or suspended except upon sworn complaint for cause and upon a hearing had before such Board. No charges were preferred against them, and they were not afforded a hearing. For that reason, if for no other, they were, under the cases cited in the opinion in the Noonan and Arnot case, improperly and unlawfully discharged.

It is, therefore, recommended that the Commissioner's decision be affirmed.

LEGALITY OF DISMISSAL OF SCHOOL JANITORS UPHELD

JOSEPH MCGARRY ET AL.,

Appellant,

vs.

BOARD OF EDUCATION OF THE CITY OF PATERSON,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

This appeal is brought to contest the legality of the action of the Board of Education of the City of Paterson in dismissing Appellants as janitorial employees in its public schools on May 2, 1925, following a hearing upon charges to the effect that their original appointments on December 23, 1923, were illegal and consequently not binding upon said Board.

Appellants contended at the hearing before the local Board of Education above referred to and contend now in their present appeal to the Commissioner that the former decision of the Commissioner of Education on January 5, 1925, as to the illegality of a previous dismissal of Appellants from their janitorial positions on February 14, 1924, and his order of reinstatement and payment of salaries from the date of such unlawful dismissal constituted a bar to the subsequent dismissal of Appellants on May 2, 1925. In addition to the claim that the right to their positions is *res adjudicata* Appellants insist that the charges upon which the latest dismissal action was taken alleged no neglect, misbehavior or other offense and that illegal appointment is not a cause upon which Appellants can legally be tried and dismissed by the Board of Education. Appellants also insist that the original appointments in December, 1923, were legal.

Since the attempted dismissal of Appellants by the Paterson Board of Education in February, 1924, Joseph McCabe has resigned his position as janitor and is not therefore a party to this action. In the absence of such issue of fact and in view of the controversy arising solely from the question of the legality of the Board's dismissal action on May 2, 1925, upon the grounds above set forth, it was agreed by counsel for both sides that the necessity for a hearing was obviated and that the case be presented to the Commissioner for decision upon submission of briefs by counsel upon the legal points involved.

Counsel for Appellants cites equity cases in support of his contention that his clients' right to their positions is *res adjudicata* and that the Commissioner's previous decision in January, 1925, as to the illegality of their dismissal by the Paterson Board of Education in February, 1924, is a bar to the later dismissal of May 2, 1925, even though the latter was on different grounds. In one of the cases which he cites, however, namely, Wooster *vs.* Cooper, 59 Eq. 204, it was stated in the opinion that "a demand will be held to be *res adjudicata* when by a former decree or judgment the same claim, based upon the same muniment of title, between the same parties, touching the same subject matter has been determined by a competent court," and in the case of Russell *vs.* Place, 94 U. S. 606, 24 L. Ed. 214, the Court held that "in order that the judgment in a former case may be conclusive in a second suit between the parties, it must be shown either by the record or by extrinsic evidence that the same question was necessarily raised and determined in the former suit."

Substantially the same conclusion was reached in the case of Bond *vs.* Markstrum, 102 Hich. 11, 60 N. W. 232, when the Court held that "such former judgment does not preclude defenses in the second case which might have been made in the first or which were set up in the answer to the first, they not having been, as a matter of fact, litigated and passed on in the first action."

In the case under consideration it must be borne in mind that the Board of Education of the City of Paterson which dismissed Appellants on May 2, 1925, was a new Board having come into office on February 1, 1925, and, therefore, according to decisions of the Commissioner and State Board of Education and of other legal authorities, notably, Gulnac *vs.* Board of Chosen Freeholders, 45 Vr. 543, a different and distinct body from that by which the dismissal of Appellants was made on other grounds in February, 1924. In the light of all the facts and of the cases above cited it is the opinion of the Commissioner that the previous decision of the Commissioner of Education of January 5, 1925, as to the illegality of Appellants' dismissal by the Paterson Board on February 14, 1924 (which dismissal disregarded Appellants' tenure rights and was based solely upon the ground that their appointments were made under suspended rules of the Board), is no bar to the later dismissal of Appellants on May 2, 1925, by an entirely new Board of Education and on grounds not previously litigated, namely, the permanent nature of Appellants' appointments by the Board of Education in office in December, 1923. This Court is bound to take judicial notice of its own records and we believe, moreover, that it is not disputed by either side to the present controversy that after a suspension of rules providing for a three months' appointment the following is the text of the original resolution of appointment of December 23, 1923, which was unsuccessfully assailed by the 1924 Board in the previous action before this Court:

> "*Resolved,* that the following named persons be and the same are hereby permanently appointed to the positions as janitors in the public schools of this city, as of the dates indicated at the scheduled salary of $1,200 per annum, etc., etc."

According to the decision of the Commissioner of Education in the case of Serina M. Brown *vs.* Oakland (affirmed by the State Board of Education) a contract of a preceding Board of Education is voidable by an incoming Board when the effect of such contract is to deprive the succeeding Board of its own appointment prerogatives. The appointment of Appellants on December 23, 1923, by a board about to go out of office in a little over a month was specifically termed a permanent one; and should the failure on the part of the Paterson Board of 1924 to attack such appointments on legal grounds be deemed a bar to a subsequent action of dismissal by the Board coming into office in 1925, the latter if bound by the previous permanent appointment of Appellants would be thus deprived of its own appointment prerogatives. Such a result would be contrary to the rulings of both the Commissioner and of the State Board of Education notably in the Brown case above referred to. The Paterson Board of Education in dismissing Appellants on May 2, 1925, cannot in the Commissioner's opinion be deemed—as their counsel claims in his brief—to have been producing piece-meal grounds for Appellants' dismissal after the unsuccessful action of February, 1924. The Board coming into office in February, 1925, was as above stated an entirely new body which, after the State Board of Education had affirmed the Commissioner's decision as to the illegality of the earlier dismissal, took the first opportunity presented to it on grounds not hitherto litigated to rid itself of the illegally binding permanent appointment of Appellants of December 23, 1923.

The Commissioner cannot agree, moreover, with the Appellants' contention that under the Janitors' Protection Act only neglect of duty, misbehavior or other offense on the part of the incumbent and not illegalities in connection with appointment constitute grounds for dismissal. In the case of O'Neil *vs.* Bayonne, 1 Misc. N. J. Rep., involving a Police Tenure of Service Act the Court of Errors and Appeals stressed the necessity of the proferring and proving of charges and the granting of a hearing as a prerequisite to dismissal and ordered the Appellant in that case reinstated in his office because such procedure had been omitted. The Court plainly indicated in its opinion however that ineligibility or illegalities of appointment, if properly presented, would constitute good grounds for dismissal when it held that: "The appointment would be presumed to be *de jure* until the contrary was proved," and that "such lawfully organized Board having made the appointment, the presumption is in favor of the lawfulness of such appointment until the contrary is made to appear." And this opinion of the Court was in spite of the fact that the provisions of the Police Tenure Act involved appeared to protect the incumbents except when guilty of misbehavior or other misconduct.

If absolute protection were conferred upon incumbents of offices or positions in spite of illegalities of appointment or ineligibility therefor, they would be safe from dismissal until some personal offense could be proved against them even though entirely ineligible for appointment or even though, when appointed by a public body, they might have received less than the statutory number of votes required therefor.

Tenure laws such as that pertaining to teachers (Chapter 243, P. L. 1909) and that applicable to municipal police officers (Article XVI, Chapter 132, P. L.

1917) plainly indicate an intention that the incumbents of such offices shall hold their positions permanently during good behavior and efficiency without giving the appointing power any opportunity to fix their terms of office. The law however pertaining to school janitors (Section 354, Article XXVII of the 1921 Edition of the School Law) provides that Boards of Education "shall make such proper rules and regulations as may be necessary for the employment, discharge * * * of the public school janitors employed by such board not inconsistent with the provisions of this Act."

The School Janitor Law therefore enables boards of education to fix their terms of employment, and the Attorney-General, moreover, has ruled that the protection afforded by the School Janitors' Act in question exists only during the term for which the incumbents are appointed and thus does not survive the expiration of the term of appointment. In the Commissioner's opinion therefore it necessarily follows that statutory protection during the term presupposes that the term be one a board of education can legally make and one moreover of legal duration. An appointment cannot be deemed of legal duration which, according to the Brown *vs.* Oakland case above referred to, deprives a succeeding Board of its appointment prerogatives.

It is, therefore, the opinion of the Commissioner of Education that the doctrine of *res adjudicata* cannot be successfully invoked by Appellants against the action of the Paterson Board of Education on May 2, 1925, in dismissing them from its employ by reason of the previous decision of the Commissioner in January, 1925, affirmed by the State Board in April, 1925, as to the illegality of the earlier dismissal of Appellants in February, 1924, on different grounds. It is also the opinion of the Commissioner that the permanent nature of the appointment of Appellants on December 23, 1923, constituted justifiable grounds under the Janitors' Protection Act for their dismissal by the Paterson Board of Education on May 2, 1925.

The appeal is accordingly hereby dismissed.

December 7, 1925.

Decision of State Board of Education

On December 13, 1923, the Appellants were appointed janitors in the Paterson School District by the Board of Education of that city. On February 14, 1924, the incoming Board adopted a resolution which declared their appointment illegal and void. An appeal was taken from that action to the Commissioner, who held that the dismissal was not legal or justifiable and ordered the reinstatement of the Appellants to their positions. His decision was affirmed by this Board. The Appellants were reinstated in their positions and paid their salaries from February 14, 1924, and continued to perform their duties and receive their salaries until May 2, 1925. Shortly before that date, they were notified to appear before the Board of Education on May 1, 1925, when a hearing would be given them upon the charge that they were illegally appointed. The Petitioners presented their case upon that hearing but the charge against them was sustained and they were discharged. The resolution of discharge is dated May 1, 1925, recites the facts above stated and contains

the finding that the Appellants were illegally appointed to and illegally held their positions and that they be and "are hereby discharged" therefrom.

The Appellants then petitioned the Commissioner who has sustained their dismissal. The Appellants urge in support of their petition, first, that the matter was *res adjudicata* by reason of the former decision and cannot now be reopened; second, that no neglect, misbehavior or other offense was alleged against them and that they could not legally be tried and dismissed upon a charge that they were illegally appointed; third, that they were legally appointed.

First: In our former decision in this case, we held that inasmuch as these janitors and janitresses were under tenure of office, they could not be discharged without a hearing on charges upon which they could legally be dismissed, and merely because the Paterson Board, without a hearing, held that they were illegally appointed. We did not hold that they were either legally appointed or that they could not be discharged if it was found, upon a proper hearing, that their appointment was illegal. The issues raised in the present case were therefore not before us and, in our opinion, the decision made is not *res adjudicata.* In order that the judgment in the former case be conclusive in this proceeding "it must be shown either by the record or by extrinsic evidence that the same question was necessarily raised and determined in the former suit." Russel *vs.* Place, 94 U. S. 606. The question now before us was not raised in the former proceeding.

Second: We cannot agree with the Appellants that the illegality of their appointment is not ground for dismissal. In O'Neill *vs.* Bayonne, 1 Misc. N. J. Rep., in which the Police Tenure of Service Act was before the Court of Errors and Appeals, it was clearly indicated in the opinion that ineligibility or illegality of appointment, if properly presented, would constitute good grounds for dismissal. It seems to us that this decision is conclusive upon this point.

Third: The final question is whether the appointment of the Appellants in 1923 was illegal. In Brown *vs.* Oakland, the Commissioner of Education, affirmed by this Board, decided that a contract by a preceding Board of Education is voidable by an incoming Board when it deprives the succeeding Board of its right to appoint. The 1923 Board had no right to make the Appellants' appointment permanent. In our opinion the appointment was illegal and the Paterson Board was within its rights in discharging the Appellants on that ground.

We therefore recommend that the Commissioner's decision be affirmed.

April 3, 1926.

DISMISSAL OF JANITOR

A. R. VICKERS

vs.

BOARD OF EDUCATION OF NORTHFIELD BOROUGH.

A. R. Vickers, *pro se.*
D. Ryon Price, district clerk, for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

Chapter 44, P. L. 1911, provides that a public school janitor shall not be discharged, dismissed or suspended, nor shall his pay or compensation be decreased, except upon sworn complaint for cause, and upon a hearing had before such board. This act went into effect on March 20th last.

It appears from the papers before me that Vickers was elected janitor of the school in Northfield about fifteen years ago, and that his last appointment was under date of September 27th, 1910. It also appears that there was no written contract entered into and that the resolution appointing him did not specifically state the term for which he was appointed. It also appears that the board attempted to elect another person in his place as janitor at a meeting of the board held in September last. This action was taken after the act above referred to became a law. It further appears that no charges had been made against him nor any hearing held as required by the statute, and that he was not formally dismissed by the board from its services as janitor.

He is clearly protected by the act above referred to and is still janitor of the school. The action taken in attempting to appoint his successor is null and void.

February 1st, 1912.

ATTEMPTED ABOLITION OF POSITION OF SCHOOL JANITOR

S. COOPER IRELAND,

Appellant,

vs.

MONROE TOWNSHIP, GLOUCESTER COUNTY, BOARD OF EDUCATION,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

S. Cooper Ireland was employed as janitor of the Grange Hall School in Monroe Township, Gloucester County, on April 2, 1923, at a salary of $18 per month, and began his duties under said employment April 16, 1923. During the latter part of the school year 1923-24, the care of the Town Hall and Hall

Street Schools was added to his duties and his salary was increased to $63 per month.

Grange Hall is a two-room school, Town Hall is a three-room building and Hall Street has two classrooms. These seven rooms, with some pupils on part time, accommodated about four hundred pupils. A new school building of twelve rooms, known as the Oak Knoll School, was erected primarily for the purpose of providing proper facilities for pupils living in the territory formerly served by the above-named schools. The Oak Knoll School opened in September with an enrollment of 424 pupils, approximately 90 per cent. of whom are from the district indicated, and all teachers who taught in the three schools and who remained in the district were transferred to the new building with but one exception. One room in the Hall Street School is now occupied with one teacher in charge of forty pupils. Mr. Ireland was assigned to Hall Street School at a salary of $12 per month, and Joseph Dilks was appointed janitor of the new building at a salary of $125 per month.

Mr. Ireland brings this appeal from the action of the Board of Education in employing Joseph Dilks as janitor of the Oak Knoll School and asks that said employment be declared illegal and that the Board of Education be requested to assign Petitioner to the janitorship of the new school building at the salary now being paid Joseph Dilks.

Chapter 44, P. L. 1911 (1925 Comp. School Law, p. 220), reads in part as follows:

> "No public school janitor in any municipality or school district shall be discharged, dismissed or suspended, nor shall his pay or compensation be decreased except upon sworn complaint for cause and upon a hearing had before such board."

It is set forth in the appeal and admitted by Respondent that Mr. Ireland was not employed for a definite term. He, therefore, comes under the protection of the above act. Edward Deisroth *vs.* Margate City Board of Education (1925 Comp. School Law, p. 574), George L. DeBolt *vs.* Board of Education of Mount Laurel Township, decided by the State Board of Education November 6, 1926.

The Appellant's rights appear to rest entirely upon whether the position of janitor held by him was abolished. If it was abolished, he could be reemployed at a less salary than he was receiving as such employment would be for another position. If the position was not abolished, he could not be dismissed nor his compensation reduced except for cause after an opportunity to be heard before the Board of Education.

In the case of Albert H. Gordon *vs.* Jefferson Township Board of Education (1925 Comp. School Law, p. 563), the opinion of the Commissioner, which was affirmed by the State Board of Education, contains the following statement:

> "It is quite apparent from the many decisions and authorities on the subject that whenever bona fide reasons exist, such as economy in the public interest, for the abolition of an office and the transfer of its duties to another official, such office may be abolished even though the incumbent be protected by a Tenure of Service statute."

Benjamin Evans *vs.* Board of Chosen Freeholders of Hudson County, 53 N. J. L. 587, holds:

> "Whenever for economical reasons arising from governmental policy it may be thought wise to extinguish the office or position, the power which created can annul it. It is a matter of course that the exertion of the power to disestablish must be bona fide, for it is manifest that if it should appear that a formal act purporting to abolish such an office or employee, while the officer or position practically still remains in existence, such a subterfuge would be of no avail."

If a school building is abandoned and the pupils and teachers are transferred to and constitute the school in a new building, it is the opinion of the Commissioner that the janitor therefore employed in the old building would have his tenure rights transferred to the new building and that such transfer would apply even though the new building accommodates a slightly larger enrollment if the janitorial duties are practically the same. The testimony indicates a transfer of janitorial duties from the three old buildings to the new building as the number of rooms to be cared for in the new building with the hot air type of heating plant did not substantially enlarge the duties of the janitor over those connected with the three buildings, and, therefore, the position held by Appellant was not abolished.

The Commissioner cannot comply with the demand of Appellant that the employment of Mr. Dilks be declared illegal and that the Board be required to assign Petitioner to the janitorship of the new building. While a Board of Education cannot dismiss a janitor who has tenure in the district or reduce his compensation without a hearing, it has control of where any janitor shall work, and the employment of all necessary janitorial service.

The Supreme Court, in the case of Helen G. Cheesman *vs.* Board of Education of Gloucester City (1925 Ed. School Law, p. 554), held "A transfer is not a demotion or dismissal. Transfers are often advisable in the administration of schools for many reasons."

It appears that the janitorial work in the new building, together with the continuance of school in the Hall Street building, necessitates the employment of more than one janitor. The employment of janitors and the division of the work between such employees rests with the Board, providing the compensation of a janitor under tenure shall not be decreased, and work proportionate to the salary is assigned.

It is the opinion of the Commissioner that the position held by the Appellant was not abolished and that he was, therefore, illegally transferred to a position with a reduced salary.

The Monroe Township Board of Education is hereby directed to assign Appellant to a position with janitorial duties commensurate with a salary of $63 per month or more and to pay to Appellant a salary of not less than $63 per month from this date and also to pay him the difference between what he has been paid and what he would have received at the rate of $63 per month from the beginning of the school year.

December 14, 1925.

DISMISSAL OF JANITOR

EDWARD DEISEROTH,

Appellant,

vs.

BOARD OF EDUCATION OF MARGATE CITY,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

Chapter 4 of the Laws of 1911 gives to a Board of Education power to make proper rules and regulations for the employment, discharge, management and control of public school janitors, employed by such board, inconsistent with the provisions of said act. It also provides that "no public school janitor shall be discharged, dismissed or suspended, nor shall his pay or compensation be decreased, except upon sworn complaint for cause, and upon a hearing had before such board."

The evidence in this case shows that the Appellant was employed as janitor by the Respondent in the fall of 1911, and the records do not show that he was employed for a definite term. It is admitted by the Respondent that no written charges or sworn complaint were ever made against the Appellant, nor was he given a hearing before the board as required by the act of 1911. Mr. Deiseroth, therefore, is still in the employ of the Board of Education of Margate City, and is entitled to his salary.

November 27, 1912.

DECISION OF THE STATE BOARD OF EDUCATION

This is an appeal by the Board of Education of Margate City from a decision of the Commissioner adjudging that Mr. Deiseroth is still in its employ as a janitor.

In October, 1911, the Board of Education of Margate City appointed Mr. Deiseroth a janitor of the Margate City School. He entered upon the performance of his duties and served until the 3d day of September, 1912, on which day the Board passed a resolution appointing another janitor in his place. No complaint was served upon Mr. Deiseroth and he was not afforded any hearing.

It is provided in Chapter 44 of the Laws of 1911 that no Public School Janitor in any Public School District "shall be discharged, dismissed or suspended, nor shall his pay or compensation be decreased except upon sworn complaint for cause, and upon a hearing had before such Board." Inasmuch as the statute was in no way complied with, the attempt to discharge Mr. Deiseroth was null and void.

The decision of the Commissioner of Education is affirmed.

March 1, 1913.

DISMISSAL OF JANITOR

CHARLES H. EVANS,

Appellant,

vs.

THE BOARD OF EDUCATION OF CHESTER TOWNSHIP,

Respondent.

George B. Evans, for the Appellant.
Kaighn & Wolverton, for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The Appellant in this case, Charles H. Evans, was in the employ of the Board of Education of the Chester Township as janitor from the year 1908. It was the custom of the Board of Education to re-employ him at the end of each year, from which act it is reasonable to infer that his term of employment ran from year to year. He was not re-employed at the close of the year in June, 1915, as was usual, but was re-employed as janitor of school buildings eight and nine on August 24, 1915. The reason for the unusual delay in re-hiring him was because of some question as to his ability to run the new heating plant that had been placed in the new buildings. The building in which he had been janitor in former years was torn down.

In a letter dated August 30, 1915, notifying the Appellant of his reappointment, is the following:

"The Board of Education of Chester Township at its last meeting instructed me to notify you that as a janitor in the employ of the Board you have been assigned to school buildings number eight and number nine for the school year 1915-16. The duties of the janitor of these buildings include the usual work of operating the heaters.

"The State law may require you to get a permit or certificate of some sort showing your authority to operate the kind of heater installed in school building number nine. On this subject, which is out of the jurisdiction of the Board, you should consult with the Department of Labor, Trenton, New Jersey."

To this letter Mr. Evans, through his attorney, replied as follows:

"Mr. Evans is glad to do anything he can as janitor of the buildings eight and nine, and will do his utmost to keep these buildings in condition.

"With regard to securing a permit to run the engine, I am not sure that my client can secure such a permit, and in order to place ourselves in the proper position in case this matter comes up in the future, I wish to state that my client in consenting to do the best he can in his new position does not obligate himself to secure a license."

Mr. Evans began work as janitor in the schools at the opening in September and continued to do the work required of a janitor up to September 28th,

1915. On this date it was necessary to start up the fires in the heaters and continue to keep the building heated thereafter. This part of the janitor's work Mr. Evans refused to perform. One of the rules of the Board of Education provides that the janitors shall have charge of the fires and shall see that the rooms are properly heated and ventilated. This rule was in force during the time that Mr. Evans had been in the employ of the Board.

It appears that the new heating and ventilating plant in buildings eight and nine to which Mr. Evans had been assigned requires a steam pressure of more than ten pounds. A law enacted in 1913 by the State Legislature requires that no heating and power plant under the control of any person or board requiring a steam pressure greater than ten pounds can be operated by any person without first obtaining a license from the board provided by law for the issuing of such licenses.

It thus appears that the janitor in these schools, in order to run the heating plant, must obtain the proper license. Mr. Evans refused to run the heating plant on the ground, first, that he was not capable of learning how to do it, and second, that he would not apply for a proper license to do so. The Appellant claims that it is not the duty of a janitor to run a heating plant which requires a license. He claims especially that it is the duty of the Board of Education to furnish him janitorial work in the schools which work is outside of any work pertaining to running the heaters under the system installed in schools eight and nine.

Charges of inefficiency were brought against Mr. Evans by the principal of the school and a hearing was had before the Board of Education. The main point of inefficiency was that the Appellant refused to run the heating plant. The Board adjudged the Appellant guilty of incompetency and discharged him from its employ as janitor of schools eight and nine. From this action of the Board appeal is taken.

The question to be decided is this. Is the rule of the Board which requires the janitors to have charge of the fires and see that the rooms are properly heated in any way modified when a heating plant is installed that requires in its running the maintaining of a steam pressure of more than ten pounds?

Chapter 44, Laws of 1911, gives power to a Board of Education to make "such proper rules and regulations as may be necessary for the employment, discharge, management and control of the public school janitors." The act further states "no public school janitor in any municipality or school district shall be discharged, dismissed or suspended, nor shall his pay or compensation be decreased except upon sworn complaint for cause and upon a hearing had before such board." The rule of the Board, which it had a right to make, requires that janitors shall have charge of the fires and shall see that the rooms are properly heated, and in no way limits the Board of Education to any particular system of heating and ventilating. The Board has a right at any time to install a heating and ventilating system which it regards as the best in its judgment. I cannot see wherein a janitor could possibly be given such tenure rights as would give to him the choice of de-

termining the kind of heating plant that he would run or would not run. That the law leaves clearly in the hands of the Board of Education.

The new plant installed the Appellant refused to run because the Legislature had enacted a law providing that a license should be obtained for such a plant. In passing such a law the Legislature in no way limited the choice of heating plants to be installed by boards of education. The requirement of the Board was such as is provided in its rules and such as is usual in school buildings of the size of the buildings eight and nine in this case. The Appellant was dismissed after making charges and after he had been given an opportunity to meet those changes. He admits that he refused to run the heating plant. He admits that he was not qualified to do so. Hence the finding of the Board that he was inefficient was based on the Appellant's own act and admission.

I find that the rule made by the Board requiring its janitors to have charge of the running of the heating and ventilating plant is a reasonable one, and that the Appellant in this case, being given a fair trial under charges and being found guilty of the charges made, was legally dismissed as janitor in the schools of Chester Township.

The appeal is therefore dismissed.

April 24, 1916.

Affirmed by STATE BOARD OF EDUCATION October 7, 1916.

DISMISSAL OF JANITOR

EDEN BENNETT,

Appellant,

vs.

THE BOARD OF EDUCATION OF NEPTUNE CITY,

Respondent.

C. F. Dittmar, for the Appellant.
James D. Carton, for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

Eden Bennett, the Appellant in this case, was under contract as a janitor of the school in Neptune City, Monmouth County. On January 2, 1917, charges of neglect of duty were made against the Appellant by a member of the Board of Education. These charges were specifically that on December 18 the janitor failed to clear the snow off the walks about the school, and that on that date one room in the school building was not sufficiently heated until about 11 o'clock in the morning. The Board, after a hearing, found the janitor guilty and dismissed him from service.

An appeal was taken to the Commissioner by Mr. Bennett and a request for a new hearing was made. A new hearing was held in the schoolhouse at Neptune City on March 14, 1917. Witnesses were examined and testi-

mony taken. It was found that the janitor on the morning in question was at the building, as required by the rules of the Board, at 7 o'clock, and that the walk leading up to the front door was cleared of snow, but the walks on the side street were not cleared of snow; neither was the snow cleared from the steps of the back porch. At 9 o'clock, the time for opening the school, the building was not properly heated. About 10 o'clock all the rooms but one were comfortable. This one room remained uncomfortable until about noon.

The question to be decided in this case is was there neglect of duty in the janitor's failure to have the snow cleared and the rooms properly heated at the opening of school, and, if so, was the Board of Education justified in the dismissal of the janitor because of neglect to perform his duty on this one day. The testimony taken in the case indicates that there was neglect of duty on this one day, and that the janitor was not sufficiently diligent in attending to his duties as required by the rules of the Board of Education.

Section 314 of the School Law, edition of 1914, reads in part: "No public school janitor in any municipality or school district shall be discharged, dismissed or suspended, nor shall his pay or compensation be decreased, except upon sworn complaint for cause, and upon a hearing had before such Board." It will thus be seen that the Board had power to discharge, dismiss or suspend, one of three things. It is not quite clear whether it is the intent of the law to differentiate between the words "discharge" and "dismiss." What the Board did was to dismiss the Appellant after a hearing. It did not use the word "discharge." I find the Board complied with the law in making the charges and giving an opportunity to the janitor to be heard.

In my opinion the offense was not sufficient to warrant a complete discharge from service as janitor. The most that his neglect of duty on this one day warranted was suspension. It is my opinion, therefore, that the suspension from service as janitor was adequate punishment for the neglect of duty on this one day, as appeared in the evidence. It is hereby ordered that the Appellant be reinstated as janitor of the Neptune City school, to begin work on April 1, 1917.

March 29, 1917.

LEGALITY OF ABOLITION OF POSITION OF SCHOOL JANITOR

WILLIAM H. THECKSTON,
Appellant,

vs.

BOARD OF EDUCATION, GLOUCESTER CITY, N. J.,
Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

William H. Theckston brings this appeal against the Board of Education of Gloucester City because of a notice from the Business Manager of the

Board to Appellant received by him during the latter part of May, 1927, to the effect that his services would not be required after June 1, 1927, and because of the fact that since that date his services have been refused by the Board of Education.

A hearing was held by the Assistant Commissioner in Camden, September 14, 1927, at which both sides were represented by counsel. The facts in the case, as disclosed by the testimony, are as follows:

Appellant was elected janitor on October 6, 1924, at a salary of $100 per month, from October 1, and upon petition received from janitors in its employ the Board on January 12, 1926, increased the salaries of all janitors in its employ $15 per month. Appellant continued to receive compensation at that rate, namely, $115 per month, until June 1, 1927.

Mr. Theckston was assigned as janitor of different schools in the city, first at the Continuation School, next at the Pusey and Jones Building, and later at the Cumberland Street, Eight-room Grade School, and performed his duties efficiently and satisfactorily until the Cumberland Street building was abandoned during the Summer of 1926, after which it was demolished during September, 1926, to make possible the erection of a new High School building of more than thirty classrooms and an auditorium. Appellant was notified by the Respondent Board of Education on or about September 14, 1926, that his services were ordered dispensed with after October 1, 1926, due to the demolition of the Cumberland Street building; and at the meeting of September 14, 1926, when such action was taken by the Board, the services of another janitor and a janitress were dispensed with because of the abandonment of the Pusey and Jones Building, theretofore used as a High School. At this same meeting a janitor was elected for the Highland Park School, at a monthly salary of $75, by reason of a vacancy reported at said meeting.

During August, 1926, Appellant was asked by the Superintendent of Schools to prepare the Highland Park School for opening, which he did, remaining at the school until about September 10th, when he explained the duties of janitor to the person coming to take charge. It is evident that Mr. Theckston did not consider that being sent to this building by the Superintendent was an assignment to it as janitor by the Board itself, as he testified, "No, I didn't have any school to be janitor of after the Cumberland Street School was torn down. I was working all over, around to all the schools."

According to the unrefuted testimony of Mr. Fowler, Chairman of the Property Committee, he was directed to have a large number of desks renovated, and upon the request of the other janitor, Mr. Moore, whose services were terminated by action of the Board on September 14, 1926, the latter was engaged after October 1, 1926, to work on the desks. Mr. Fowler offered Mr. Theckston like employment, explaining to both that such employment was of temporary nature. No mention was made of compensation, both men received the same pay that they had received prior to October 1, 1926, and the payment was made from the Janitors' Account.

Mr. Fowler, who subsequently resigned from the Board of Education and was appointed Business Manager, notified Mr. Theckston and Mr. Moore during the latter part of May that, as sufficient desks were renovated for the

needs of the schools, their services would not be required after June 1, 1927. Immediately following this discontinuance of Appellant's services, he appealed from the action of the Business Manager and has since held himself in readiness to perform janitorial services for the Board of Education.

Counsel for Appellant contends:

1. Appellant's employment was indefinite and that he could not legally be removed without a hearing in accordance with Chapter 44, P. L. 1911, which reads in part as follows:

> "No public school janitor in any municipality or school district shall be discharged, dismissed or suspended, nor shall his pay or compensation be decreased except upon sworn complaint for cause and upon a hearing had before such board."

2. If the Cumberland Street School position was abolished, Appellant had a right to any vacancy occurring in other schools of the district.

3. Assignment to the Highland Park School in August, 1926, gave Appellant tenure rights to that janitorship.

4. Appellant is entitled to tenure as an unassigned janitor because of the large amount of work in the schools of janitorial type to be done by other than assigned janitors.

5. To permit the transfer of a janitor to a position to be abolished defeats the protection of the law referred to above.

Counsel for the Respondent holds on the other hand:

1. The position held by Appellant was legally abolished and that tenure rights ended with the abolition of the Cumberland Street School janitorship.

2. The employment of Appellant after October 1, 1926, did not constitute any recognition of him as a janitor or of his services as janitorial by the Respondent.

It is admitted by counsel for Respondent that Appellant's employment was for an indeterminate term and that he could not be removed without a hearing, if his position were not abolished. In this the Commissioner concurs.

The demolition of the Cumberland Street Grade School of eight rooms and the transfer of the pupils of said school to other schools of the district and the erection on the same site of a High School more than four times as large for pupils of other grades, which building is completed practically a year later than the demolition of the original building, constitutes, in the opinion of the Commissioner, an abolition of the position of janitor in the original building. The Commissioner held in the case of Kuyl *vs.* Board of Education of the City of Paterson, 1925 Compilation of School Law, page 577, that:

> "The right of a Board of Education to abolish in good faith any office or position under its control even though the incumbent be under tenure has been sustained by many authorities in the State, notably that of the case of Albert H. Gordon *vs.* Jefferson Township Board of Education, sustained by the State Board of Education in October, 1923. The right moreover of the incumbent to a notice and hearing under the Tenure Law exists only while the office itself remains and not when such office has been abolished."

Moreover, according to the 28 Cyc. 445,

> "The statutes requiring a hearing or opportunity to explain apply only where the removal is for incompetency, misconduct or other reason personal to the individual removed, and not where the removal is made in good faith from motives of economy, as where the services are no longer needed, or there is not a sufficient appropriation to pay salaries, but to make a compliance unnecessary the office must be abolished in good faith."

The members of the Board in this case testified that no other reason than the abolition of the position actuated them in dispensing with the services of Appellant, nor was there other proof presented to establish *mala fides* on the part of the Board of Education. The action, therefore, of the Board in terminating the employment of Appellant on October 1, 1926, was in the Commissioner's opinion legal.

Did Appellant, however, attain other rights by reason of vacancies occurring before his services as janitor terminated on October 1, 1926? Did he attain such rights by reason of his assignment to the Highland Park School or by his employment after October 1, 1926, or is he entitled to a position of unassigned janitor as claimed by Appellant?

It was testified that the Board of Education took official action upon the employment of all janitors but did not take such action in relation to other employees formerly engaged by the Chairman of the Property Committee or later engaged by the Business Manager. The Commissioner cannot agree with the contention that a temporary assignment by the Superintendent upon which the Board took no official action constituted a legal right to the position of janitor in the Highland Park School, and the testimony of Appellant bears out this conclusion when he stated that he had no school to be janitor of after the Cumberland Street School was torn down. Moreover, it is the Commissioner's opinion such an assignment, even if official, would have to be of a very definite nature to overcome the presumption that it was intended by the Board that his position as janitor should end on October 1, 1926, in accordance with the notice which he received incident to the demolition of the Cumberland Street School. If a janitor whose position is abolished had a right to a vacancy, then Mr. Moore and Mr. Theckston both had equal rights to any vacancy which might occur. In the opinion of the Commissioner such a contention is not sound, since in accordance with the above quoted authorities the right of an incumbent of an office under tenure is not an absolute one but dependent entirely upon the continuance of the position. When the office is abolished, therefore, all tenure rights are ended simultaneously.

Regarding the contention of a right to the position of unassigned janitor, it was testified that the Board has no unassigned janitor. Even should the Board, however, have a position known as unassigned janitor and should decide in good faith to abolish such position, any tenure rights would thereupon at once become void.

If it could be proved that a janitor was placed in a position which it was intended to abolish for the purpose of defeating such persons' tenure rights,

then *mala fides* would void such action. There was no evidence, however, to that effect in this case.

It is, therefore, the opinion of the Commissioner that Appellant's position was legally abolished by action of the Board on September 14, 1926, and that his employment after October 1, 1926, in renovating desks, the compensation for which might be chargeable to the Janitors' Account, did not constitute employment as a janitor.

The appeal is hereby dismissed.

October 17, 1927.

MEETINGS OF LEGAL VOTERS OF SCHOOL DISTRICT

RICHARD S. HARTPENCE,

Appellant,

vs.

BOARD OF EDUCATION OF KINGWOOD TOWNSHIP,

Respondent.

Richard S. Hartpence, *pro se.*
Harry J. Abel, for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

A meeting of the legal voters of the school district of the Township of Kingwood was held April 18, 1911, and at said meeting the Board of Education was authorized to purchase a certain plot of ground at a cost not to exceed the sum of $150, and to erect thereon a schoolhouse at a cost not to exceed the sum of $1,350. It was also ordered at said meeting that the money necessary to purchase said land and to erect said schoolhouse be "raised by Township Tax."

In accordance with the action of the legal voters the $1,500 ordered to be raised was assessed and collected and paid to the custodian of the school moneys of the district.

The Board of Education, finding it impossible to purchase the plot selected at the district meeting of April 18th, called another district meeting, which was held on June 30th, 1911.

At the meeting of April 18th three plots had been submitted to the vote of the people, and at the meeting held June 30th two plots were submitted, one of said plots being one of those rejected at the meeting of April 18th, and the other an entirely new plot, and the Board of Education was authorized to purchase one of said plots at a cost not to exceed the sum of $140, and to erect thereon a schoolhouse at a cost not to exceed the sum of $1,350. The District Clerk did not notify the Assessor and Collector of the action taken at the meeting of June 30th, and the only tax assessed and collected for the purchase of land and the erection of a schoolhouse was the tax ordered at the meeting of April 18th.

Subsequently the Board of Education purchased the plot selected at the meeting of June 30th, and paid for the same from the proceeds of the tax ordered at the meeting of April 18th.

The Appellant claims:

1st. That the meeting of June 30th was not legally called for the reason that the notices calling said meeting were prepared by a committee and not by the board in regular session; that the District Clerk did not personally post all the notices, and that there is no proof that the notices were posted the time required by law.

2d. The Appellant also claims that the ballots used were illegal, because they do not conform to the statute.

(b) Because they state the money is to be raised by "township tax," instead of by "district tax."

(c) Because they do not state the purpose for which the money was to be raised.

3d. Also that the Board of Education could not legally use the money appropriated at the meeting of April 18th for the purchase of a certain plot for the purchase of another plot selected at the meeting of June 30th.

The District Clerk testified that he prepared the notices for the meeting of June 30th after the adjournment of the meeting of the board on June 16th, and in accordance with the direction of the board. The evidence also shows that a notice was posted on each of the eight schoolhouses in the district, and that they were posted on the 19th and 20th of June.

The District Clerk did not personally post all the notices, but he testified that they were posted by the other members of the board at his request, and the other members of the board testified that they posted the notices on the schoolhouses near their homes.

The law requires that the District Clerk shall post a notice on each schoolhouse in the district, and at such other places as the Board of Education shall direct, and that at least seven notices shall be posted not less than ten days prior to the meeting.

The meeting of June 30th was called for one P. M. The Appellant claims that because some of the notices were not posted until after one o'clock on June 20th the notices were not posted the ten days required by the statute. The law does not recognize parts of days, and a notice posted at any time on June 20th was a legal notice.

I am of the opinion that the notices were posted in substantial compliance with law, and that the failure of the District Clerk personally to post them did not make the meeting of June 30th illegal.

The law does not specify the kind of ballot which shall be used at a school meeting. Any ballot, therefore, which expresses the intent of the voter is a legal ballot.

I am of the opinion that the ballots used at the district meetings of April 18th and June 30th clearly express the intent of the voters to purchase a lot, erect a schoolhouse thereon, fix the amount of the appropriation for each purpose, and determine the method by which the money shall be raised. It is true that the ballots read, "Resolved, That money be raised by Township Tax

to pay the expense of the same"; using the term "Township Tax" instead of "District Tax." As the school district comprised but one township, and as the amount to be raised was to be assessed on all the taxable property in the township, I am of the opinion that the use of the term "Township Tax" did not render the tax illegal.

The fact that one of the plots submitted at the meeting of June 30th was the same as one submitted at the meeting of April 18th, also that but one school building is needed in the part of the township in which the plots selected are situate, shows that all that the voters intended to do, by their action at the meeting of June 30th, was to substitute a plot on which to erect a schoolhouse for the plot selected at the meeting of April 18th.

There is, however, no resolution on the ballots used on June 30th, directing that the money appropriated for the purchase of land at the meeting of April 18th should be used for the purchase of the plot selected at the meeting of June 30th.

Moneys appropriated for a specific purpose cannot be used for any other purpose without the consent of the appropriating power. The action of the Board of Education, therefore, in using the money appropriated at the meeting of April 18th for the purchase of a plot of ground selected at said meeting to purchase the plot selected at the meeting of June 30th was illegal.

The moneys appropriated at the meeting of April 18th for the purchase of land and the erection of a schoolhouse cannot legally be used for any other purpose until the legal voters at a regularly called district meeting have authorized the transfer.

November 1, 1912.

Decision of the State Board of Education

This is an appeal from a decision of the Commissioner of Education in so far as it sustains the validity of a meeting of the voters of the School District of the Township of Kingwood held on the 30th day of June, 1911.

We have examined the record on appeal and the briefs submitted in behalf of the parties. We also notified the parties we would hear oral argument. At the time and place specified in the notice, the Respondent appeared by counsel, but no one appeared for the Appellant. The only point seriously urged in behalf of the Appellant is that all seven notices of the meeting were not posted at least ten days prior to June 30th, the day specified. Some of the notices were posted on June 19th and others on June 20th. The meeting was called for 1:00 P. M. on June 30th, and as several of the notices were not posted until after 1:00 P. M. on the 20th, the Appellant urges that legal notice of the meeting was not given. It is usual in the computation of the time of a notice either to include the first day and exclude the day on which the event is to take place, or to include the latter and exclude the former. Whichever rule is applied, it is evident that ten days' notice was given. The Appellant, however, insists that there must be full ten days' notice, and that it is not sufficient that the notice should have been nine days and a fraction. In the computation of time the law does not as a general rule recognize fractions of a day. It is true that the rule is a mere legal fiction and its operation is not

allowed to work manifest wrong. We are not convinced, however, that its application in this case will work any injustice. On the contrary, to disregard the rule would thwart the will of the voters and cause them unnecessary annoyance, delay and expense.

The decision of the Commissioner is affirmed.

March 1, 1913.

CALLING OF ELECTION ON PETITION OF VOTERS

RICHARD W. WILLS,
Appellant,

vs.

THE BOARD OF EDUCATION OF UPPER FREEHOLD TOWNSHIP,
Respondent.

John Meirs, for the Appellant.
Barton B. Hutchinson, for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

This is an appeal taken from the action of the Board of Education of Upper Freehold Township in refusing to call a meeting of the voters of the school district when petitioned to do so by more than fifty legal voters.

The law applicable to the case is found in section X of the School Law and reads as follows:

> "The Board of Education shall have power * * * to call a special meeting of the legal voters of the district at any time when in its judgment the interests of the school require it, or whenever fifty of such legal voters shall request it by petition so to do. In the notices of any special meeting, called upon petition as aforesaid, shall be inserted the purposes named in said petition so far as the same are not in conflict with the provisions of this act."

This seems by implication to be mandatory. The law requires that the Board of Education insert in the notices calling a special election the things contained in the petition, provided that these things are not in conflict with the provisions of the School Law. It thus becomes the duty of the Board of Education to determine for itself whether the things in the petition are in conflict in any way with other things in the School Law. If there is no conflict, then it is mandatory upon the Board to call a special meeting when petitioned to do so by fifty voters. In order to determine the question at issue it is well to briefly set forth the case.

At the annual election held on March 16, 1915, there was voted to be raised by special tax the following amounts of money: for current expenses of the schools, $4,100; for repairs, $400; for lot at Cream Ridge, $500; for new school at Cream Ridge, $5,000.

At a meeting of the Board of Education held on April 5, 1915, a petition was presented signed by 218 persons asking that a special meeting of the voters be called in order that the appropriations as set forth in the petition might be substituted for the appropriations already voted. These are the propositions contained in the petition:

"To enable the Board of Education to purchase or take and condemn land adjacent to the brick schoolhouse at Cream Ridge, for the purpose of enlarging the ground appurtenant to said schoolhouse, $200; for repairs of schoolhouse, $400; to enlarge, repair and furnish the brick house at Cream Ridge, making the same comply with the minimum requirements of the building code of the State Board of Education, $1,000; for current expenses, $3,000."

The Board deferred action on the petition at this meeting, as it did from time to time thereafter, until it was finally denied at a meeting of the Board in October, 1915.

The first purpose named in the petition is to purchase land "adjacent to the brick schoolhouse at Cream Ridge for $200." The quantity of land is not mentioned. It may be any quantity. To insert in a notice to the voters that land adjacent to the Cream Ridge brick school could be purchased for $200, without naming the quantity, is too indefinite. On such a notice voters could not know what they were voting for. Surely to insert such a meaningless proposition as that in a notice to the voters would be in conflict with common sense, and, therefore, with the law.

The next proposition in the petition is "to enlarge, repair and furnish the brick house at Cream Ridge, making the same comply with the minimum requirements of the building code of the State Board of Education," at a cost of $1,000.

The brick building at Cream Ridge is a very old building, 18 feet by 24 feet, with 8 foot ceilings and no cellar. The Board of Education had been notified by the County Superintendent of Schools that unless a new building was provided in conformity with the School Law he would proceed to formally condemn the building as unfit to house forty children and more who were in attendance at the school. Acting under his instructions, the Board of Education submitted the question to the voters at the annual election, and a majority of the voters responded in an affirmative vote, providing adequate moneys for all requirements of the school.

Article X, section 152, of the School Law, edition of 1914, says:

"Each school district shall provide suitable school facilities and accommodations for all children residing in the district and desiring to attend the public schools therein. Such facilities and accommodations shall include proper school buildings, together with furniture and equipment."

This is plainly and positively mandatory, with no qualifying condition. The legal voters at the annual election on March 16, acting under this positive mandate in the law, gave by a majority vote an order to the Board of Education to cause to be raised by tax $5,000 to build a "proper school building, together with furniture and equipment." This also included grading, fencing and suitable outhouses.

In the petition the Board of Education is asked to insert in the notice calling a special meeting, $1,000 for a suitable building, furniture and equipment. This is an impossible amount of money for such a purpose. It would take more than half the amount for proper outhouses, furniture, heating and ventilating. The Board of Education in the exercise of its judgment decided it was in conflict with the section of the School Law above quoted, because with only $1,000 it was impossible to furnish proper school facilities according to the building code of the State Board of Education.

At the annual meeting there was voted for current expenses the sum of $4,000. The law defines current expenses as including principals', teachers', janitors' and medical inspectors' salaries, fuel, textbooks, school supplies, flags, transportation of pupils, tuition of pupils attending schools in other districts, truant officers and the incidental expenses of the schools. Many of these things are made by special statute mandatory, and all are items necessary to keep the schools open, and hence the voting of money for them by special taxation is mandatory. It would follow, therefore, that a petition containing a request to lower the amount already voted as provided by law would be a "purpose in conflict with the School Law."

If, as the counsel for the Appellant claims, the law providing for the calling of a special meeting by petition is mandatory *per se,* then by a continuous performance of fifty voters school government by petition could be substituted for government by ballot. Thus nothing in school affairs could be settled definitely and endless confusion would follow.

As a rule, Boards of Education ask for such a sum for current expenses as they find from experience is necessary to keep the schools open the length of time required by law. Upper Freehold is a school district of nine schoolhouses, fourteen teachers and a supervising principal. $4,100 is not an excessive sum for current expenses in such a district. To reduce the amount to $3,000 would result in going in debt in order to keep the schools open nine months, as required by law.

Four thousand dollars is needed in addition to the amount appropriated from State moneys in order to "provide for the maintenance, support and management of the schools" of Upper Freehold Township. To raise less than this amount would result in not providing for the proper support of the schools. In the matter of the insufficient amount proposed in the petition, there is positive conflict with the provisions of the School Law.

At the hearing in this case no evidence was introduced by the Appellant to show that the schools could be kept open as required by law for the amount named in the petition for current expenses, nor that a proper school building could be furnished for the amount named.

I find, first, that it is the duty of a Board of Education, when it receives a petition signed by fifty legal voters resident in a school district asking that a special meeting be called, to ascertain whether the purposes named in the petition are in conflict with the provisions of the School Law. If the Board finds that there is conflict, then it is not bound to call such special meeting.

It is my opinion that the purposes named in this petition under consideration are each and severally plainly in conflict with the provisions of the School Law as found in Chapter 123, P. L. 1907, and that the Board of Education of Upper Freehold Township was justified in refusing to call the special election for the purposes as set forth in the petition.

The Appellant also petitioned for a recount of the ballots voted at the annual election in March, 1915. This request is refused because of not being made at a reasonable time after the election.

The appeal is dismissed.

March 22, 1916.

DECISION OF THE STATE BOARD OF EDUCATION

The papers and correspondence in this case are voluminous and the issues raised confusing, but the kernel of the matter lies in a small compass if we can get at it.

It seems that the schoolhouse at Cream Ridge, in Upper Freehold Township, was old and badly out of repair, that it had been condemned by the County Superintendent, and that the necessity for a new building, or extensive repairs on the old building, was admitted by everyone. The Board of Education of the township at the annual meeting, held March 16, 1915, submitted to the legal voters of the township the following propositions:

For building and repairing schoolhouses,	$400
For current expenses,	4,100
For purchase of land from D. L. Weiss,	500
For erection and equipment of new schoolhouse,	5,000

By a majority vote of those present the propositions were duly endorsed and declared carried.

But there had been a minority opposition displayed at the meeting. This minority after the annual meeting got up a petition signed by more than fifty voters asking that a special meeting be called for the purpose of submitting to the voters at that time, for their approval or rejection, by vote of the majority of those present, the following appropriations:

For purchase of land,	$200
For repairs to schoolhouse,	400
To enlarge, repair and furnish the brick house at Cream Ridge, making the same comply with the minimum requirements of the Building Code of the State Board of Education,	1,000
For current expenses,	3,000

which appropriations, when made, "shall be in lieu of the appropriations submitted to the voters at a meeting held Tuesday, March 16, 1915."

Both parties to this controversy seem to have agreed that there should be something done about the condemned schoolhouse, but they disagree upon the amount of the improvement. The contest is over how much money should be expended, and the second call for a meeting was to be in the nature of a recall. This is the kernel of the matter to which reference has been made, and all the side issues brought in are merely so much confusion and distraction. The case turns upon the legality of the acts of the Board of Education,

first, in declaring the appropriations at the annual meeting of March 16, 1915, as duly and legally voted, and second, in denying the subsequent petition of the more than fifty voters, calling for a meeting to pass appropriations in lieu of those already passed.

Irregularities in the manner of voting and counting at the annual election are charged by the Appellant, but we do not think them proven. We assume the legality of the first election and venture to think it would not have been questioned had the sums appropriated been smaller in amount. The legality of the second act of the Board of Education in refusing to call a special meeting on the petition of more than fifty voters is another matter, and is to be decided upon the interpretation of Article 7, section 97, paragraph X, of the School Law (1914). That paragraph reads as follows:

"The Board of Education shall have power to call a special meeting of the legal voters of the district at any time when in its judgment the interests of the school require it, or whenever fifty of such legal voters shall request it by petition so to do. In the notices of any special meeting, called upon petition as aforesaid, shall be inserted the purposes named in said petition, *so far as the same are not in conflict with the provisions of this act.*"

It will be observed that the wording here is not "shall call a special meeting, etc.," but "shall *have power* to call a special meeting." The phrase stands at the head of the section and qualifies fourteen paragraphs, all of them more or less requiring the use of discretion. If the words "have power" be disregarded, then such paragraphs as VIII would read that the Board *"shall* suspend or dismiss pupils from school," or paragraph V, *"shall* take and condemn land and other property for school purposes"—mandatory readings that obviously were never intended by the Legislature. School boards were given the *power* to do these things, but were not compelled to do them by legal mandate. We think the reading of paragraph X should be that school boards have the *power* to call special meetings, but are not compelled to do so if in their judgment the interests of the school do not require them. It will be noted that the first part of the opening sentence reads: "The Board of Education shall have power to call a special meeting of the legal voters of the district at any time *when in its judgment the interests of the school require it,* or whenever fifty of such legal voters shall request it by petition." This specifically reposes faith in the *judgment* of the Board as regards its own act, and implies a vesting with discretion as to the acts of any fifty petitioning voters. The intent of the law seems to be that the Board, by its own initiative, or by a reminder from fifty legal voters, could, in its judgment, call a special meeting.

But, as regards the calling of this special meeting on the petition of fifty voters, there is a proviso in paragraph X which seems to put still more discretion and authority in the Board of Education. This proviso requires that in the aforesaid petition "shall be inserted the purposes named" for which said meeting is called. These purposes shall be inserted in the petition *"so far as the same are not in conflict with the provisions of this act."* Evidently the Board was clothed with authority to deny the petition if it should in its purposes prove conflicting with what has been called "this act."

What "act" was here intended? None other than the general school act, entitled "An act to establish a thorough and efficient system of free public schools," etc., of which Article 7, section 97, paragraph X, is a part and parcel. With what provisions of this "act" would the purposes set forth in the petition of the more than fifty voters in Upper Freehold Township for a special meeting be in conflict? Generally with the provisions of this very section 97, and specifically with paragraph IV, which empowers the Board of Education "to purchase, sell and improve school grounds; to erect, lease, enlarge, improve, repair or furnish school buildings, and to borrow money therefor with or without mortgage; *provided,* that for any such act it shall have the previous authority of a vote of the legal voters of the district." The Board of Education had authority given it in this paragraph to build a new schoolhouse and equip it; it had also "the previous authority of a vote of the legal voters of the district." Any new meeting called for the specific purposes of undoing or nullifying the authority thus given would be "in conflict with the provisions of this act." If permitted or allowed it would render nugatory or ineffective any action that the Board might take. For if the fifty petitioners were defeated on their first petition they could immediately get up a second or third or tenth petition, and thus go on indefinitely to the defeat of the law and to the rendering void of the purposes of the school system.

We think the Board of Education of Upper Freehold Township was within the law in declining to call a special meeting at the instance of the more than fifty voters; and that the annual meeting of March 16, 1915, and the vote upon the appropriations then and there proposed were legal and should not be interfered with.

The appeal is dismissed.

July 1, 1916.

LEGALITY OF APPOINTMENT OF PRINCIPALS

KATHRYN D. NOONAN AND LIDA A. ARNOT,

Appellants,

vs.

THE BOARD OF EDUCATION OF THE CITY PATERSON,

Respondent.

Michael Dunn, for Appellants.
Randall Lewis, for Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The facts in this case, as disclosed by the pleadings and by the testimony taken by the Assistant Commissioner on November 12th in the City of Paterson, are as follows:

Miss Kathryn D. Noonan was first employed as a teacher in the Paterson Public Schools in March, 1901. From 1901 until the Paterson Normal School was taken over by the State, July 1, 1923, she filled the position first of critic teacher and then of unassigned teacher in the latter school. At the time of the taking over of the Normal School by the State, Miss Noonan, under a leave of absence from the Paterson Board of Education by which she was to suffer no loss of rights or standing as a teacher in the city schools, continued in her position as unassigned teacher in the Normal School under the jurisdiction of the State Board of Education.

On December 13, 1923, at a regular meeting of the Board of Education of the City of Paterson the following resolution was adopted by a vote of 6 to 2:

> "*Resolved,* That Miss Kathryn D. Noonan be and is hereby appointed to the position as principal of School No. 2 at a salary of $2,800 per annum, dating from December 15, 1923, with annual increases of $200 up to a maximum of $3,800 per annum as per schedule of salaries for principals of primary schools adopted October 13, 1921, and effective September 1, 1922."

Miss Noonan continued to occupy the position of principal of School No. 2 until March, 1924, when she was notified that she had been dismissed as principal of School No. 2 and had been assigned to the Boys' High School as an unassigned teacher. The salary in the latter position was $2,600 per annum and involved a reduction of $200 from that which she had been receiving as principal of School No. 2 and Miss Noonan entered upon her duties under protest and brought this action.

Miss Lida A. Arnot, it appears from the facts of the case, was first appointed a teacher in the Paterson Public Schools in 1898 as a critic teacher and served as such until she subsequently received the appointment of head of the English Department in the Paterson Normal School. When the Normal School came under the jurisdiction of the State Board of Education in July, 1923, as stated above, Miss Arnot was given a leave of absence similar to that granted Miss Noonan under which without loss of rights as a Paterson Public School teacher she continued to serve as a teacher of English in the State controlled Normal School.

On December 13, 1923, at the regular meeting of the Paterson Board of Education above referred to the following resolution was adopted by a vote of 5 to 4:

> "*Resolved,* That Miss Lida A. Arnot be and is hereby appointed to the position as principal of School No. 17 at a salary of $2,800 per annum dating from December 15, 1923, with annual increases of $200 up to a maximum of $3,800 per annum as per schedule of salaries for principals of Primary Schools adopted October 13, 1921, and effective September 1st, 1922."

Miss Arnot entered upon the duties of principal of School No. 17 and served until March, 1924, when she was ordered to report to the Boys' High School as a teacher of English at an annual salary of $2,600, a reduction of $200 in

the salary received as principal of School No. 17. Miss Arnot in like manner, as the other Appellant, Miss Noonan, entered upon her duties at the Boys' High School under protest and brought this appeal.

Both the above named Appellants possessed at the time of their appointments as principals of Schools Nos. 2 and 17, respectively, on December 13, 1923, the State certificate qualifications which under the New Jersey School Law entitled them to hold such positions.

Prior to the adoption of the resolutions appointing Miss Noonan and Miss Arnot school principals as aforesaid on December 13, 1923, at the regular board meeting the following resolution was adopted by a vote of 6 to 3.

> *Resolved,* That rules concerning the appointment of principals be rescinded for this meeting only."

At the regular meeting of the Board of Education of the City of Paterson of February 14, 1924, the following resolution was adopted:

> "WHEREAS, The attempted suspension at the December meeting of the rules of this board relative to the appointment of principals was illegal and void, not being in conformity with the rules of this board and Cushing's Manual of Parliamentary Procedure, and
>
> "WHEREAS, By reason thereof the attempted appointment of principals for schools Nos. 2 and 17 was illegal and void the said appointees not having complied with the rules of this board governing the appointment of principals, therefore
>
> "*Be it Resolved,* That this board hereby rescinds and sets aside the said attempted appointment of principals for Schools Nos. 2 and 17 and hereby declares these positions to be vacant, this resolution to take effect immediately."

It was under the above resolution that the action of assigning Miss Noonan and Miss Arnot to positions in the Boys' High School at a reduction of $200 in annual salary was taken.

Subsequent to the hearing of this case by the Assistant Commissioner as aforesaid briefs upon the legal points involved were filed by counsel for both appellants and respondent.

The Respondent defends its action on February 14, 1924, in rescinding the December, 1923, appointment of both Appellants on the ground that Cushing's Manual of Parliamentary Procedure, which the board had adopted bearing upon the suspension of rules and which requires a unanimous vote, had been violated by the board when it suspended the rules by a vote of 6 to 3; that the rules alleged to be illegally suspended, namely, the rule relating to Principal's License No. 17 and Rule 26 and prescribing qualifications or requirements with which Appellants did not comply were vital to the appointment of Appellants thus made on December 13, 1923. Respondent further contends that the above-mentioned rules while not specifically adopted by the then board of education of the City of Paterson but existing prior to its organization had the effect of an ordinance and remained in full force and effect and binding upon the board of education until specifically repealed.

The Commissioner cannot agree with Respondent's contention that the rules of a previous board of education are binding per se upon a subsequent board merely because they have not been repealed, since according to the legal authorities (Serina M. Brown *vs.* Oakland Board of Education, School Law 623) boards of education and boards whose organization is similar (Gulnac *vs.* Board of Freeholders of Bergen County, 74 Law 543) are non-continuous bodies and the rules of one board do not, unless adopted by it, bind the subsequent board. However, authorities on corporations generally agree that by-laws although never specifically adopted by the board of directors will be considered as adopted if such by-laws are referred to and treated as the corporation by-laws by the board of directors at its meetings. (Graevner *vs.* Post, 119 Wis. 392.)

While the board of education of the City of Paterson in 1923 had never specifically adopted the rules in question it had apparently by constant reference to them acccepted them in the conduct of its business. Moreover, the board's very reference to the rules in question at its meeting on December 13, 1923, when it voted to suspend them admitted its tacit adoption of and governance by such rules. The language of the resolution itself declaring the rules suspended for this meeting only" admits the existence and control of the rules.

The Commissioner cannot, however, agree with the Respondent that the qualifications imposed and prescribed by the rules alleged to be illegally suspended are mandatory or essential prerequisites to the principalship of Schools Nos. 2 and 17, to which appellants were respectively appointed. The rule stating that Principal's License No. 17 may be granted upon competitive examination is not mandatory in such examination requirement. While the word "may" undoubtedly means "must" when used by the Legislature in a statute prescribing for subordinate agencies a duty in which the public is interested, there can be no such mandatory meaning attached to the word "may" when it is used by a public corporation in a rule for regulating its own affairs. Such a rule so worded is a plain reservation by the corporate body of discretion in the matter dealt with by its rule. Moreover, there is nothing in the rule dealing with Principal's License No. 17 which makes the possession of such license essential to the principalship in question. The license is apparently prescribed in connection with the salary schedule, and while the rule provides that principals holding it may be placed in charge of primary schools, it distinctly fails to provide that other principals must hold such license in order to be placed in charge of such schools. Similarly, there is nothing in Rule No. 26 which definitely requires for the appointment of teachers and principals the recommendation of the committee on education or the Superintendent of Schools. The rules provide merely that the committee upon the recommendation of the City Superintendent shall recommend from time to time persons for appointment, promotion or transfer, but does not prevent the board from acting in making appointments without the committee's and superintendent's recommendation.

The question now arises as to whether the suspension of its rules by the board of education by a vote of 6 to 3 in making Appellants' appointments on

December 13, 1923, was valid in view of the parliamentary procedure outlined in Cushing's Manual and Adopted by the Paterson Board of Education, by which a unanimous vote is necessary for the suspension of the rules. Upon this subject, as indicated by Appellants' brief, 28 Cyc. 352 holds as follows:

> "Municipal governing bodies usually adopt or recognize parliamentary law as their rules of order and proceeding, yet the courts unless positively required by express statutory provision will not annul or invalidate an ordinance enacted in disregard of parliamentary law providing the enactment is made in a manner required by statute."

Again, 29 Cyc. 1692, states

> "Where a deliberate body adopts rules of order for its parliamentary governance the fact that it violates one of the rules so adopted does not invalidate a measure passed in compliance with statute."

Another particularly relevant citation in appellants' brief is that of 19 R. C. L., page 189, which states that

> "A municipal council has inherent power to make rules of procedure for its government, provided such rules are not inconsistent with the Constitution or with any statute of the State. Such rules cannot have the effect of limiting the powers of the municipal council as established by statute, and an enactment which is actually adopted by a municipal assembly in accordance with its statutory powers is not invalid because its own rules of procedure were not complied with, where they were in term suspended or waived or merely tacitly ignored."

In the case cited by Appellant moreover of Barnert *vs.* the Mayor and Board of Aldermen of the City of Paterson, 48 N. J. L. 395, the Board of Aldermen attempted to determine that a resolution of the board passed by a majority vote of the quorum failed of passage because of a rule of the board by which a greater vote than a mere majority of the quorum was required for passage of resolutions, by-laws and ordinances. The court held that in the absence of a charter provision to the contrary a majority of a Board of Aldermen according to the general law constituted a quorum and a majority of a quorum was all that was required by law for passage of a resolution; and that no matter what the board's rule required in the way of a vote, the effect of the action of the board upon the resolution would be determined according to the existing law. The resolution was accordingly determined to have carried in spite of the board's rule.

In the case before us, therefore, the School Law requires but a majority vote of the board of education in making, amending or suspending its rules. If therefore according to the authorities above cited the board at its meeting on December 13th in connection with Appellants' appointments suspended its rules by the vote required by law, namely, a majority vote, the validity of such suspension is unaffected by the violation of the board's own adopted parliamentary procedure, by which the unanimous vote was required for suspension of rules. In the Commissioner's opinion, therefore,

in the light of the numerous authorities upon the subject the rules of the Paterson Board of Education were legally suspended at the December 13, 1923, meeting.

Even however should the rules of the board of education be deemed not to have been suspended at such meeting but in full force and effect and presenting an insuperable barrier in the way of absolute requirements as to qualifications with which Appellants could not comply, Appellants' brief cites convincing authorities to prove that appointments legally made by a public board or body of persons qualified under the law for the positions in question are valid without regard to the violation of the board's rules prescribing other than statutory qualifications. A case in point is that of Barnert *vs.* Mayor and Board of Aldermen of the City of Paterson, 48 N. J. L. 395, above cited, and of Michaelis *vs.* Board of fire Commissioners of Jersey City, 49 N. J. L. 154. In the latter case the board attempted to evade an appointment made by it of an engineer on the ground of a violation of a rule of the board in that the Appellant was appointed without having filed a sworn application with physician's certificate attached. The court held that since the appointment was made according to law the board would be deemed to have waived its rule in question and accordingly upheld the appointment.

In the case under consideration therefore since the appointments of Appellants on December 13, 1923, were made in the manner required by the School Law, namely, a majority of all the members of the board, and of persons admitted to possess statutory qualifications for the positions in question, it is in the Commissioner's opinion immaterial that Appellants may have lacked qualifications prescribed by rules of the board of education and that the violation of such rules in no way affected the validity of the appointments.

To sum up the case therefore it is the Commissioner's opinion that the qualifications and recommendations prescribed by rules of the Paterson Board of Education were not intended by such rules to be prerequisites as shown especially by the use of the word "may" in connection with the holding of License No. 17 by a primary school principal and the holding of an examination for such license; that in any event such rules were properly and legally suspended by such board in spite of the violation of its parliamentary procedure for suspending its rules and that even had the rules existed at the time of the appointment of Appellants and prescribing prerequisites to appointments with which Appellants could not comply, nevertheless such appointments made according to law, namely, by a majority vote of the board of persons qualified under the statute, were entirely legal and should be sustained.

Finally, both Appellants were, it is admitted, protected by the Teachers' Tenure of Service Law and according to the Court of Errors and Appeals in the case of O'Neil *vs.* Bayonne, 1 Misc. 475, cited by Appellants' brief, a person protected by the Tenure of Office Act and appointed by a regularly constituted board is protected in his position and is entitled to have a notice and hearing in the attempt to prove his ineligibility for the position.

It is therefore the Commissioner's opinion that the Appellants' appointments by the Paterson Board of Education as principals of Schools Nos. 2

and 17, respectively, on December 13, 1923, were entirely legal and such appointments are hereby sustained. Accordingly the action of the Paterson Board of Education on February 14, 1924, in rescinding such appointments is hereby declared to be illegal and void. It is further the Commissioner's opinion that even had the appointments of December 13, 1923, been illegal, Appellants were entitled to have been heard under the Tenure of Office Act upon the question of validity of their appointments before any action such as that of the Paterson Board of Education in February, 1924, in rescinding the previous appointments could legally be taken.

It is therefore hereby ordered that Appellants be reinstated in their positions as principals of Schools Nos. 2 and 17 respectively, and their salaries be paid from the date of their dismissal in March, 1924.

January 7, 1925.

DECISION OF THE STATE BOARD OF EDUCATION

This is an appeal from a decision of the Commissioner which sustained the petition of the respondents which alleged that they had been demoted from their positions as principals of schools in the City of Paterson, in violation of the Tenure of Office Act. The facts will be found fully stated in the Commissioner's opinion and will be only briefly summarized here. Miss Noonan and Miss Arnot have been for many years, and now are, qualified teachers in the school system of the City of Paterson. They were formerly members of the faculty of the City Normal School, the teachers of which were, by resolution of the Paterson Board of Education, retained as teachers of the Paterson system after that school became a State school. Some time after that they resigned from the normal school and on December 13, 1923, by resolutions duly passed by the Paterson Board of Education by a vote, in the case of Miss Noonan of six to two and in the case of Miss Arnot of five to four, were appointed principals of elementary schools at salaries of $2,800 each.

At the time this resolution was passed the Paterson Board of Education was acting under a set of rules, some of which were not followed in making the appointments.

Accordingly prior to the adoption of the above resolutions, a resolution was passed by a vote of six to three, rescinding, for that meeting only, the rules concerning the appointment of principals.

Miss Noonan and Miss Arnot entered upon the performance of their duties as principals and received their salaries as such, until their demotion, which took place as follows:

On February 14, 1924, the Board of Education passed the following resolution:

"Whereas, the attempted suspension at the December meeting of the rules of this Board relative to the appointment of principals was illegal and void, not being in conformity with the rules of this Board and Cushing's Manual of Parliamentary Procedure, and Whereas, by reason thereof the attempted appointment of principals for Schools Nos. 2 and 17 was illegal and void, the

said appointees not having complied with the rules of this Board governing the appointment of principals, therefore,

"Be it Resolved, that this Board hereby rescinds and sets aside the said attempted appointment of principals for Schools Nos. 2 and 17 and hereby declares these positions to be vacant, this resolution to take effect immediately."

Pursuant to this resolution Miss Noonan and Miss Arnot entered upon their new duties as teachers under protest and some time later started this proceeding.

We shall confine ourselves to the more important questions discussed and decided in the Commissioner's opinion.

First: He holds that the suspension of the Board's rules by a vote of six to three was valid, notwithstanding a rule of the Board required it to follow Cushing's Manual which requires a unanimous vote for the suspension of the rules.

It was held in Barnert *vs.* The Mayor and Board of Aldermen of the City of Paterson, 48 N. J. L. 395, that in the absence of a charter provision to the contrary, a majority of a Board of Aldermen according to the general law constituted a quorum, that a majority of a quorum was all that was required for passage of a resolution, and that no matter what the Board's rule required in the way of a vote, the effect of the action of the Board upon the resolution would be determined according to the existing law.

The school law requires but a majority vote of the Board of Education in making, amending or suspending its rules. Accordingly, under the case above cited and other cases in which it has been followed by the Courts of New Jersey, the appointments were valid whether or not the local board violated its own rules of procedure.

Furthermore, in Michaelis *vs.* The Board of Fire Commissioners of Jersey City, 49 N. J. Law 154, the plaintiff was promoted to the position of engineer. Later on the Board attempted to transfer him to a position with decreased wages, claiming that his original appointment was invalid because of the violation of a rule of the Board that no appointment should be legal without the filing of an application properly sworn to, with a physician's certificate attached. The Court held that after permitting the appointee to exercise his employment and receive pay it could not be said that they had not waived the performance of the rule and the demotion was held illegal.

This rule applies directly to the present case.

Second, it has recently been held by the Court of Errors and Appeals, in the case of O'Neil *vs.* Bayonne, 1 Misc. 475, that a person protected by a Tenure of Office Act and appointed by a regularly constituted Board is entitled to the protection of the act, notwithstanding he may have been ineligible at the time of his appointment. The Court said:

"The presumption is in favor of the lawfulness of the appointment until the contrary is made to appear. Unless this be so the incoming Board can arbitrarily oust any appointee lawfully appointed by an outgoing Board upon a mere assertion in a resolution or otherwise that this or that appointee was ineligible to hold the office for the reason that the appointment was not made

in compliance with the provisions of a statute or ordinance relating to such an appointment."

The case of Mager *vs.* Yore, 75 N. J. 198, seems to be to the same effect.

The cases above cited apply to the Teachers' Tenure of Office Act as well as to the act relating to police officers involved in these cases. Accordingly even though the appointment of the Respondents as principals by the resolution of December 13, 1923, was invalid, they could not be discharged on that ground without notice and a hearing, as provided in that act. As they had received no such notice and been given no such hearing, the action of the Paterson Board on February 14, 1924, rescinding such appointment was a violation of the Tenure of Office Act and therefore illegal and void.

Counsel for the Appellants have not filed briefs or appeared before us in this appeal or either of the two appeals decided herewith so that we have not had the benefit of argument and citation of authority in behalf of the Board of Education.

Without referring to the other points discussed in the Commissioner's opinion, it is recommended, on the grounds above stated, that his decision be affirmed.

ILLEGAL IMPOSITION OF LEAVE OF ABSENCE UPON SCHOOL PRINCIPAL

GEORGE G. WHITE,

Appellant,

vs.

BOARD OF EDUCATION OF THE BOROUGH OF HILLSDALE,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The above-named Appellant, who claims tenure protection as a Principal of Schools in the Borough of Hillsdale by virtue of three consecutive calendar year appointments, commencing September 1, 1923, brings this action to secure his re-instatement in the active service from which he claims to have been illegally removed by the Board of Education on August 16, 1926, by means of an enforced leave of absence of one year from that date.

The Respondent contends in the first place that Appellant was not employed during the year 1925-26 as a principal but as a teacher, that Appellant had in any event waived tenure protection, that he had violated his contract by engaging in other employment during the summer months, and finally that the leave of absence of one year granted Appellant by the Board was merely the legal acceptance of an offer to that effect made by him at a meeting of the Board of Education on June 21, 1926.

A hearing in this case was conducted by the Assistant Commissioner on Wednesday, October 6, 1926, at the Court House in Hackensack, at which testimony of witnesses on both sides was heard. Since that date briefs on the legal points involved have also been filed by counsel for both Appellant and Respondent.

The Commissioner cannot agree with Respondent's contention that Appellant was not a principal but a teacher during the years 1923-24 and 1925-26. While it is true that Appellant's contract for the year 1923-24 and also for the year 1925-26 contained the specific designation of teacher, the duties performed by him and accepted by the Board of Education during the entire three years of employment were always those of a so-called unapproved supervising principal. The testimony also shows that the Board of Education informed Appellant in 1923 by means of a letter signed by its district clerk that he had been appointed principal at a salary of $2,500, and that the Board in a letter dated May 20, 1926, and also signed by the clerk admitted Appellant's true status for that year by expressing its reluctance to have him come under tenure as "principal." It was further the uncontradicted testimony of the district clerk at the hearing before the Assistant Commissioner that the omission of the word "principal" in the first and third year contracts was purely a clerical error on his part. The contracts, therefore, between Appellant and the Hillsdale Board of Education as drawn for the years 1923-24 and 1925-26 in the opinion of the Commissioner failed to accurately express what has been proved to be the intention of both parties, namely, that Appellant be appointed principal of schools, and are therefore instruments which a court must necessarily interpret in accordance with such plain intention.

Neither can the Commissioner agree with the Respondent's contention that Appellant had in any event waived his tenure rights. That Appellant gained tenure protection on September 1, 1926, as a result of the completion of three consecutive calendar years of employment in the Hillsdale Borough district is in the Commissioner's opinion unquestionable in the light of the opinion of the Supreme Court in the case of Davis *vs.* Overpeck Township (p. 586, 1925 Comp. School Law). In that case (which is later than that of E. Brandes *vs.* Hoboken Board of Education, p. 550, 1921, Comp. School Law) Justice Parker held that in order to prevent tenure protection from accruing, the employment of a teacher, principal or supervising principal must be terminated short of three calendar years, and that if not so terminated, tenure would inevitably accrue upon the completion of such three years. There is no evidence in the case under consideration that Appellant ever waived his tenure rights as principal of schools in Hillsdale, and he could not, in the Commissioner's opinion, in any event be legally held to a waiver of the benefits of legislation which, according to an opinion of the Attorney-General, was enacted not as a matter of personal privilege but of public policy for the benefit of the school system.

As for Respondent's contention that Appellant's employment elsewhere during the summer months constituted a violation of his contract, it is the Commissioner's opinion that no such violation of contract is involved in the absence of express contractual provision prohibiting it, unless there is actual proof of neglect of duty as a result of such employment. No such contractual provision and no such neglect of Appellant's duties as principal have been proved in the case under consideration, and moreover it appears that the Hillsdale Board of Education has been aware of Appellant's occasional employment elsewhere during the summer months and has never protested against it.

There remains to be considered the question of whether the granting to Appellant by the Hillsdale Board of Education on August 16, 1926, of a year's

leave of absence was, as contended by Respondent, merely the legal acceptance by the Board of an offer to that effect by the Appellant on June 21, 1926. It appears from the testimony that the Board of Education in the spring of 1926, not realizing that Appellant would inevitably come under tenure on September 1, 1926, as a result of the then existing contract, failed to re-appoint him as principal for the coming year, 1926-27, but appointed a Mr. Humber as principal instead. At a meeting of the Board on June 21, 1926, the Appellant, Mr. White, called to the attention of the Board of Education the fact that he himself would be entitled to retain the office of principal by virtue of tenure protection accruing in September; but in order to save the Board embarrassment and the taxpayers money, Appellant suggested that the Board grant him a year's leave of absence, at the end of which time, if he did not have another position, he could return to Hillsdale. The president of the Board of Education then stated that a communication with regard to the matter would be addressed to Trenton, after which the Board would call a special meeting to act upon Appellant's suggestion. No further word having been received from the Board of Education, Appellant on August 15, 1926, notified the Board that as he would come under tenure on September 1st he desired to offer his services and to inquire when he should report for duty, open school, etc. The Board of Education thereupon after receipt of such communication on August 16th notified Appellant that the Board thereby granted his request for a year's leave of absence, reserving to itself all rights under the existing contract.

It is in the Commissioner's opinion extremely doubtful whether Appellant's suggestion at the June 21, 1926, meeting that a year's leave of absence be granted him could be considered an actual offer, and whether it must not on the contrary be considered merely an invitation for negotiation. According to 9 Cyc. 278, "If a proposal is nothing more than an invitation to the person to whom it is made to make an offer to the proposer, it is not such an offer as can be turned into an agreement by acceptance."

The proposal made by Appellant at the June 21st meeting was actually more in the nature of a suggestion than an offer, since it lacked an exact designation as to the date from which the year's leave of absence was to take effect and other exact terms such as an actual offer would logically contain. If, however, Appellant's suggestion is to be taken as a formal offer, the Commissioner cannot agree with Respondent's contention that it was of such a nature as to require no specific acceptance by the Board. While, according to Anson on Contracts (p. 28), there may sometimes be a tacit acceptance of an offer, "if the character of the contract makes it reasonable that acceptance should be signified by words or writing, then conduct alone will not suffice."

In the present case Appellant could not be deemed to have received the grant of a leave of absence until he received word of the Board's action upon his suggestion, and moreover the president of the Board stated at the June 21st meeting that further action would be taken by the Board upon Appellant's suggestion when word was received from Trenton.

It remains to be considered whether Appellant's offer, if such it is to be called, was actually revoked by him prior to its acceptance by the Board on August 16, 1926, or, if not, whether it is to be considered as having lapsed by reason of the delay of the Board of Education in accepting it. As above

stated, the Appellant on August 16, 1926, before the Board accepted his offer notified the Board of Education that he was offering his services and inquiring as to when he should report for duty, open school, etc. According to 9 Cyc. 288, "formal notice (of revocation) is not always necessary. It is sufficient that the person making the offer does some act inconsistent with it, as for example, selling the property, and that the person to whom the offer was made had knowledge of it." (Coleman *vs.* Applegarth, 68 Md. 21.)

In the opinion of the Commissioner Appellant's notice of August 16th to the Board that he was ready to report for duty, etc., must be considered as action inconsistent with his offer for a leave of absence and consequently a revocation of such offer prior to its acceptance. Even, however, if there were no revocation such offer must in the Commissioner's opinion be deemed to have lapsed because of the delay of the Board of Education in accepting it. According to 9 Cyc. 291 and Kempner *vs.* Cohn, 47 Ark. 519, and Park *vs.* Whitney, 148 Mass. 278, an offer must, if it is not to be deemed to have lapsed, be accepted "within a reasonable time"; and in order to determine what is a reasonable time there must be taken into consideration "the situation of the parties, their facilities for communication, etc." The Hillsdale Board of Education in the present instance took no action with regard to Appellant's offer of June 21st at its meeting on July 19th in spite of the fact that it had received the word from Trenton which it was awaiting, and called no special meeting thereafter to act on the offer as the president had informed the Appellant it would do, but on the contrary waited until its regular meeting of August 16th before taking any action. The most advantageous time for obtaining another position for a prospective leave of absence was during the summer months, but Appellant, bound by a contract until September 1st and by tenure thereafter, would have endangered his certificate under Sections 166 and 179 of the School Law had he either during his contract or except upon sixty days notice after coming under tenure accepted another position without the consent of the Board. The terms of Appellant's offer also make it evident that before obtaining another position he desired the assurance of the Board that it was granting him a leave of absence only so that, if he should so desire, he could return to his position at the end of such leave. Appellant, therefore, who was thus compelled to await official response from the Board, could not in the Commissioner's opinion be deemed to be still continuing on August 16, 1926, his offer regarding a leave of absence, since through the delay of the Board in accepting such offer the time had then gone by when Appellant could derive any advantage from it in the way of accepting another position.

In view of all the facts it is therefore the opinion of the Commissioner that the Hillsdale Board of Education on August 16, 1926, illegally imposed upon George G. White, the principal of schools of that district, a leave of absence of one year from that date. It is, therefore, hereby ordered that the Hillsdale Board of Education proceed at once to re-instate Appellant, who gained tenure as principal on September 1, 1926, in the active service of which he has been illegally deprived since August 16th and that his salary be paid from the latter date at the rate which he was receiving at that time.

November 2, 1926.

DISMISSAL OF PRINCIPAL ON CHARGES

EDWIN W. OLIVER,

Appellant,

vs.

THE BOARD OF EDUCATION OF THE CITY OF HOBOKEN,

Respondent.

Collins & Corbin, for the Appellant.
John J. Fallon, for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The Appellant was principal of school number nine in the City of Hoboken and had served as such for more than three consecutive years previous to the time of his dismissal. He therefore comes under the operation of the tenure of service act relating to teachers' employment. This act in part provides that no principal or teacher can be dismissed or be made subject to reduction of salary except for inefficiency, incapacity or conduct unbecoming a teacher or other just cause. It also provides that a principal or teacher must be given the opportunity of being heard after charges have been preferred against him or her.

In this case charges of conduct unbecoming a principal were preferred against Mr. Oliver, the Appellant, by two citizens of the City of Hoboken who were not members of the Board of Education. A hearing was held, at which appeared counsel for Mr. Oliver and for the persons making the charges. Under the law the Board of Education is constituted a sort of jury before whom charges against teachers are tried. The hearing in this case lasted during several night sessions. The testimony taken in the case was, by consent of counsel, largely that which had been taken in the Court of Chancery in a trial brought by A. J. Demarest, who had sued his wife for divorce. Mr. Oliver was named as co-respondent in this unsuccessful divorce proceeding. A transcript of this testimony was read. Some additional testimony was also taken.

A transcript of the testimony thus taken before the Board of Education of the City of Hoboken was submitted in the appeal taken to the Commissioner of Education. A hearing was held by the Commissioner in which argument was made by eminent counsel representing both sides of the case. A transcript of the original charges, made up of several separate specifications, was submitted. The first specification was that the Appellant had alienated the affections of Mrs. Demarest from her husband. This was reasserted in some of the other specifications. The specification alleging the alienation of affections was a result of conduct set forth in the other enumerated specifications in the charge. Proof of conduct unbecoming the Appellant as principal of a school is set forth in numerous instances of meetings with Mrs. Demarest. These meetings were prearranged and were

without the consent or knowledge of Mr. Demarest, who was living apart from his wife at the time.

The thing to be considered is not whether there was an alienation of affections, because this is a matter that must be reached as a conclusion based upon certain circumstances, but whether there was conduct unbecoming a teacher. The evidence that would show that Mrs. Demarest's affections were separated from her husband must in its nature be circumstantial. It is difficult to penetrate into the realm of the emotions, only on the basis of speculation. Moreover, it is not the essential thing in this case, only as it may appear as a result of the conduct of the Appellant.

The great bulk of testimony taken in this case, some 800 pages, must be considered in its entirety. The Appellant admitted that he did frequently meet Mrs. Demarest even after he had been ordered not to visit the Demarest home, as had been his custom. It was admitted that Mr. Oliver consented, somewhat reluctantly as he says, to watch Mr. Demarest, at the request of Mrs. Demarest, who suspected her husband of improper conduct.

These many meetings and the unusual situations connected therewith were such as, standing without explanation, must be considered as conduct unbecoming a principal of a school. Both Mr. Oliver and Mrs. Demarest give explanations which are intended to excuse if not justify the unusual things in their conduct. For instance, the necessity for clandestine meetings was explained on the ground that reports had to be made by Mr. Oliver to Mrs. Demarest in regard to what he saw and what he knew of the conduct of Mr. Demarest. These meetings were usually on Saturdays, when the report of the week would be given. The meetings, always prearranged, were at times in restaurants in New York, on ferry boats, and in a few instances were followed by automobile drives.

It is not charged that there were unlawful happenings in any of these meetings or any unseemly conduct that would indicate in itself anything unlawful. It is, however, in connection with other admitted happenings, that these meetings should be considered. There is no evidence to show the purpose of the meetings to be to heal the family troubles. On the contrary, there is evidence to show that the breach was widened between husband and wife.

The important question in the final analysis is, are the explanations of the clandestine meetings and the unusual situations in which the Appellant was found consistent with good morals, professional fidelity, and the common standard of social ethics. The Board of Education decided without a dissenting vote that these explanations were inconsistent and found Mr. Oliver guilty of conduct unbecoming a teacher. As a result he was dismissed from service as principal of the school. It is my opinion that this conclusion was a fair one.

The action of the Board of Education is sustained and the appeal is hereby dismissed.

May 22, 1917.

INSUFFICIENCY OF CHARGES AGAINST PRINCIPAL UNDER TENURE

MARY M. LEISTNER,

Appellant,

vs.

LANDIS TOWNSHIP BOARD OF EDUCATION,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

This appeal is presented to contest the legality of the action of the Board of Education of Landis Township on February 8, 1926, by which after hearings before the Landis Township Board on December 19th and January 8th, respectively the Appellant, who was under tenure as a principal and teacher in that district, was dismissed by the Board of Education from its employ. The charges against Appellant filed with the School Board by the supervising principal, H. L. Reber, on December 8, 1925, and upon which she was subsequently dismissed alleged "incapacity, inefficiency and conduct unbecoming a teacher."

The Appellant's chief contention is that the conclusions reached by the Landis Township Board of Education as to her unfitness as a principal and teacher were not justified by the testimony before it.

The Commissioner of Education has before him the entire stenographic record of the testimony produced before the local Board of Education together with briefs of counsel and oral argument heard by the Assistant Commissioner at Trenton on May 6th.

The Commissioner finds no merit in Appellant's contention that through change of membership the Landis Township Board of Education, by which she was dismissed on February 8, 1926, was a different body from that by which the hearing of charges against her was conducted. Not only had there been no re-organization of the Board of Education at the time of Appellant's dismissal on February 8, 1926, but the election itself for new Board members did not take place until February 9th.

Upon a careful consideration however of the testimony produced before the local Board of Education and of the briefs and argument of counsel, the Commissioner is unable to sustain the Board in its conclusion as to Appellant's "incapacity, inefficiency and conduct unbecoming a teacher," which if true, would under the provisions of the Teachers' Tenure Law justify her dismissal as principal and teacher in the Landis Township schools. The testimony produced before the Board in support of the charges did show some dissension between Appellant and the teachers under her supervision as principal, but the testimony failed to fix the responsibility for such dissension upon Appellant. There was criticism by some of the witnesses of Appellant's policy, apparently inaugurated by her as a disciplinary experiment, in requiring the pupils of the different classes to play in different parts of the school grounds; but disagreement between teachers and principal as to the wisdom of a certain policy

adopted by the latter does not in the Commissioner's opinion constitute in itself an offense on the part of the principal.

There was also testimony indicating a lack of harmony between the Appellant and the Parent-Teacher Association. Not only, however, was the responsibility for this situation not clearly imposed upon Mrs. Leistner, but the latter was in the Commissioner's opinion under no obligation to obey the commands or suggestions of a Parent-Teacher Association, an organization which not only had no control over Appellant but which indeed forms no official part of the public school system.

One of the principal grounds relied upon by the Respondent to justify its dismissal of Appellant was the testimony before it as to corporal punishment having been inflicted by the Appellant contrary to law upon Mildred Caesare, one of the pupils in the school under her supervision. In the Commissioner's opinion the preponderence of testimony indicated that there was no act of violence on the part of Appellant toward the pupil in question, but that upon the occasion described the child contrary to regulations was running through the corridor of the school eating her lunch as she ran, and that Mrs. Leistner forcibly detained her by seizing her by the shoulder and then proceeded to compel her to gather up the crumbs of her lunch from the floor. In any event the incident was not in the Commissioner's opinion of sufficient gravity to jeopardize a teacher's tenure protection.

The testimony, it is true, did reveal a few other minor incidents during Mrs. Leistner's incumbency of the office of school principal and arising out of her conduct and supervision of the school affairs, which indicated some lack of discretion on her part. The incidents, however, were not in the Commissioner's opinion either individually or collectively of sufficient importance to seriously reflect upon Appellant's conduct or upon her efficiency as principal and teacher in the Landis Township schools.

As a result of careful consideration of the entire record in the case, it is the opinion of the Commissioner of Education that the conclusion as to Appellant's "incapacity, inefficiency and conduct unbecoming a teacher" reached by the Landis Township Board of Education after hearing the charges preferred against her was not justified by the testimony produced before the Board, and that Appellant's dismissal was therefore in contravention of her rights under the Teachers' Tenure Law. It is therefore hereby ordered that the Landis Township Board of Education proceed at once to reinstate Mrs. Leistner in her position as principal and teacher in the schools of the district and that the Board proceed at once to pay her salary from the date of dismissal at the rate she was receiving at that time.

May 10, 1926.

Decision of the State Board of Education

The supervising principal of schools in Landis Township preferred charges against Mrs. Mary M. Leistner, a principal and teacher in that district, alleging "incapacity, inefficiency, and conduct unbecoming a teacher." After hearings by the Board of Education, in which a considerable amount of testimony was taken, the charges were sustained and Mrs. Leistner was dismissed. The

Commissioner, after examination of the testimony, held that the evidence did not justify the action of the Board, that the dismissal was in contravention of Mrs. Leistner's rights under the Teachers' Tenure of Office Law, and therefore ordered the Landis Township Board to at once reinstate Mrs. Leistner in her position as principal and teacher, and pay her salary from the date of dismissal at the rate she was receiving at that time. We have examined all of the evidence before the Board and agree with the Commissioner that it does not support the charges, or justify the Appellee's dismissal, and therefore recommend that the Commissioner's decision be affirmed.

DISMISSAL OF TEACHER ON CHARGES

L. W. SMITH,

Appellant,

vs.

BOARD OF EDUCATION OF THE CITY OF PHILLIPSBURG,

Respondent.

S. C. Smith and Marshall Miller, for the Appellant.
Blair Reiley, for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The Appellant in this case was a teacher in the schools of Phillipsburg and had served in such capacity for more than three consecutive years. He was, therefore, under the provisions of the tenure of service act.

In April, 1917, written charges were made by Valette V. Secor, the father of Ambrose Secor, a boy attending the Phillipsburg High School. These charges were to the effect that Ambrose Secor was forcibly ejected from the school room by Mr. Smith on March 28, 1917. The particular charge was that the boy was kicked three times by the Appellant while obeying his order to leave the studyroom and report to the principal of the school.

A hearing was held by the Board of Education at which witnesses were examined and counsel on both sides were heard. The Board of Education found the Appellant guilty of the charge and forthwith dismissed him from service as a teacher in the high school.

Mr. Smith appealed from that decision to the Commissioner of Education. A hearing lasting two days was held by the Commissioner at Phillipsburg, at which witnesses on both sides were examined by counsel.

The facts brought out in the case were that on March 28, 1917, while Mr. Smith, who had charge of the studyroom at the time, was about to dismiss the school, a piece of chalk was thrown by someone. Mr. Smith supposed that Ambrose Secor, who was sitting near the place from which the chalk was thrown, was the person who threw it. He went to the desk where Secor was sitting and said to him, "Get out." The boy made no answer but proceeded to gather up his books and, according to his own testimony and that of four or five witnesses, to obey the order of Mr. Smith.

Mr. Smith, in his statement, says the boy did not immediately obey the order, and looked at him in a defiant manner, whereupon he put his hand on his shoulder, turned him around and gave him, according to his testimony, a shove with his foot. The boy, according to Mr. Smith's testimony, slowly proceeded down the aisle and stopped at the door and looked over his shoulder in a defiant manner, whereupon Mr. Smith again gave him a shove with his foot. Another shove with the foot was given him in the hall. The boy's books fell out of his hand. The boy claims that the shove given him caused the books to be thrown out of his hand, but Mr. Smith claims that the books simply dropped down on the floor. Secor admits that the so-called kicks did not hurt.

It is not denied by the Appellant in this case that he did use his foot to propel the boy toward the office of the principal, where he was ordered to go. There is conflict of testimony as to whether the action by Mr. Smith in using his foot would be called a kick or a shove. The boy himself calls it a kick. A few other boys in giving their testimony also called it a kick. Several witnesses, together with Mr. Smith, himself, say it was a shove with the foot.

There is conflict of testimony also as to whether the obedience to the order of the teacher was prompt. Mr. Smith and several witnesses say that it was not prompt, while the boy and a few witnesses on the other hand say that he moved promptly when he was ordered to do so.

The testimony also showed that Ambrose Secor did not throw the chalk. That was admitted as being done by another boy.

The question in the case is, was this action of Mr. Smith in using his foot to compel the boy's obedience to the order given by him conduct unbecoming a teacher. Mr. Smith's explanation or excuse for using his foot was, first, that the boy assumed a threatening attitude and a defiant look and hence that force was necessary to have his order carried out; and, secondly, that he used his foot because a physical infirmity on that day prevented him from using his hands.

The testimony shows that there was no word of defiance uttered by Secor. It also shows that Secor was not informed by Mr. Smith why he was ordered to the office.

The Board of Education, with all the facts before it, found Mr. Smith guilty of conduct unbecoming a teacher and dismissed him from its service. The question before the Commissioner, therefore, is not a question of facts. The facts as stated above, are admitted. The question for decision on this appeal is, was the conduct of the Appellant unbecoming a teacher in a high school.

The teacher is clothed with authority to maintain discipline in school. In schools of more than one teacher the principal alone can inflict the only punishment allowed under the law—suspension or expulsion from school. Corporal punishment is prohibited by law.

In this case the Appellant was within his right in ordering the boy to the principal for investigation of the alleged offense. If the boy resisted the Appellant or used defiant language or refused to obey the order to "get out" there might have been justification in using reasonable physical force to get him to the principal's office.

I do not find that there was any resistance nor any defiance of the authority of the teacher and hence no excuse for using force and much less was there necessity for using the foot to hasten the movement of the boy. The boy was not injured, but the insult, the humiliation, quite as much as the injury, must be considered.

I therefore agree with the action of the Board in finding the Appellant guilty of conduct unbecoming a teacher and dismissing him from service.

The appeal is hereby dismissed.

August 23, 1917.

Affirmed by STATE BOARD OF EDUCATION, January 19, 1918.

LEGALITY OF REMOVAL OF SUPERVISING PRINCIPAL

JOHN S. MCCURDY,

Appellant,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF MATAWAN,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

This appeal is presented for the purpose of contesting the legality of the action of the Matawan Township Board of Education in notifying Appellant on April 23, 1926, that in accordance with the terms of his employment of April 23, 1925, his services as Supervising Principal would terminate on June 1, 1926, and that he was in no way to act as Supervisor after that date.

Appellant contends that his employment as Supervising Principal from July 1, 1925, to June 1, 1926, under the resolutions of the Board of Education of April 23, 1925, was invalid in that there was no written contract of employment and an entire absence of any rules and regulations for the employment and government of its teachers adopted by the Matawan Township Board of Education in lieu of such written contract, and that subsequent thereto, namely, on March 17, 1926, he was legally employed under written contract as Supervising Principal of the Matawan Township schools for the term of one year from March 20, 1926, at an increase of $200, which contract has not yet expired.

Respondent on the other hand insists that the office of Supervising Principal to which Appellant was appointed on April 23, 1925, was not an office for which the law requires a written contract or rules and regulations in lieu thereof, that consequently the employment of April 23, 1925, was entirely valid, that there was no vacancy in the office of Supervising Principal in March, 1926, and that therefore the action taken by the Board of Education on March 17, 1926, was an illegal attempt to fill an office not yet vacant and which would not become vacant until June 1, 1926, after the expiration of the official life of such Board. Respondent further contends that the resolution of March 17, 1926, under which Appellant claims valid employment failed to receive the

vote of a majority of the whole membership of the Board of Education as required by law, that Appellant's employment as Supervising Principal was also illegal because of the fact that such an office did not exist in the School District of Matawan at that time, and finally that in any event Appellant's notification on April 23, 1926, of the termination of his services was a compliance with the mutual termination provision of the very contract of March 17, 1926, under which he claims his office.

Hearing in this case was conducted by the Assistant Commissioner of Education on September 17, 1926, at the Court House in Freehold, at which testimony of witnesses on both sides was heard, and since that date briefs on the legal points involved have been filed by counsel for both Appellant and Respondent.

The Commissioner cannot agree with Respondent's contention that Appellant's employment of April 23, 1925, was valid and that there was consequently no vacancy in the office on March 17, 1926. Article VIII, Section 163, of the 1925 Compilation of the School Laws provides in part as follows:

> "A Board of Education may make rules and regulations governing the engagement and employment of teachers and principals * * * The employment of any teacher by such Board, and the rights and duties of such teacher with respect to such employment, shall be dependent upon and shall be governed by the rules and regulations in force with reference thereto. If a Board of Education shall not have made rules and regulations as aforesaid, then no contract between such Board of Education and a teacher shall be valid unless the same be in writing, or partly written and partly printed, in triplicate, signed by the President and District Clerk or Secretary of the Board of Education and by the teacher."

Article VIII of the School Law above quoted, while entitled "Teachers", expressly refers to both principals and teachers, and was held by the Commissioner of Education in the case of Davis *vs.* Boonton Board of Education (decided December 24, 1925), to even include Supervising Principals. The Commissioner is not prepared therefore to say that even if Appellant had been appointed in 1925 to the office of an approved Supervising Principal, he would not have been subject in like manner to the requirements of either a written contract or rules and regulations of the Board of Education in lieu thereof prescribed by Article VIII, Section 163, above quoted. When it is considered however that the office of Supervising Principal for the Township of Matawan was not authorized by the County Superintendent and approved by the Commissioner and State Board of Education until September 11, 1926, and the office to which appellant was appointed in April, 1925, was merely that of an unapproved Supervising Principal or Principal with supervisory duties, there is in the Commissioner's opinion not the slightest question but that full compliance with the statutory requirements as to the formalities of employment was essential to the validity of such employment. Instead however of any such written contract and with the entire absence of any rules and regulations of the Board of Education in lieu thereof, it appears that

Appellant was appointed Supervising Principal on April 23, 1925, by resolution only. As in the case of Herman Shapiro *vs.* Board of Education of the City of Paterson, decided April 7, 1926, such an employment was in the Commissioner's opinion invalid and there consequently existed on March 17, 1926, a vacancy which the then Board of Education of the Township of Matawan was legally authorized to fill.

There then remains to be considered the question among others of whether the resolution of the Board of Education of March 17, 1926, by which Appellant was appointed Supervising Principal for one year from March 20, 1926, received a majority vote of all the members of the Board as required by law.

Section 130, Article VII, of the 1925 Compilation of the School Law, provides as follows:

> "No principal or teacher shall be appointed, transferred or dismissed, nor the amount of his salary fixed * * * except by a majority vote of the whole number of members of the Board of Education."

It appears from the testimony in this case that at the meeting of the Board of Education on March 17, 1926, 8 members, including the president, were present, that upon a roll call, which did not include the president, the motion for Appellant's appointment as Supervising Principal for one year from March 20, 1926, duly seconded, received 4 affirmative and 3 negative votes, and that thereupon the president announced that the motion was carried. While the decisions are numerous to the effect that in the case of a tie the chairman's announcement that the motion has carried is equivalent to a casting vote (Small *vs.* Orne, 79 Me. 78; Rushville Gas Company *vs.* City of Rushville, 121 Ind. 212, etc.), the case of Roberts *vs.* Dancer, 93 S. E. 297, decided by the Court of Errors and Appeals of Georgia and cited by Appellant's counsel seems to be the leading authority upon the effect of such an announcement by the chairman in a situation such as that under consideration, where the resolution without the vote of the chairman received a majority vote but one vote less than a majority of the whole Board, as required by law. In the Georgia case above referred to the Court held as follows:

> "In the present instance we think concurrence must have been evidenced in some more active and positive manner than by acquiesence, which is altogether implied, and that in some way actual and positive manifestation of such intent must have been given. It is our opinion that the statement of the chairman, in declaring the resolution carried, when the circumstances were such that his vote became necessary to its adoption, was equivalent to the express and formal casting of his vote therefor."

In the case under consideration the president of the Matawan Township Board of Education announced the motion for the appointment of Appellant as Supervising Principal carried "when the circumstances were such that his vote became necessary to its adoption" by a 5 to 3 vote or a majority of the whole number of the Board. He must be deemed in such case to have known the majority necessary to carry the motion, and in the Commissioner's opinion

his announcement of its having carried was therefore in the light of the above authorities equivalent to "the express and formal casting of his vote therefor." In this particular instance, moreover, the announcement of the carrying of the motion was the first opportunity the president had had to cast his vote, since his name was not included in the roll call upon the motion. The cases which Respondent's counsel cites, namely, 42 Conn. 32, and 60 Iowa 391, are not in the Commissioner's opinion in point, since in one case the chairman announced that a candidate had been elected who not only had not received a majority vote but for whom a majority could not have been effected even by the vote of the chairman, and in the other case the chairman announced a resolution defeated because it had not received a three-fourths majority when the majority it had received was sufficient according to law to carry it. In neither of the above cases could the result have been in any way affected by any action of the chairman, as in the case under consideration. In referring to the Tennessee case upon which Respondent's counsel also relies, the Court of Appeals of Georgia in Roberts *vs.* Dancer, above quoted (93 S. E. 297), concluded with the following statement: "We find that the Tennessee Supreme Court in Lawrence *vs.* Ingersoll, 88 Tenn. 32, 12 S. W. 422, 6 L. R. A. 309, 17 St. Rep. 870, has laid down a contrary rule; but we think the doctrine here followed is founded upon the better reason, and it is therefore adopted."

In the Commissioner's opinion there is no merit in Respondent's contention that Appellant's appointment on March 17, 1926, was illegal because the office of Supervising Principal had not at that time been duly authorized in Matawan by the County Superintendent and approved by the Commissioner and State Board of Education. The office known in school districts as an unapproved Supervising Principal is generally recognized and considered to be a type of principal with supervisory duties, for whom an apportionment of $400 is allowed as in the case of all other school principals, instead of the $600 apportionment to which a district is entitled for an approved Supervising Principal. The appointment of such a principal with supervisory dutes is, therefore, in the Commissioner's opinion, in no way invalidated by the specific designation of Supervising Principal.

The notice given Appellant by the Matawan Board of Education on April 23, 1926, to the effect that his services as Supervising Principal would terminate on June 1, 1926, cannot in the Commissioner's opinion be considered, as Respondent claims, the exercise of a mutual termination clause in the March 17, 1926, contract, since the notice itself specifically stated that Appellant's services were being terminated in accordance with the terms of his April 23, 1925, appointment, by which he was employed from July 1, 1925, until June 1, 1926. Moreover, without in any way ruling that the termination clause in the March, 1926, contract was intended to be effective, since a line was drawn through the blank specifying the number of days notice, the Commissioner is in any event of the opinion that the Respondent is estopped from claiming to have exercised a clause in a contract the validity of which it has all through the same action absolutely denied.

It is therefore the opinion of the Commissioner that Appellant's appointment as Supervising Principal of Matawan from July 1, 1925, until June 1, 1926, was invalid for lack of a written contract or rules and regulations of the

Board of Education in lieu thereof, that there consequently existed a vacancy which on March 17, 1926, was legally filled by the appointment of Appellant to the position of so-called Supervising Principal for one year from March 20, 1926, and that such contract of March 17, 1926, was violated by the notice of the Board of Education of April 23, 1926, by which Appellant's services were to terminate on June 1, 1926. In the Commissioner's opinion such notice constituted not only a violation of contract but a violation of Appellant's potential tenure rights, since the contract of one year since March 20, 1926, would place Appellant under tenure on July 1, 1926. Appellant is therefore entitled to the remedies of the Teachers' Tenure Law.

It is, therefore, hereby ordered that the Matawan Township Board of Education proceed at once to re-instate Appellant in the position from which he was illegally removed on June 1, 1926, with salary from that date at the rate which was specified in the March 17, 1926, contract.

Dated, October 19, 1926.

DECISION OF THE STATE BOARD OF EDUCATION

This is an appeal by the Matawan Township Board of Education from a decision of the Commissioner directing it to reinstate the Respondent, John S. McCurdy, in his position as Supervising Principal. The Commissioner holds that he was illegally removed. The facts and questions of law involved are stated and discussed at length in the Commissioner's opinion. We agree with his conclusions and recommend that they be affirmed.

February 5, 1927.

DISMISSAL OF SUPERVISING PRINCIPAL UNDER TERMS OF CONTRACT

GROVER F. KIPSEY

vs.

BOARD OF EDUCATION OF WARREN TOWNSHIP.

Alvah A. Clark, for the Appellant.
John F. Reger, for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The minutes of the Board of Education of Warren Township for April 3d, 1911, contain the following:

"Motion made by Mr. Shoemaker that Grover F. Kipsey be engaged as Supervising Principal, if qualified, for the balance of the year, with the understanding that if his services were satisfactory to the Board he be engaged to serve as Principal beginning in September in the immediate year. Carried."

At a meeting of the Board held June 3d, 1911, certain teachers were appointed for the then ensuing year, and action on the continuance of the Supervising Principal was deferred.

At a meeting of the Board held June 24th, after a motion had been made to continue Kipsey as Supervising Principal, and before action thereon, the President, Edmund E. Sage, presented his resignation as a member of the Board. The resignation was at once accepted, and after the election of a President, Minard G. Smith was elected a member of the Board, and at once took his seat. Immediately thereafter Sage was elected as Supervising Principal for the then ensuing school year.

Kipsey claims that his appointment on April 3d was not only for the remainder of the then current school year, but also for the year beginning July 1st, 1911, and he appeals from the action of the Board and prays that he be restored to the position of Supervising Principal.

The Board of Education denies that it elected Kipsey for more than three months, but insists that his employment for the ensuing year was conditioned upon his services being satisfactory; that his services were unsatisfactory; that Kipsey was not qualified for the position by reason of the fact that he did not hold a proper certificate, and that the contract was invalid for the reason that it was not in writing.

A supplement to the School Law, P. L. 199, p. 259, provides, among other things, that "no person shall be appointed Supervising Principal unless he or she shall hold either a State or first grade county certificate."

At the time Kipsey was appointed he held a second grade county certificate, and he also had a letter from the County Superintendent of Schools dated March 31, 1911, stating that Kipsey had passed an examination in all but one of the subjects required for a first grade county certificate, and that "should you be elected Supervising Principal I should, therefore, give you a provisional first grade certificate good until June 1, the understanding being that you would pass the one subject still to be taken at the May examination for teachers." There is no record of the issuing of the provisional certificate, and the County Superintendent was unable to fix the date on which it was issued, but he says in his testimony: "On further reflection, I feel perfectly satisfied that I did give a permit to Mr. Kipsey, although I cannot recall the actual fact of handing it to him or mailing it. I am morally certain, entirely to my own satisfaction, that I did give such a permit, particularly in the light of the letter which was presented here this morning in which I said I would do so. A permit is not usually given until a position is established. We would not give a permit in advance because we would not know where the party would be. I simply had to wait until some one was elected to fill the position, and I issued the permit to the best of my recollection."

A provisional first grade county certificate has the same value as a license to teach as a certificate of the same grade issued after the required examination is completed.

The evidence regarding the certificate is not entirely satisfactory, but in view of the testimony of the County Superintendent and of the fact that Kipsey was paid his salary each month, the right of the Appellant to the office of Supervising Principal cannot be attacked successfully on the ground that he did not hold a proper certificate.

The Respondent in its brief says, "the contract was not in writing." There is nothing in the evidence covering this point, and in the absence of proof to the contrary it must be assumed that the appellant was legally employed.

A Board of Education is presumed to know the law relating to contracts and the payment of salaries, and the Respondent having permitted Kipsey to serve as Supervising Principal, and having paid him his salary, it cannot at this late date plead that there was no contract with Kipsey.

Full force and effect must be given to all parts of a contract, and the language must, if possible, be given its ordinary interpretation.

If, as the Respondent insists, the contract was only for the months of April, May and June, the latter part of the resolution was unnecessary. Had the resolution simply read "That Grover F. Kipsey be engaged as Supervising Principal, if qualified, for the balance of the year," the Board of Education and Kipsey could have, at a later date, entered into a contract for the school year 1911-12. If the contention of the Respondent is correct, the remainder of the resolution which reads "with the understanding that if his services were satisfactory to the Board, he be engaged to serve as Principal beginning in September in the immediate year," is unnecessary and meaningless.

On the other hand, construing the resolution as a contract for the ensuing year, if Kipsey's services proved satisfactory, gives a meaning to all parts of the resolution, and it is the natural and correct construction.

The determination as to whether or not the services rendered by Kipsey from the date of his employment until the date on which his successor was appointed were satisfactory rested entirely in the discretion of the Respondent, and the Board had the undoubted right to discharge him at the end of June if, in its judgment, his services were unsatisfactory.

The value of his services was to be determined by the Board, and even if it could be proven that his services were of the highest order it would be of no avail if the Board discharged him in good faith, for the reason that his services were not satisfactory to it.

The only cause for which Kipsey could have been removed was that his services were unsatisfactory to the Board of Education, and the point remaining for consideration is, was the appointment of Sage and the consequent removal of Kipsey made in good faith, and because Kipsey's services were unsatisfactory?

A careful reading of the evidence given by the members of the Board who voted for the appointment of Sage leads inevitably to the conclusion that the character of the services rendered by Kipsey had no influence whatsoever on the action of the Board.

Certain members of the Board testified that they had heard rumors about Kipsey, but they were never brought to the attention of the Board, and no attempt was made to ascertain whether they were true or false.

At the meeting of June 24th when the County Superintendent asked if there was any dissatisfaction with Kipsey there was no response.

All the circumstances connected with the candidacy of Sage, his resignation as a member of the Board, the election of his successor, and his appointment as Supervising Principal, show conclusively that the removal of Kipsey

was not done in good faith and because his services were unsatisfactory to the Board of Education. In fact, the Board never considered the question, but the members have endeavored to justify their action on their individual judgment founded on rumors which they never investigated.

The Appellant was not legally removed and must be restored to his position of Supervising Principal.

December 29, 1911.

ILLEGAL DISMISSAL OF SUPERVISING PRINCIPAL UNDER CONTRACT

ALBERT S. DAVIS,

Appellant,

vs.

BOARD OF EDUCATION OF THE TOWN OF BOONTON,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The facts in this case as indicated by testimony taken at a hearing before the Assistant Commissioner of Education at Morristown on November 12th, 17th and 21st, 1925, are as follows:

Appellant was appointed under a written contract dated June 4, 1923, as Supervising Principal of the Schools of Boonton for a term of three years, commencing July 1, 1923, and ending June 30, 1926, at a salary of $4,000 for the first year, $5,000 for the second year and $5,500 for the third year. Appellant continued to serve under the appointment as aforesaid and to receive his salary until August 28, 1925, upon which date at a meeting of the Boonton Board of Education a resolution was passed abrogating the contract. On or about September 1, 1925, application was made by Appellant to the Boonton Board of Education for the same position of Supervising Principal at a salary of $458.33 per month from September 1, 1925, until April 1, 1926, but this application was rejected at a meeting of the Board on September 11th by a vote of eight nays with the ninth member present refraining from voting. Appellant thereupon at once presented an appeal to the Commissioner of Education, in which he demanded reinstatement in his position of Supervising Principal of the Boonton Schools, under the three-year contract as aforesaid, and the payment of his salary from the date of his dismissal, namely August 28, 1925.

The Respondent, the Boonton Board of Education, defends its action on the ground that the three-year contract under which Appellant was originally employed was an attempt on the part of the then Board of Education to bind its successors and therefore not legally binding upon it as one of such succeeding Boards, that such contract was incapable of ratification, that Appellant, moreover, acquiesced in the abrogation of the contract by the Board on August 28, 1925, as aforesaid, by application on or about September 1, 1925,

for a short term appointment as Supervising Principal, thus constituting an estoppel of the present action; and finally, Respondent contends that Appellant's conduct of his office during his incumbency demonstrated his unfitness as Supervising Principal, thus further justifying the action taken by the Board of Education at its meeting on August 28, 1925.

In the case of Serina M. Brown *vs.* Oakland Board of Education, reported on page 656 of the 1925 Compilation of the New Jersey School Law, it was held by the Commissioner of Education, whose decision was sustained by the State Board, that as Boards of Education are non-continuous bodies, one Board could not by a three-year appointment of a teacher legally deprive a succeeding Board of its right to appoint her successor, and that such appointment was accordingly voidable by such succeeding Board. In a more recent case, namely, Noonan and Arnot *vs.* Paterson City Board of Education (reported on page 527, 1925 Compilation of School Law), which was also sustained by the State Board of Education, the Commissioner held that since Boards of Education were non-continuous bodies (Gulnac *vs.* Board of Chosen Freeholders, 74 L. 543), a board was not bound *per se* by rules adopted by a preceeding Board. In the Brown case above referred to the Commissioner was supported in his conclusion that a Board of Education cannot make an appointment for such a term as to divest future Boards of the power to appoint whom they may desire by Illinois cases, namely, Stevenson *vs.* School Directors, 87 Ill. 255, and C. C. Cross *vs.* School Directors, 24 Ill. App. 191. The Brown case differed somewhat from the one under consideration in that it involved action by an outgoing Board of Education to supersede a contract expiring during the life of the succeeding Board with a three-year agreement which would automatically deprive such succeeding Board of its right of appointment. It is the opinion of the Commissioner, however, that the three-year appointment of Mr. Davis by the Boonton Board of Education, dating from July 1, 1923, may be considered by its terms just as effectively to divest future Boards including the present Board of all power to appoint his successor.

It is also the opinion of the Commissioner, however, that an appointment such as that of Appellant, even though plainly voidable by a succeeding Board of Education, is nevertheless capable of subsequent ratification either express or implied, since it involved no collusion or fraud or elements which could render it void. In the recent case of Noonan and Arnot *vs.* Paterson Board of Education, above referred to, it was held that rules adopted by a preceding Board of Education and not *per se* binding upon a new Board were nevertheless to be considered as ratified and adopted by such new Board, if acted under or referred to by it as the rules governing such Board.

In the case under consideration the testimony shows that the Boonton Board of Education, which came into office on the first Monday in April, 1925, and which later on August 28, 1925, rescinded Appellant's three-year contract, actually paid the latter his salary for the months of April, May, June, July and August until the date of actual dismissal, namely, August 28, 1925. The testimony also shows many official acts of recognition of Appellant as Supervising Principal during the months above enumerated, on the part of the Board of Education which came into office in April, 1925, as aforesaid, such as the payment of Appellant's expense allowances, receipt of his various official re-

ports, adoption of his recommendations, etc. It is, therefore, the opinion of the Commissioner that the Boonton Board of Education, which came into office in April, 1925, by its own acts adopted and ratified, so far as it was concerned, the three-year contract entire and indivisible in its terms, by which on July 1, 1923, Appellant was appointed as Supervising Principal of the Boonton Schools.

It remains to be considered whether the Respondent's dismissal of Appellant on August 28, 1925, was justified on the ground of the former's inefficiency or unfitness for his office of Supervising Principal. In the opinion of the Commissioner the testimony does not support the contentions of the Board of Education in this regard. The lack of proper supervision of the schools under Appellant is not established by the testimony nor was there shown any failure on his part to keep the Board of Education informed by means of reports as to the condition and progress of the schools under his supervision. The schools, moreover, were shown by the testimony to have a high standard of efficiency during Appellant's incumbency. The incidents which were proved indicating somewhat of discord and friction between the Appellant and the Board of Education, even though viewed in a light unfavorable to Appellant, were not in the Commissioner's opinion of sufficient gravity or importance to be considered as an impairment of Appellant's efficiency or fitness for his office, and thus to justify his dismissal.

The Commissioner does not consider that Appellant can be deemed to have acquiesced in his dismissal of August 28, 1925, as claimed by the Respondent merely because of his having applied in September for a new appointment as Supervising Principal until April, 1926. Such an application, never accepted by the Respondent, could be considered nothing more than an offer of compromise, which when rejected by the Board of Education could in no way act as an estoppel of Appellant or to the prejudice of his right to appeal from the dismissal action of August 28, 1925, as aforesaid.

The remedy to which Appellant is entitled, therefore, for what the Commissioner finds to be an illegal dismissal and a violation of contract alone remains to be considered. Section 165, Article VIII, page 109 of the 1925 Compilation of the School Law, provides as follows:

> "In case the dismissal of any teacher before the expiration of any contract entered into between such teacher and the Board of Education shall, upon appeal, be decided to have been without good cause, such teacher shall be entitled to compensation for the full term for which said contract shall have been made; but it shall be optional with the Board of Education whether such teacher shall or shall not teach for the unexpired term."

It is true that in the above quoted section of law the term "teacher" is used, while the office held by Appellant was that of Supervising Principal. Article VIII, of the School Act of 1903, of which the above quoted provision is one of the sections, while entitled "Teachers", nevertheless provides in its opening sentence that "a Board of Education may make rules and regulations governing the engagement and employment of teachers and principals, the terms and

tenure of such employment and the promotion and dismissal of such teachers and principals, the salaries, and the time and mode of payment thereof, and may from time to time change, amend or repeal such rules and regulations." It is the opinion of the Commissioner, therefore, that the term "teacher" as used thereafter in the remaining sections of Article VIII has a broader significance than the term itself would imply and includes both teachers and principals. In other parts of the School Law such as that dealing with salary schedules (Sec. 319, Art. XXVI, of the 1925 School Law Compilation) the term "teacher" is used in a comprehensive sense to include both the teachers and principals specifically enumerated in the beginning of the article.

In the dismissal action of the Boonton Board of Education on August 28, 1925, there is involved no actual tenure which had been violated and, moreover, the July 1, 1923, contract which was broken need not necessarily, after the expiration of the term of the present Board in April, 1926, inevitably result in tenure protection, since the three-year contract was an entirety and when adopted by a succeeding Board is binding only through its own official term. Accordingly, the matter is not one for the application of remedies prescribed by the Teachers' Tenure Law.

The Commissioner is without authority under Section 165, Article VIII, page 109, of the 1925 Compilation of the School Law, above referred to, to fix any damages, as Appellant suggests in his brief, by deducting the amount Appellant has been earning since the date of his dismissal from the compensation due him. Such fixing of damages would be a function of a Court of Law and not of the Commissioner, who, under the section of the School Law above referred to, is authorized in the case of an unlawful dismissal of a teacher under contract to award the entire compensation from the date of dismissal until the end of the term.

It is, therefore, hereby ordered by the Commissioner of Education that in accordance with the provisions of Section 165 above referred to, the Boonton Board of Education proceed at once in its discretion either to reinstate Appellant in his position of Supervising Principal of the Boonton Schools and to pay him his salary from August 28, 1925, at the rate stipulated in the contract for the third year; or, if the Board does not desire the continuance of Appellant's services, that it proceed at once to pay him his salary at the rate stipulated for the third year as aforesaid from the date of his dismissal on August 28, 1925, and during that part of the remainder of Appellant's contract term which is binding upon the present Board of Education, namely, until the first Monday in April, 1926.

December 24, 1925.

DISMISSAL OF TEACHER UNDER TERMS OF CONTRACT

EDNA BREDER,

Appellant,

vs.

THE BOARD OF EDUCATION OF EGG HARBOR CITY,

Respondent.

William I. Garrison, for the Appellant.
Herman L. Hamilton, for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

On the 14th day of May, 1915, Edna Breder entered in a contract with the Board of Education of Egg Harbor City to teach in the public school for a term of one year, beginning the 1st day of September, 1915, at a salary of $550 per year. In this contract it was stipulated as follows: "It is hereby agreed that either of said parties to this contract may, at any time, terminate said contract and the employment aforesaid, by giving to the other party one month's notice in writing of its election to so terminate the same."

At a special meeting of the Board of Education held on January 18th, 1916, called for the purpose of investigating complaints that had been lodged with the teachers' committee referring to Miss Breder as a teacher and disciplinarian, Miss Breder was present and gave an explanation of her relation to the trouble that seemed to exist. At the close of this meeting it was ordered by the Board "that Miss Breder be asked for her resignation and that she be dismissed as per contract." The following letter was written to Miss Breder by the Secretary of the Board:

Egg Harbor City, N. J., January 19th, 1916.

Miss Edna E. Breder,

Dear Madam—At a special meeting of the Board of Education held Tuesday Eve. Jan. 18, the Board instructed me to ask you for your resignation which is to take effect Feby. 18th, 1916. If your resignation is not forthcoming, this notice will act as your dismissal as per contract.

Please acknowledge receipt and oblige.

Respt. Yours,

JNO. W. BRAUNBECK, *Sec.*

By this letter it will be noted that one month's notice was given in accordance with the terms of the contract. Counsel for Miss Breder held that there was not a full month's notice given because the letter of the Secretary was dated January 19th, and her dismissal was to take effect February 18th.

Article VIII of the School Law, affecting teachers' contracts, provides that "In every such contract, unless otherwise specified, a month shall be

construed and taken to be twenty school days or four weeks of five school days each." With this definition provided in the School Law itself, it is clear that Miss Breder had a month's notice, there being twenty-two school days from January 19th, the date of the notice, to February 18th, the date when her resignation was to become effective.

The clause in the contract is bilateral in its effect; that is to say, either party to the contract may terminate it, under the terms of the contract, by giving to the other party one month's notice.

It is my opinion this was done; hence Miss Breder was legally dismissed as teacher in the school at Egg Harbor City.

March 2, 1917.

SALARY OF TEACHER UNDER TENURE OF SERVICE ACT

ARTHUR WAKEFIELD,

Appellant,

vs.

THE BOARD OF EDUCATION OF HOBOKEN,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The Appellant was employed as a teacher in the schools under the control of the Respondent from June 1st, 1907, to January 30th, 1914, but his salary did not begin until September 1st, 1907, from which date said salary was paid to him each year in twelve equal monthly installments, except the July and August installments, which were both paid in July. He ceased to be a teacher in the schools of Hoboken, by virtue of his resignation, dated January 1st, 1914, to take effect on January 30th, 1914, which resignation was accepted by the Respondent on January 19th, 1914.

The Appellant has received five-twelfths of his salary for the year beginning September 1st, 1913, but claims that he should have received six-twelfths, for the reason that he taught in the schools of Hoboken for one-half of the time the schools were actually in session during said year.

The Appellant further claims that the refusal of the Respondent to pay him the full one-half of his annual salary is a violation of that provision of Chapter 243, of the laws of 1909, which prohibits a board of education from reducing the salary of a teacher "after the expiration of a period of employment of three consecutive years in the district."

In the case of Gowdy *vs.* the Board of Education of Paterson, 84 N. J. L. 231, the Supreme Court held that the resolution of the Board of Education providing that the salaries of teachers should thereafter be paid in twelve monthly installments, instead of ten, as theretofore, resulted in a reduction in Miss Gowdy's salary, and was, therefore, prohibited by the act of 1909.

Prior to the passage of said resolution, Miss Gowdy's salary had, for a number of years, been paid in ten monthly installments, and had been so

paid prior to the passage of the act of 1909, and for some months subsequent to its passage. It was, for this reason, and not merely because Miss Gowdy had performed all the duties required of her at the end of ten months, that the Court decided that the action of the Board of Education was illegal.

The Appellant in this case has always received his salary in twelve monthly installments, except for July and August. There is nothing in the rules of the Respondent which requires the payment of the August salary in July, but such payment is, by virtue of a special resolution, adopted each year.

The conditions are so dissimilar that I am of the opinion that the decision of the Court in Miss Gowdy's case cannot be construed as applying to the case under consideration.

Section 106 of the School Law provides that "a Board of Education may make rules and regulations governing the engagement and employment of teachers, the terms and tenure of such employment, and the promotion and dismissal of such teachers and principals and the time and mode of payment thereof, and may from time to time change, amend or repeal such rules and regulations. The employment of any teacher by such board and the rights and duties of such teacher with respect to such employment, shall be dependent upon and shall be governed by the rules and regulations in force with reference thereto."

The section, except as modified by the act of 1909, is still in force.

Rule XI of the Board of Education of Hoboken reads as follows:

"Salaries shall be paid by the Secretary as nearly as possible on the last Friday of the month."

This rule was in force at the time the Appellant was employed by the Respondent and is still in force.

The Appellant has not suffered a reduction of salary, but has been paid the full amount due him.

The appeal is dismissed.

July 6, 1914.

Decision of the State Board of Education

The facts in this case are clearly stated in the decision of the Commissioner of Education and need not be repeated here. The contract of the Board of Education of Hoboken with Arthur Wakefield, as a teacher, ceased and determined with the resignation of the said Arthur Wakefield, which, being duly accepted, took effect on January 30, 1914. His claim for vacation money payable during the months of the following July and August, when his contract had been terminated by his own act on the previous January, can hardly be upheld. The contention of the respondent that Mr. Wakefield's successor-teacher at Hoboken would claim the monthly payments of July and August, and that payment to Mr. Wakefield in whole or in part would require from the School Board double payment for those months, is certainly entitled to consideration. If the respondent's argument here is sound, and we think it is, it may not be impertinent to enquire if Mr. Wakefield has not a claim against his new employers for the vacation months of July and August. Does Mr. Wakefield think to forego such a claim with his new employers, or does he

think to collect for those months from both old and new employers? We do not think his claim against the respondent in this case is well based.

The law in the case and the non-application of the Gowdy case herein are very well summarized in the Commissioner's opinion. We uphold that opinion and dismiss the appeal.

November 7, 1914.

REDUCTION OF SALARY OF TEACHER UNDER TENURE

LILIAN M. REED AND E. MAY HILLS,
Appellants,

vs.

THE BOARD OF EDUCATION OF THE CITY OF TRENTON,
Respondent.

Linton Satterthwaite, for the Appellants.
Malcolm C. Buchanan, for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The following state of facts is admitted by both parties in this case:

Miss Lilian M. Reed was principal of the Lutheran School in the City of Trenton up to March 11, 1912, and Miss E. May Hills was head teacher in the Parker School. After the death of the principal of the Parker School both schools were organized as one and Miss Reed was made principal of the combined schools on March 11, 1912, and Miss Hills remained as head teacher of the Parker School with the additional responsibility of the Lutheran School.

Both Miss Reed and Miss Hills were at the time of assuming the new responsibilities protected by the tenure of service act and were receiving salaries in accordance with the schedule of salaries arranged for the schools of the City of Trenton. Miss Hills had reached the maximum salary of $850 under the schedule. Miss Reed was receiving a salary of $1,050 at the time of her appointment as principal of the Parker School.

The schedule for principals provided for an increase of $50 a year in salary, with a maximum varying according to the number of teachers supervised. Because of the combination of these two schools the Board of Education agreed to pay Miss Reed $200 a year in addition to the salary provided in the schedule and also agreed to pay Miss Hills $50 a year in addition to the schedule salary, the maximum of which she was receiving.

The resolution providing for the combining of the two schools and the appointment of Miss Reed as principal and Miss Hills as head teacher distinctly stated that this combination of schools was to be a temporary arrangement and that these salaries could last only while the temporary combination of schools lasted. The teachers were so informed.

This temporary combination of schools ordered on March 7, 1912, by the Board of Education, and the appointment of principal and teacher made on March 11, 1912, lasted until July 6, 1916, a period of over four years. On January 6, 1916, the Board of Education granted an additional increase of salary to Miss Reed of $100 per year and to Miss Hills an increase of $50 per year. This increase was to date from September, 1915. This last increase of salary continued a full school year. It will thus appear that the increase of $200 per year to Miss Reed as principal lasted through more than three years, as also did the increase to Miss Hills. The additional increase of $100 and of $50 respectively lasted through a period of one year.

On July 6, 1916, the Board of Education discontinued what it regarded as a temporary organization of the Lutheran School as an annex to the Parker School and annulled the temporary assignment of Miss Reed as principal of the Lutheran School and discontinued all increases of salary given for what it regarded as extra work resulting from the combination.

This appeal to the Commissioner of Education is taken under what is known as the tenure of service act which in part is as follows:

The service of all teachers, principals, supervising principals of the public schools in any school district of this State shall be during good behavior and efficiency, after the expiration of a period of employment of three consecutive years in that district, unless a shorter period is fixed by the employing board. No principal or teacher shall be dismissed or subjected to reduction of salary in said school district except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause, and after a written charge of the cause or causes shall have been preferred against him or her, signed by the person or persons making the same, and filed with the secretary or clerk of the Board of Education having charge of the school in which the service is being rendered, and after the charge shall have been examined into and found true in fact by said Board of Education, upon reasonable notice to the person charged, who may be represented by counsel at the hearing.

It is admitted that these teachers were serving under tenure at the time the increases of salary were made. The question involved in the controversy is, "Can there be any such thing as a temporary increase of salary in case of a teacher who is under the tenure of service act?"

If these Appellants were new in the school district of the City of Trenton and were employed in these positions by resolution of the Board of Education making their salaries temporary, and such temporary employment continued from the 11th day of March, 1912, until July 6, 1916, a period of more than three years, it would be very clear that they would come under the tenure of service act and could not be dismissed or subjected to reduction of salary in the school district of the City of Trenton except in the way that the statute provides. This would be true notwithstanding that the teachers were informed that they were employed temporarily. If the employment lasted for more than three consecutive years it was not temporary after the third year had expired. It then became permanent by operation of law.

In this analogous case the question of time regardless of the question of salary enters. The salary that would become permanent would be the salary that was received during the third year of employment. It cannot be soundly argued that teachers who are already under the tenure of service act would be less protected than would new teachers in the district. The Appellants were already under the tenure of service act and were safely protected in their employment. In addition to the element of time, three years, that the statute gives, it also further renders protection by saying that the salary of a teacher who has served the requisite length of time to make her position permanent cannot be reduced.

Much stress was laid by counsel on the question of a temporary assignment to these positions by the Board of Education. This undoubtedly can be done. A Board of Education may assign a teacher to any school within the district, even though she is under tenure of service in that district. A principal may be assigned to the principalship of another school in the district. The Board of Education had a perfect right to assign the Appellants to these new positions in the schools of the City of Trenton. The tenure of service act does not require in these assignments that the salary shall be increased even when there are increased burdens placed upon the teacher or principal. The only command of the statute is that the salaries be not reduced. The statute does not command that the salaries be increased. Neither does it prohibit the increase of salaries. The thing it clearly states, and which proposition is in strict conformity to the permanency of the teachers' positions, is that the salary shall not be reduced.

We next have only to inquire, was the amount paid a salary? Was it paid in such a manner as to indicate that it was a salary? The Appellants received this increase not separately, but in the regular way in monthly installments. The schedule salary and the increased amount were added together and paid in regular monthly installments as an annual salary.

A Board of Education cannot make a temporary increase of salary to a teacher under tenure even though such teacher may agree to have her salary reduced when certain conditions entirely under the control of the Board of Education shall be changed. This would be making a contract in conflict with the statute law which says that no teacher under the tenure of service act shall be dismissed or subjected to reduction of salary when once under the tenure of service act.

It is my opinion that there being no charges made against these Appellants for "inefficiency, incapacity, conduct unbecoming a teacher or other just cause," the salaries paid to them for the school year ending June 30, 1916, cannot be reduced even though the work and the responsibility have been lessened.

July 26, 1917.

DECISION OF THE STATE BOARD OF EDUCATION

The Appellees in this case are teachers in the Trenton schools, and are teaching under tenure of service. No complaint against them has been made. The Trenton Board of Education has not dismissed them, nor taken any

action toward dismissing them. They are still on scheduled salaries, and apparently the Trenton Board of Education wishes to keep them in its employ. This action was started by them that they might have certain temporary salaries (paid to them for extra work) declared permanent salaries, even though the temporary service had been abandoned as no longer needed.

In March, 1912, Miss Reed was principal of the Lutheran School in Trenton, and Miss Hills was a head teacher in the Parker School. The principal of the Parker School died, and the Trenton Board of Education thought best to continue the two schools under one head. Miss Reed was appointed principal over both schools, and Miss Hills remained as head teacher in the Parker School. This was a temporary arrangement, but it entailed some extra work for both teachers. In addition to their regular salaries, fixed in accordance with the schedule of salaries arranged for the Trenton schools, they were paid extra sums for the extra work put upon them.

The minutes of the Trenton School Board, under date of March 7, 1912, read "that the Lutheran School be organized temporarily as an annex to the Parker School and that Miss Lilian Reed be appointed principal, the appointment to take effect from March 11, 1912, and that her salary be increased temporarily $200 a year."

Under date of April 12, 1912, there is the minute that "Miss May Hills, senior assistant of the Parker School, be granted an increase of $50 a year in salary during the temporary arrangement of one principal being assigned to two schools."

Further increases were granted in 1916. Under date of January 6, 1916, there is a minute of the Trenton School Board that "Miss Lilian M. Reed, principal of the Lutheran Parker Schools, be given an increase in salary of $100, and Miss May E. Hills * * * assistant in the Parker School, be given an increase in salary of $50; these increases to date from September 1, 1915, and be regarded as temporary and subject to such change as may be required to conform to any salary schedule that may be subsequently adopted."

Under date of July 6, 1916, this minute appears: "that the temporary organization of the Lutheran as an annex to the Parker School be dissolved, that the temporary assignment of Miss Reed as principal of that school be annulled, that the temporary special increment of salary granted to Miss Reed as principal of the two schools and Miss Hills as senior assistant of the Parker School be withdrawn."

It is very clear from these entries that only a temporary arrangement regarding the schools and the salaries was contemplated. It seems to have been so understood by all parties concerned. The arrangement lasted some four years and the Appellees now claim that the salary has become automatically permanent because the Tenure of Service Act declares that "No principal or teacher shall be dismissed or *subjected to reduction of salary* in said school district, except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause," etc.

There is chance here for pretty argument on either side, as the briefs of counsel disclose, but we do not think that either arguments or technicalities

should turn us from a common sense view of the case before us. The Tenure of Service Act was not passed to fit such a case as this. The prohibition against reduction of salary applies to a permanent scheduled salary and not to a temporary increase given for extra work done. The prohibition of the statute was meant to prevent school boards from reducing a teacher's salary to a nominal sum and thus forcing a resignation that could not be gotten otherwise. There is no attempt in this case to force a resignation nor is there any reduction in the regular scheduled salary. The extra work given the teachers was withdrawn and the Trenton Board of Education thought the extra salary should be withdrawn also.

The question of how long the payments of the temporary salaries ran on should not enter into this case. Tenure of service is not arrived at by salaries but by time service. The Appellees were already under tenure by three years or more of service under regular scheduled salaries. Their status there is not questioned. But they now seek to invoke an extra tenure of service because of three years or more of extra work for which they received extra compensation. We do not believe that the law contemplated any such double protection. If the statute were so construed any and all temporary payments to teachers for temporary work could not be made without incurring the liability of a permanent indebtedness and school boards would be tempted to put all extra services upon teachers without any extra compensation whatever.

We think no injustice has been done the Appellees by the action of the Trenton Board of Education. They do not receive further payment of temporary salary, but neither have they the temporary work to do. Their regular scheduled salaries and their position under the Tenure of Service Act are in no way imperiled.

The decision of the Commissioner of Education is reversed.

January 19, 1918.

LEGALITY OF TRANSFER OF PRINCIPAL UNDER TENURE

EMMA A. MACNEAL,
Appellant,

vs.

BOARD OF EDUCATION OF OCEAN CITY,
Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

By agreement of counsel this case is submitted for decision upon a stipulation of facts together with briefs upon the legal points involved and an oral argument heard by the Assistant Commissioner of Education on August 31, 1926, at the State House at Trenton.

From the stipulation of facts it appears that Appellant was first appointed by the Respondent as a teacher in the public schools of Ocean City in 1918,

that she served in such capacity up to and including the school year 1923-24, a period of six years, that for the school year 1924-25 she was designated by the Respondent as grade principal of one of the Ocean City schools and served in the latter capacity during that year and the following year, 1925-26. Appellant's salary as grade principal was fixed in 1924 at $1,800, with provision for a yearly increase of $100 until a maximum of $2,000 was reached, and she was consequently receiving for the school year 1925-26 a salary of $1,900. On June 14, 1926, the Board of Education confirmed the action of the City Superintendent in refusing to recommend Appellant's continuance as grade principal and designated her as a teacher of the sixth grade of the Wesley Avenue School for the school year 1926-27 at a salary of $1,900. Appellant accepted the transfer under protest and brought this appeal on the ground of alleged illegal demotion and reduction of salary in contravention of the Teachers' Tenure Law.

Section 176, Article VIII of the 1925 Compilation of the School Law provides in part as follows:

> "The service of all teachers, principals, supervising principals of the public schools in any school district in this State shall be during good behavior and efficiency, after the expiration of a period of employment of three consecutive years in that district, unless a shorter period is fixed by the employing board. * * * No principal or teacher shall be dismissed or subjected to reduction of salary in said school district except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause."

The Commissioner cannot agree with Respondent's contention that in order to gain the protection of the Tenure Act as principal of the Ocean City schools Appellant must necessarily have served for three consecutive years in that particular position. The act does not, in the Commissioner's opinion, prescribe the necessary three-year period of service for each of the groups, namely, teachers, principals and supervising principals, but makes permanent the term of an incumbent, whether he be teacher, principal or supervising principal, who has been employed for three consecutive years in the aggregate in the various designated positions or who has been promoted to the higher of such positions after three years of service in any one of them. If, therefore, a person employed in the position of teacher has been promoted by the employing Board to that of principal, her status under the Tenure Act will not, in the Commissioner's opinion, be affected by the fact that she has been employed as a teacher for all or part of the time necessary to gain the statutory protection, since both are positions specifically included in the Tenure Act. In such case the rights thus gained as teacher will attach to and continue in the position to which such person has been promoted. Should the Respondent's theory prevail, it might well be to the interest of a Board desiring to rid itself of a teacher under tenure to promote her to the office of principal or supervising principal. Since she could not hold both positions at once and would, according to Respondent's contention have lost tenure protection in the higher position, she might then at any time be dismissed by the Board of Education while in process of earning such protection anew in the office to which she was

promoted. Such the Commissioner is convinced was not the intention of the Legislature in enacting the Teachers' Tenure Law.

The case of Noonan and Arnot *vs.* Board of Education of the City of Paterson is exactly parallel to the one under consideration in that both Appellants in that case had gained tenure as teachers, were promoted to the position of principal and then almost immediately were dismissed and again assigned to teaching positions. It was held by the Commissioner and by the State Board of Education on appeal that the Appellants were under tenure in the position of principal to which they had just been promoted and could not be dismissed except by the procedure provided for in the Tenure Law.

Moreover, the Commissioner does not agree with Respondent's contention that the case of Davis *vs.* Overpeck Township (p. 581, School Law) supports the latter's contention that a supervising principal must have served three consecutive years in that particular position to gain tenure as such. Nowhere in the decision of the State Board of Education (which reversed that of the Commissioner) is there anything to indicate that the Board was not taking into consideration Mr. Davis' services as a teacher as well as principal in determining that he had gained tenure protection; and in the concurring opinion of Dr. J. C. Van Dyke it was specifically stated that "the Appellant herein was, with his six years of service (three years as teacher and three years as principal) well within the provisions of the act." When the Davis *vs.* Overpeck case was reviewed by the Supreme Court on a Writ of Certiorari, Justice Parker, it is true, utilized Appellant's three years of service as a principal only as a basis in reaching the conclusion that he was under the protection of the Teachers' Tenure of Service Act. In that case, however, the Court was not compelled to consider the effect of Mr. Davis' services as a teacher in determining the question of tenure as principal, since his service of three years in the latter position alone was sufficient to gain for him the protection of the act. Moreover, it was in the Commissioner's opinion probably the purpose of the Court in deciding the case to take as a hypothesis the state of facts least favorable to Appellant, thus making the more conclusive and convincing a decision in his favor.

The written notification to Miss MacNeal of her assignment to the position of grade principal and acceptance by her for each of the school years 1924-25 and 1925-26 in the Commissioner's opinion in no way constituted, as the Respondent contends, a contract rather than a tenure employment. Even though the form had been such as is required by the School Law for teachers' and principals' contracts, the Appellant could not in any event be held to any contract for a definite period of service and thus to a waiver of her tenure rights. Tenure protection for teachers, according to an opinion of the Attorney-General, is conferred by the Legislature as a matter of public policy for the benefit of the school system, and as such cannot be waived by a beneficiary.

There is, therefore, in the Commissioner's opinion, no doubt whatever of the fact that Miss MacNeal was under tenure as principal in the Ocean City schools at the time of her transfer to the position of sixth grade teacher, and that she was entitled to the continued protection of the Tenure Law in the position of principal or any position which was its equal or superior in rank.

There remains then to be considered the question of whether Appellant suffered a demotion when she was transferred from the position of grade principal to that of sixth grade teacher, and if so whether such demotion is to be considered a violation of tenure rights.

The Teachers' Tenure Law definitely prohibits any reduction in salary of a teacher or principal under tenure. Had Appellant been allowed to continue in her position as grade principal her salary, according to the $100 yearly increase designated for such position by the Board, would have reached for the year 1926-27 the sum of $2,000, while the salary awarded her on the transfer to a teaching position was fixed at $1,900. Appellant hence suffered an actual decrease in compensation. Moreover, the sum of $1,900 for the sixth grade teaching position is $400 more than the maximum fixed by the Ocean City Board of Education for its grade teachers. Upon this point the opinion of the State Board of Education in the case of Davis *vs.* Overpeck, above referred to, may be quoted as follows:

> "If the decision appealed from is sound, there is nothing to prevent a Board from elevating any teacher who has served more than three years to a position as principal, increasing his salary and subsequently assigning him to teach with the assurance that though but a teacher he will thenceforth receive a salary of a principal. * * * If such procedure can be adopted it would not only be unjust to the taxpayers but it would promote dissatisfaction among teachers, for what teacher would not feel aggrieved if another teaching the same grade with no more experience, was paid the salary not of a teacher but of a principal."

Aside from the question of compensation, however, it has been held in a number of cases that the transfer of a principal under tenure to the position of teacher constitutes a demotion and hence a violation of the Tenure Law. In the Davis case above quoted the State Board held that "When a principal is reduced to the rank of a teacher he is dismissed as a principal just as surely as is an officer in the army dismissed as such when he is reduced to the ranks and another assigned to his place or a teacher be dismissed as such if made a truant officer or a janitor;" and Justice Parker, in the same case, said that "his (Mr. Davis') attempted assignment as teacher in a lower grade was legally tantamount to and in fact operated as an attempted dismissal as principal of the High School." Similar rulings with regard to demotion were contained in the cases of Noonan and Arnot *vs.* Paterson, above referred to, and in the case of Welch *vs.* West Orange, reported on page 591 of the School Law.

In view of all the facts, therefore, it is the opinion of the Commissioner of Education that the Appellant, Emma A. MacNeal, was under tenure as a grade principal in the schools of Ocean City at the time of her transfer to the position of sixth grade teacher by action of the Board of Education on June 14, 1926; that such transfer constitutes a demotion both as to compensation and rank and hence a violation of the Teachers' Tenure Law. It is, therefore, hereby ordered that Appellant be at once reinstated in the position of grade

principal, or in a position its equal in rank, in the Ocean City schools and that her salary be paid from the date of such transfer at the rate she was receiving at that time.

Dated, September 27, 1926.

Affirmed by State Board of Education without written opinion January 8, 1927.

Affirmed by Supreme Court without written opinion January 18, 1928.

LEGALITY OF TRANSFER OF TEACHER UNDER TENURE

HELEN G. CHEESMAN,
Appellant,
vs.

THE BOARD OF EDUCATION
OF GLOUCESTER CITY,
Respondent.

Bleakley & Stockwell, for Appellant.
Henry M. Evans, for Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

It is admitted that the Appellant in this case, Helen G. Cheesman, is by virtue of approximately nineteen years of service as a teacher in the public schools of Gloucester City protected by the provisions of the Tenure of Service Act.

It appears from the pleadings on file in this office that Appellant was up to September, 1921, the principal teacher of the seventh and eighth grades in the Monmouth Street School in Gloucester City; that on September 16, 1921, the Board of Education assigned Appellant to the position of principal teacher of the fifth and sixth grades of the Cumberland Street School in the same district. Appellant protested against this change and refused to take the position to which she had been assigned pending an appeal to the Commissioner of Education. Appellant claims that the transfer from the position of principal teacher in the seventh and eighth grades of the Monmouth Street School to that of principal teacher of the fifth and sixth grades in the Cumberland Street School is an illegal one and virtually a dismissal. Appellant's grounds for so claiming are that the facilities in the Cumberland Street School are not equal to those in the school from which she was transferred, and that being made principal teacher of the fifth and sixth grades in the one school is a demotion from the position of principal teacher of the seventh and eighth grades in the other school.

The main question to be considered therefore is a simple one: Has a board of education a legal right to transfer a teacher or a principal teacher in the grades from one grade to another or from one school to another, provided the transfer has not been from a regular high school to an elementary school? This department has frequently decided that teachers under tenure may be transferred from one grade to another in the elementary grades without

violation of the intent of the Tenure of Service Law. That is to say, a teacher in any of the elementary grades, as for instance the eighth grade, may be transferred to any of the positions in the elementary grades without any violation of law.

In view of the fact that in the case in question the Appellant's contract was general in its terms and not limited as to any particular school in which Appellant was to teach, and in view of the fact that her transfer was made within the elementary grades and from one position as principal teacher to another, it is the opinion of the Commissioner of Education that the Gloucester City Board of Education had a legal right to make the transfer in question, and that such action on the part of the Board of Education did not amount to a dismissal of Appellant from her position and was consequently not a violation of the Tenure of Service Act.

It further appears that there was held on September 30, 1921, a special meeting of the Gloucester City Board of Education; that Appellant was duly notified of such meeting and to the effect that she would be given a hearing upon the charges of insubordination which had been made against her because of her refusal to comply with the order of the Board of Education transferring her to the position of principal teacher of the fifth and sixth grades in the Cumberland Street School.

Appellant appeared through her counsel at such special meeting of the Board of Education and protested that the Board of Education had no legal right to dismiss her because of her refusal to comply with an order of the board, the legality of which order was in process of adjudication by the Commissioner of Education. Appellant's contention, in other words, was that refusal to obey an order could not be considered insubordination until the legality of that order had been sustained. Appellant was, however, found guilty of insubordination and by a majority vote of the Gloucester City Board of Education ordered dismissed from the service of such Board of Education.

While there may be technically some grounds for the action of the Board of Education in dismissing on the charge of insubordination a teacher who has refused to obey an order, the legality of which was being adjudicated, it is nevertheless the opinion of the Commissioner that an unfair advantage would be taken by such precipitous action. There is no evidence in the case at hand of wilful insubordination on the part of the Appellant but apparently only a desire to await the adjudication of this department before complying with the order of the board.

While sustaining, therefore, the Board of Education in its action transferring Appellant to the position of principal teacher of the fifth and sixth grades of the Cumberland Street School, the Commissioner of Education does not sustain the Respondent in its dismissal of the Appellant on the charge of insubordination.

It is therefore hereby ordered that the Appellant, Helen G. Cheesman, be reinstated in the service of the Board of Education of Gloucester City and that such reinstatement take effect immediately.

Dated October 28, 1921.

DECISION OF THE STATE BOARD OF EDUCATION

Miss Helen G. Cheesman was employed by the Board of Education of Gloucester City, Camden County, by a written contract dated May 18, 1921, "to teach in the Gloucester City Public Schools" at a salary of $1,350 a year. The contract recites that she had an elementary grade teachers' certificate, but assigns her to no particular school or duties.

Her petition alleges that before the contract was signed she was told in answer to her inquiry that she would be principal of what the petition terms the "Junior High School" located in the Monmouth Street School, Gloucester City. She reported at the school at its opening in September, but on the fifth of September, after a meeting of the Board of Education at which a resolution was passed that she be transferred to the principalship of the Cumberland Street School, which is a fifth and sixth grade school, the superintendent of schools notified her that she was so transferred, and directed her to report at that school.

She refused to accept the transfer on the ground that it was a demotion and violated her tenure of office and consulted counsel, who appealed on her behalf to the Commissioner and advised her that she should not teach pending that appeal. She therefore refused to report to the Cumberland Street School.

Her appeal came before the Commissioner simply on the pleadings. No testimony was taken, but the contract was included in the petition. The Commissioner decided that her transfer was not a demotion but simply a transfer from one grade school to another grade school and did not affect her tenure of office.

It appears both from the pleadings and from the records of this Board and the Commissioner's Office, that the school, which in the petition is termed a "Junior High School" was merely a seventh and eighth grade school and not a "Junior High" or "Intermediate School," as defined by law or in the accepted sense of that title. The Commissioner was therefore right in holding that the Board had the right to transfer Miss Cheesman to the Cumberland Street School without preferring charges against her. (See Welch *vs.* West Orange Board of Education, N. J. School Laws, 1921, pp. 557, 558.)

Counsel for Miss Cheesman raised the point that the assurance above referred to, which is alleged to have been given her by authority of the Board of Education, can be read into the contract and that therefore proof should be taken on that issue. In our opinion the written contract must be presumed to express the entire agreement and this contention therefore is overruled.

One other question remains to be decided. It appears that Miss Cheesman, after she had refused to report at the Cumberland Street School, was charged by the Board of Education with insubordination on account of that refusal. It is alleged by the Board that she was notified in writing of the charge, the notice fixing a time and place at which she should appear before the Board to make answer. She did not appear in person in response to said notice, but was represented by counsel, who stated formally that she had been advised not to appear on account of her appeal to the Commissioner from the Board's order of transfer. The Board of Education proceeded to take testimony on the

charges, found that her refusal to report at the Cumberland Street School was insubordination and dismissed her on that ground. There was no other complaint against her.

Appeal from the Board's decision was taken to the Commissioner, who held, without receiving the record of the trial, that she should be reinstated because she was acting under advice of counsel and that while she was perhaps technically guilty of the charge of insubordination, nevertheless she should not be punished for following her counsel's advice.

To this we cannot agree, first, because she should have complied with the order of the Board pending her appeal and would not have waived her rights by so doing; second, because the Board of Education of Gloucester City ought not to be compelled to pay Miss Cheesman for work she did not perform as well as for a substitute to take her place, and, third, because this Board will not disturb the finding of a local board on a question of this kind, provided it has reached its decision after giving a fair hearing and there is no showing of passion or prejudice on its part (Fitch *vs.* Board of Education of South Amboy, N. J. School Laws 1921, pp. 533 to 535.)

In order to determine whether or not her trial and dismissal were fairly and properly conducted by the Board the transcript of its proceedings and such evidence as may be pertinent thereto should be before the Commissioner.

It is very unfortunate that Miss Cheesman, who is a teacher with a good record, should be dismissed under charges merely because she followed the advice of her counsel and therefore, though the Board of Education may be justified in its ruling, it is hoped that some less harsh action may be taken.

The case is therefore remanded to the Commissioner with instructions that Miss Cheesman was not demoted, but transferred and that therefore she should have obeyed the order of the Board; and that the Commissioner take up the matter with the Board and Miss Cheesman and endeavor to effect a reinstatement without salary from the time of her refusal to report at the Cumberland Street School to the date of reinstatement; and should he be unable to effect a reinstatement, that he receive the transcript of the proceedings of the trial before the Board and such pertinent testimony as the parties desire to offer and render a decision anew in the case.

Decision of the Supreme Court

The writ of certiorari in this case is prosecuted for the purpose of reviewing the legality of the action of the Gloucester City Board of Education in transferring the prosecutrix, Miss Helen G. Cheesman, from principal teacher of the 7th and 8th grades at the Monmouth Street School in Gloucester City, to be principal teacher of the 5th and 6th grades in the Cumberland Street School in said city, and the action of that Board in dismissing Miss Cheesman for insubordination in refusing to obey the order of transfer.

Miss Cheesman had been for some 19 years a teacher in the public schools of Gloucester City. On May 18, 1921, she executed a contract in the statutory form with the Board of Education to teach in that city from September 1, 1921, to June 30, 1922. Miss Cheesman had been instructing the 7th and 8th

grades at the Monmouth Street School. In September, 1921, the Board of Education transferred her to the Cumberland Street School where she was to teach scholars of the 5th and 6th grades. Miss Cheesman contended that the Monmouth Street School was a Junior High School; that the transfer demoted her and was contrary to the contract. She refused to obey the order and appealed the order of transfer to the State Commissioner of Education. The Gloucester City Board of Education then charged Miss Cheesman with insubordination. She was served with notice of this charge. She did not attend the meeting at which the charge was to be heard, but employed counsel to appear specially to protest against the proceeding. The Board held her guilty of insubordination and dismissed her. From this dismissal Miss Cheesman appealed to the State Commissioner of Education. The Commissioner of Education considered these appeals upon the record and held that the transfer was legal but that Miss Cheesman was not guilty of insubordination. An appeal was then taken by Miss Cheesman to the State Board of Education. The State Board of Education held that the transfer was legal and that Miss Cheesman was guilty of insubordination and properly dismissed. It is these determinations of the State Board of Education which Miss Cheesman seeks to set aside.

The contract was in the usual form prepared by the Commissioner of Education under Section 106 of the School Law (C. S., Vol. 4, p. 4762). It did not mention the principalship of the Monmouth Street School. The Gloucester City Board of Education had the power of transfer. (Sec. 68, School Law, C. S., Vol. 4, p. 4744.) Miss Cheesman could not be dismissed or her salary reduced except for causes mentioned in the Tenure of Office Act (C. S., Vol. 4, p. 4763, Section 106a) and in the manner prescribed in said act. Her salary was not reduced or she was not dismissed. A transfer is not a demotion or dismissal. Transfers are often advisable in the administration of schools for many reasons.

It is contended in behalf of the prosecutor that when Miss Cheesman signed the contract the secretary of the local Board told her that in signing the contract she was made the principal of the Junior Department of the Gloucester City High School. Assuming the statement was made by the secretary, he was not in the making of such a statement acting within the scope of his authority. The contract spoke for itself and could not be changed or altered by parol testimony.

It is further contended that Miss Cheesman could not be guilty of insubordination and dismissed pending her appeal of the order of transfer to the State Commissioner of Education. We do not think this point well taken. Miss Cheesman could have taken up the work in the Cumberland Street School, to which she was transferred, under protest pending her appeal. Such a course would not have prejudiced her appeal. She chose to assume in her actions that the transfer was illegal. In this Miss Cheesman acted at her peril. If the transfer was legal it necessarily follows that she was guilty of insubordination in refusing to obey the order and that the Board was justified after charges had been preferred and notice given to hear the case and order a dismissal, if it chose so to act.

We think there is no merit in the contention that the State Commissioner and State Board of Education heard the appeals upon the record without taking testimony. We fail to see how the prosecutrix was harmed in this respect. The facts were not disputed. There does not appear to have been any offer of testimony. Both parties evidently were satisfied with the record.

We have reached the conclusion that the decision of the State Board of Education was correct. It will be affirmed. The writ is dismissed.

TRANSFER OF TEACHER UNDER TENURE

CAROLYN E. TOBEY,

Appellant,

vs.

THE BOARD OF EDUCATION OF THE CITY OF NEWARK,

Respondent.

G. R. Monroe, for Appellant.
Charles M. Myers, for Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

It is admitted that the Appellant is protected by the provisions of Chapter 243, P. L. 1909, known as the "Teachers' Tenure of Service Act."

Prior to October, 1910, she held the position of "Model and Critic Teacher in the Kindergarten Department of the Webster Street School, Branch of the Newark Normal School," and received an annual salary of $1,600.00. At a meeting of the Respondent, held October 27, 1910, a resolution was adopted transferring the Appellant, and two other teachers holding similar positions, to the positions of "Kindergarten Directresses," dating such transfers from the first day of October preceding, and reducing their salaries to $1,100.00 per annum.

From this action the appeal is taken.

The questions to be decided are:

1. Was the transfer of the Appellant contrary to the provisions of the Teachers' Tenure of Service Act?
2. If the transfer was permissible, was the reduction in the amount of her salary contrary to the provisions of said act?
3. If the transfer and reduction of salary were legal, is the Appellant entitled to salary for the month of October, 1910, at the rate of $1,600.00?

1. Was the transfer of the Appellant contrary to the provisions of the Teachers' Tenure of Service Act?

Section one, of the act, reads in part as follows:

"No principal or teacher shall be dismissed or subjected to a reduction of salary in said school district except for inefficiency, incapacity, conduct un-

becoming a teacher or other just cause, and after a written charge of the cause or causes shall have been preferred against him or her * * * and after the charge shall have been examined into and found true in fact by said Board of Education," and section three reads as follows:

"Nothing herein contained shall be held to limit the right of any school board to reduce the number of principals or teachers employed in any school district when such reduction shall be due to a natural diminution of the number of pupils in said school district."

No charges of any kind were made against the Appellant and no hearing was granted her, nor was there a "natural diminution in the number of pupils" if that provision of the law be strictly construed.

There are, scattered throughout the State, many small schoolhouses erected before our roads were improved and when there were no large, well graded schools within a reasonable distance. The per capita cost of some of these schools is much greater than that of a large graded school, and the educational facilities provided for the pupils are very much less. Also, in some of the smaller districts, high school classes have been maintained for the reason that there were no well-equipped high schools convenient of access. The tendency is to abandon these schools and classes, and transport the pupils to the larger and better equipped graded schools, the result being a considerable reduction in the cost of maintaining the schools, and also giving to the pupils a far better opportunity to secure an adequate education. In some of these schools, there are teachers who are protected by the Tenure of Service Act, and to hold that these schools and classes could not be abandoned, and the teachers dismissed, would be an injustice to the pupils and taxpayers of the district.

The correct and reasonable construction of the term "natural diminution in the number of pupils" is that whenever the number of pupils enrolled in the schools is decreased either by an actual loss of population, or by reason of discontinuing a class and sending the pupils to another school, thereby rendering the services of the teacher of such class unnecessary, there has been a "natural diminution" within the meaning of the law.

A strict construction of section three would prevent Boards of Education from providing for the pupils the thorough and efficient school system guaranteed to them by our Constitution, would compel the maintaining of schools and classes which had outlived their usefulness, and impose an unnecessary financial burden on the districts. The statute must be so construed that it will permit a Board of Education to close a school or abolish a class which is unnecessary, even though such action results in the dismissal of a teacher who is protected by the Tenure of Service Act. This construction is in accord with the decisions of the Supreme Court in the cases of Paddock *vs.* Hudson County Board of Taxation, 82 N. J. L. 360, and John Colgarry *vs.* Board of Street and Water Commissioners of the City of Newark, 89 Atlantic Reporter 789.

The evidence in the case under consideration shows that the Kindergarten Department of the Newark City Normal School was discontinued for the reason that the necessity for it no longer existed, and that it had ceased

to be an indispensable part of a thorough and efficient school system. The Respondent, having abolished the Kindergarten Department, could legally have dismissed the Appellant from its service. Therefore, her appointment to another position was not contrary to the provisions of the Tenure of Service Act.

2. If the transfer was permissible, was the reduction in the amount of her salary contrary to the provisions of the act?

The resolution adopted by the Respondent, assigning the Appellant as "Kindergarten Directress" in the Webster School, is not an accurate statement of the action taken. It was not a transfer, but the appointment of the Appellant, who, by reason of the abandonment of the Kindergarten Department, held no position, to a position then vacant. The Respondent has adopted rules governing the salaries of teachers, and the Appellant is receiving the maximum salary allowed by the rules, for the position she holds. There has been no reduction in the salary of the Appellant within the meaning of the Tenure of Service Act.

3. If the transfer and reduction of salary were legal, is the Appellant entitled to salary for the month of October, 1910, at the rate of $1,600.00 per annum?

Section 68 of the School Law provides that "no principal or teacher shall be appointed, transferred or dismissed, nor the amount of his or her salary fixed * * * except by a majority vote of the whole number of members of the Board of Education."

The Respondent assigned the Appellant to her new position at a meeting held October 27, 1910, and provided that the assignment should take effect as of October 1, 1910.

Action by a Board of Education, under Section 68, is not complete until the vote is actually taken. The Respondent erred in attempting to make the resolution effective as of October 1st, and the Appellant is entitled to compensation at the rate of $1,600.00 per annum up to October 27, 1910.

August 17, 1914.

TRANSFER OF TEACHER UNDER TENURE

ANNA B. MORRISON,

Appellant,

vs.

THE BOARD OF EDUCATION OF DELAWARE TOWNSHIP, CAMDEN COUNTY,

Respondent.

For the Appellant, Scovel & Harding.

For the Respondent, Lawrence B. Reader and Howard L. Miller.

DECISION OF THE COMMISSIONER OF EDUCATION

This appeal is taken by Anna B. Morrison, under the Teachers' Tenure of Service Act. Two questions are involved. First, was the Appellant

principal of the school at Ellisburg? Second, if the Appellant was principal, did her transfer to the single-room school at Horner Hill constitute a dismissal?

The facts in the case, as developed at the hearing held in the Court House at Camden on the 8th day of September, 1915, are as follows:

The Appellant, Anna B. Morrison, began teaching at Ellisburg, in Delaware Township, Camden County, in 1903. A letter was produced in evidence, addressed to Anna B. Morrison, dated April, 1903, and written by Amos G. Haines, District Clerk of the Board of Education, in which appeared these words, "I beg to inform you that at a meeting of the school board last evening you were elected principal of the Ellisburg school." On the basis of this letter the Appellant began her work as teacher and principal in the Ellisburg school. The minutes of the meeting of the Board of Education of April 17, 1905, contain this, "The following were nominated and elected: Ellisburg, No. 1, Anna B. Morrison, principal, salary $50 per month for ten months; Anna E. Fields, primary room, salary $40 per month for nine months." On April 9, 1906, the minute is as follows: "Election of teachers, school No. 1, Anna B. Morrison, principal, salary $50 per month; Clara L. Munson, primary, salary $40 per month." On April 6, 1908, the minute is as follows: "On motion, the following teachers were elected: Anna B. Morrison, principal." Other evidence was introduced to verify the fact that Miss Morrison was regarded as the teaching principal of this school. The County Superintendent testified that he regarded the Appellant as principal. It is in evidence that the Appellant prepared examination questions, not only for her own grades, but for the primary grades as well. It is also in evidence that the Appellant always received a larger salary than any other teacher in the school district. On the other hand, it is denied by individual members of the Board of Education that the Appellant was principal.

Counsel for the Respondent claims because there was no written contract as required by the statute that the Appellant had no way of defining the position which she occupied. That there was no written contract is true. This was because the Board of Education failed to perform its duty. To be sure, the Appellant could compel the granting of a contract. It has, however, been held in a similar case that a teacher having rendered service which was accepted and paid for constitutes an admission of a contractual relation. It is, therefore, not a valid answer to the question at issue.

By order of the Board of Education the Appellant has been transferred, at the same salary, $80 per month, to the Horner Hill school, a single room school in the district of Delaware Township. She is now teaching in this school. The position as teacher at Horner Hill is a subordinate position, it being a single room school, which involves the teaching of all the grades. Moreover, that the position is a subordinate one is manifest by the fact that never before was so large a salary paid in this district as is paid now to the Appellant.

In the case of Davis *vs.* the Board of Education of Overpeck Township, the State Board of Education used this language: "It would be within the

power of a board to assign a man who is receiving a salary of $3,000 or more to teach in a grade where the usual salary paid in the district for such grade is only one-fifth or one-sixth of that amount. If such procedure can be adopted it would not only be unjust to the taxpayers, but it would promote dissatisfaction among teachers, for what teacher would not feel aggrieved if another teacher in the same grade, with no more experience, was paid the salary, not of a teacher, but of a principal?" The Davis case is similar to the case under present discussion. There has been a transfer of the Appellant to a subordinate place, and by reason of this transfer the subordinate position has been elevated to a salary larger than is paid in any other school in Delaware Township. Surely this, too, is not fair to the taxpayers.

The law provides that no principal or teacher shall be dismissed or subjected to reduction of salary in said school district except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause, and after a written charge of the cause or causes shall have been preferred against him or her, signed by the person or persons making the same, and filed with the secretary or clerk of the Board of Education having charge of the school in which the service is being rendered, and after the charge shall have been examined into and found true in fact by said Board of Education, upon reasonable notice to the person charged, who may be represented by counsel at the hearing.

In this case there has been no charge of inefficiency, incapacity, or conduct unbecoming a teacher. The lawful remedy, therefore, of dismissing the Appellant from her position as head teacher at Ellisburg has not been pursued.

I have reached the following judgment in this case:

First. The Appellant, being in the continuous service of the Respondent since 1903, is under the Teachers' Tenure of Service Act.

Second. The preponderance of evidence shows that the Appellant was the principal teacher in the Ellisburg school, and I so find.

Third. Under the law, as interpreted by the State Board of Education and affirmed by the Supreme Court in the Davis case, I find the transfer from the position of principal teacher to a subordinate position in a single room school, thus raising the salary of this school far above the salary paid hitherto, was tantamount to a dismissal as principal teacher in the Ellisburg school.

The appeal is sustained, and it is ordered that the Appellant be replaced in her former position as principal of the Ellisburg school.

October 14, 1915.

STATUS OF TEACHERS UNDER TENURE AS AFFECTED BY RULES OF A LOCAL BOARD OF EDUCATION

CLARA PLANER NOMMENSEN,
Appellant,
vs.
HOBOKEN BOARD OF EDUCATION,
Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

This appeal was brought by Appellant for the purpose of contesting the validity of the action of the Hoboken Board of Education in February, 1921, in refusing to allow Appellant to resume her duties as a teacher in the public schools of the above named district on the ground that her services even though protected by the Tenure of Service Act had been automatically terminated by a violation of two rules contained in the Manual of Rules adopted by the Hoboken Board of Education. The rules referred to were contained in paragraphs 8 and 11 of Rule 13, and provided that the marriage of any female teacher should be considered as equivalent to her resignation; and that the position of any teacher remaining absent for a period of one month without permission of the Board of Education should be considered vacant and should be filled accordingly.

On June 8, 1922, the Commissioner of Education rendered a decision to the effect that the services of Appellant could not legally be automatically terminated by a Board of Education and that such termination could not be legal without charges being preferred and a hearing granted in accordance with the requirements of the Tenure Law, and accordingly ordered the Appellant reinstated in her position as of February 1, 1921, and ordered her salary paid her from that date.

The case was appealed to the State Board of Education which discussed the merits of the case in relation to the rules contained in the manual of the Hoboken Board of Education, and in a decision dated October 7, 1922, stated that if the marriage question were the only one involved it would recommend affirmance of the Commissioner's decision, but that it considered testimony necessary on the question of Appellant's alleged absence without leave. The case was therefore remanded to the Commissioner with a request that testimony be taken as aforesaid.

A hearing was accordingly conducted by the Commissioner of Education on Friday, November 17, 1922, at Hoboken, at which hearing testimony of a number of witnesses was taken.

The facts admitted in this case and brought out by the testimony showed that Appellant who as Clara Planer had been for many years a teacher in the Hoboken public schools, was on June 17, 1920, married to one Ludwig Nommensen. Shortly after that date Appellant sailed for Germany to visit her parents. In August Appellant planned to return to this country and had

arranged for her passage when she was forced to change her plans and remain in Germany for a time because of the serious illness of her mother. On September 4th, of the same year, she accordingly wrote to the president of the Hoboken Board of Education requesting a leave of absence to expire either December 31, 1920, or January 31, 1921, according to the wish of the Board. Appellant then received from the secretary of the Board of Education a letter dated November 1, 1920, informing her that a leave of absence had been granted her by the Board of Education to expire February 1, 1921. When Appellant returned to the United States, she appeared before the president of the Hoboken Board of Education, late in December of 1920, and asked the definite date on which she should return to her position as aforesaid, and was told by him that her marriage had automatically terminated her services with the Hoboken board as provided for in its rules. On February 16, 1921, Appellant demanded through her counsel a hearing before the board, which demand was absolutely refused.

The Teachers' Tenure Law very definitely prohibits the dismissal of any teacher under tenure except for "inefficiency, incapacity, conduct unbecoming a teacher, or other just cause." No rules of a Board of Education can be effective if in contravention of a statute (section 120, Article VII, School Law) and it is therefore very obvious that in order for Appellant's violation of Respondent's rules to legally justify her dismissal, such violation must constitute the offenses described in the Tenure Law as justifying dismissal of a teacher.

Plainly the violation by Appellant of Respondent's rule regarding marriage cannot in itself be considered inefficiency, incapacity, or conduct unbecoming a teacher, and cannot therefore be sufficient cause under the Tenure Law to justify her dismissal.

Neither in the opinion of the Commissioner can the so-called violation of Respondent's rule regarding absence for one month or more without leave be deemed in this case insubordination or conduct unbecoming a teacher so as to justify dismissal under the Tenure Law.

The testimony plainly showed Appellant's good faith intention of returning from her trip to Germany in time for the opening of school, which intention was frustrated by her mother's illness. Moreover, she had in the Commissioner's opinion every reason to suppose that the favorable reply to her request for a leave of absence from the secretary of the board, the officer whose duty it is to transmit the board's official acts, represented the official act of the Hoboken Board of Education itself, and therefore had every reason to consider her continued absence justifiable under such a permission.

If a Board of Education might legally make a rule providing for a teacher's dismissal in the case of absence for thirty days without leave regardless of the fact that such teacher might have an entirely justifiable reason for such absence, then such a rule carried out to its logical conclusion could make a teacher's absence for one day without leave, a reason for dismissal. Both instances are equally subversive of the provisions of the Teachers' Tenure Law which prohibits the dismissal of any teacher under tenure except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause.

In view therefore of the fact that Appellant's violation of the Respondent's rules cannot be said to constitute in either instance any of the offenses which alone under the Tenure Law can legally justify a teacher's dismissal, it is the opinion of the Commissioner that the services of Appellant were illegally terminated by the Hoboken Board of Education; and it is hereby ordered that Appellant be at once reinstated in her position as a teacher in the Hoboken schools, and that her salary be paid her from February 1, 1921, the date on which she was again to resume her services after the absence aforesaid, and at the same rate she had been receiving previous to her dismissal.

January 4, 1923.

DECISION OF THE STATE BOARD OF EDUCATION

The history of this case is stated in the opinion of the Commissioner of Education and need not be repeated here.

The evidence taken before the Commissioner, pursuant to our former opinion, shows that the Respondent, who has been for many years a highly respected teacher in the Hoboken schools, after her marriage in June, 1920, went to Germany to visit her parents. Shortly before the date when she expected to return to this country for the opening of the schools, her mother was taken seriously ill and she wrote to the Hoboken Board of Education asking for a leave of absence to December 31, 1920, or January 31, 1921, as preferred by the Board. Her letter was presented to the Board, referred to a Committee, and on November 1, 1920, the secretary of the board wrote her a letter, stating that a leave of absence had been granted her by the Board to expire February 1, 1921. She sailed from Germany before the arrival of this letter, which followed her to this country. Upon her return to Hoboken, and before the expiration of her leave of absence, she called upon the president of the board of education and asked him for the definite date on which she should return to her position. When he learned from her that she had been married, he told her that she could not return to her position and that under a rule of the Hoboken Board of Education her contract with it was terminated. In February, 1921, through her counsel, she requested a hearing from the board of education but it was refused.

The record also shows that the procedure of the board with respect to her application for leave of absence was the same as that followed by it in granting leaves of absence to other teachers. It appears that it was not the practice of the committee, to whom the Respondent's application for leave of absence was referred, to report its action back to the board, or for the board as a whole to take action on such applications. Under these circumstances, we find that the Respondent had the right to rely on the letter of November 1st, granting her leave of absence, and that she did not abandon her position as contended on behalf of the Appellant.

The Appellant further contends that the Respondent was properly dismissed because she violated paragraphs 8 and 11 of rule 13 of the Hoboken Board Education. Paragraph 8 provides that the marriage of any female teacher shall be considered as equivalent to a resignation. Paragraph 11 provides

that the position of any teacher remaining absent for a period of one month without permission of the board of education shall be considered vacant and be filled accordingly.

No rule or by-law of a board of education which conflicts with the Teachers' Tenure of Service Act is enforceable. The board can, if it so desires, pass a rule or by-law concerning the effect of marriage and against absence without leave, but under the Tenure of Service Act, no teacher can be discharged unless charges are preferred against her, she is given a fair hearing to answer them, and it is found after such a hearing that she is guilty of inefficiency, incapacity or conduct unbecoming a teacher, or "other just cause" appears to justify her dismissal. The action of the Appellant in enforcing its rules and refusing Mrs. Nommensen a hearing was therefore contrary to the statute (Chap. 243, P. L. 1909).

With respect to paragraph 11 of rule 13 of the Hoboken Board, it is also to be observed that, as stated above, the Respondent's absence was with permission of the board of education, and therefore, as a matter of fact, that part of the rule was not violated.

For the reasons above set forth, and on all the grounds stated by the Commissioner in his opinion, we believe that the action of the Appellant was wrong and we therefore recommend that the decision of the Commissioner be affirmed.

ABOLITION OF OFFICE OF SUPERVISING PRINCIPAL

ALBERT H. GORDON,

Appellant,

vs.

JEFFERSON TOWNSHIP BOARD OF EDUCATION,

Respondent.

U. G. Davenport, for Appellant.
King & Vogt, for Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

This action is brought by the above-named Appellant, Albert H. Gordon, a supervising principal employed jointly by the Jefferson Township and Mount Arlington Township Boards of Education to contest the legality of the abolition of such office as far as Jefferson Township School District is concerned by a resolution by the Board of Education of the latter district adopted April 30, 1923. Following is the text of the resolution passed by a vote of five to three, a majority of the whole number of the board:

> "That the office of Supervisor of Schools in Jefferson Township be discontinued at the end of the present school year, June 30, 1923, and the present incumbent notified at once to that effect and that a request for the services of a helping teacher throughout this township for the coming year be sent immediately to the County Superintendent."

The Appellant contends that in view of the fact that a Supervising Principal was employed jointly by the school districts of Mount Arlington and Jefferson Townships and approved by the County Superintendent, the Commissioner and the State Board of Education, such office cannot legally be abolished except by joint action of the two boards of education approved by the County Superintendent, the Commissioner and the State Board of Education.

The Appellant, who is under the protection of the Teachers' Tenure Law, further contends that the abolition of the office of Supervising Principal was not made in good faith by the Jefferson Township Board of Education, but that such action was entirely the result of personal animosity and political antagonism on the part of various board members against Appellant; and that the proposed performance in the future of the same duties by a helping teacher is virtually a dismissal of Appellant without compliance with the provisions of the Teachers' Tenure Law as to charges and a hearing and the appointment of someone else in his place.

A hearing in this matter was conducted by the Assistant Commissioner of Education on June 18, 1923, at the Court House in Morristown, at which hearing the testimony of witnesses on both sides was heard.

The Commissioner cannot agree with Appellant's contention that a school district joining with another in the appointment of a Supervising Principal cannot dispense with such office as far as the former district is concerned without the consent of the latter district and without the approval of the County Superintendent, the Commissioner and the State Board of Education. While the law allows joint action by districts in making such an appointment and requires the approval of the County Superintendent, the Commissioner and the State Board for such action, there is nothing in the statute which makes such an office permanent for both or either of the districts or which would prevent both or either from afterward abolishing the office. Neither does the testimony in the present instance disclose any terms of an agreement between the two districts by which joint action is required before the Supervising Principal's office can be dispensed with.

The testimony before the Commissioner failed to support the contention that the action taken by the Jefferson Township Board of Education in abolishing the office of Supervising Principal was directed against Albert H. Gordon, the incumbent of the office, or was actuated by personal animosity or political antagonism. It appears from the evidence and especially from the sworn statements of four out of five of the board members voting for such abolition that such action was taken in the bona fide belief that the duties hitherto performed by the Supervising Principal could be just as efficiently performed by a helping teacher; and that no further expenditure towards such helping teacher's salary would be necessary than the district is already making while receiving at the present time no benefit of her services. It appears that the board members voting for the abolition of the Supervising Principal's office expected to be able to save for the district approximately $800 a year and at the same time in no way decrease the efficiency of the school system.

According to 28 Cyc. 445,

"The statutes requiring a hearing or opportunity to explain apply only where the removal is for incompetency, misconduct or other reason personal to the individual removed, and not where the removal is made in good faith from motives of economy, as where the services are no longer needed, or there is not a sufficient appropriation to pay salaries, but to make a compliance unnecessary the office must be abolished in good faith."

The Justice's opinion in the case of Benjamin Evans *vs.* Board of Chosen Freeholders of Hudson County (53 Law 587) holds that

"Whenever for economical reasons arising from governmental policy it may be thought wise to extinguish the office or position, the power which created can annul it. It is a matter of course that the exertion of the power to disestablish must be bona fide, for it is manifest that if it should appear that a formal act purporting to abolish such an office or employee, while the officer or position practically still remains in existence, such a subterfuge would be of no avail."

In George F. Sutherland *vs.* Board of Street and Water Commissioners of Jersey City (61 Law 436) the opinion contains the following statement:

"But it is settled that statutes of this nature (Veterans' Acts) are not designed to prevent the abolition of an office and the transfer of its duties to another official, when such a course is taken bona fide for economical reasons or for the promotion of greater efficiency in the public service."

A similar opinion was rendered in the case of William Boylan *vs.* Board of Police Commissioners of the City of Newark (58 Law 133) wherein it was held that the provisions of the Police Tenure Act were not sufficient to prevent the abolition of the offices of nine police sergeants and the transfer of their duties to four men denominated "Roundsmen" and a consequent saving of $5,000 per annum in salaries.

It is quite apparent from the many decisions and authorities on the subject that whenever bona fide reasons exist, such as economy in the public interest, for the abolition of an office and the transfer of its duties to another official such office may be abolished even though the incumbent be protected by a Tenure of Service statute.

In the case under consideration the testimony shows a bona fide belief on the part of the Board of Education of Jefferson Township that economy could be practiced and no efficiency lost by the abolition of the office of Supervising Principal and the transfer of its duties to a helping teacher, and in view of such a bona fide belief the abolition of the office was in the Commissioner's opinion legal.

The good faith of the action taken by the Jefferson Township Board of Education in transferring the duties of the Supervising Principal to a helping teacher is supported by the fact that the district in question is not the type which requires the entire time and attention of a supervisor, in which latter type the services of the helping teacher would not prove adequate by reason of the necessity of dividing her time between two or more districts.

In view of the absence therefore of any proof of a personal action against the incumbent of the office of Supervising Principal in Jefferson Township, but, on the other hand, in view of the abolition of the office for bona fide reasons, it is the opinion of the Commissioner of Education that the action of the Jefferson Township Board of Education was legal and should be sustained.

The appeal is accordingly hereby dismissed.

Dated July, 1923.

DECISION OF THE STATE BOARD OF EDUCATION

The Appellant, Albert H. Gordon, was employed as supervising principal by the Board of Education of Jefferson and Mount Arlington Townships in Morris County for a number of years under annual contracts. On April 30, 1923, by a vote of five to three the Jefferson Township Board passed a resolution to the effect that the office of supervisor of schools in the township be discontinued at the end of that school year, and that the county superintendent be asked to provide a helping teacher to supervise the schools of the township. Mr. Gordon appealed to the Commissioner, who, after hearing testimony, has held in an opinion in which the facts are fully stated, that the Board had the right to abolish the position of superintendent, notwithstanding the Appellant's tenure of office, unless in so doing it was prompted by motives of animosity or prejudice, and on that point the Commissioner finds that the weight of the evidence before him is that the action of the Board was in good faith and was not the result of animosity, passion or prejudice, but that, on the contrary, "the testimony shows a bona fide belief on the part of the Board of Education of Jefferson Township that economy can be practiced and no efficiency lost by the abolition of the office of supervising principal and the transfer of its duties to a helping teacher." The record shows that this finding of the Commissioner is justified by the evidence and should not be disturbed. Also we agree with the conclusions of law stated in his opinion and therefore recommend that it be affirmed.

DISMISSAL OF SUPERVISING PRINCIPAL UNDER TENURE

SUE H. COLES, *Appellant,*

vs.

THE BOARD OF EDUCATION OF PILESGROVE TOWNSHIP, ***Respondent.***

E. G. C. Bleakley, for the Appellant.

T. G. Hilliard, for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The Appellant has been in the employ of the Respondent continuously since September, 1903, and is, therefore, protected by Chapter 243, P. L. 1909, commonly known as the Teachers' Tenure of Service Act. Said act provides that a teacher or principal, after three years of continuous service, cannot

be removed or subjected to reduction in salary "except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause," and upon written charges and after a hearing before the board of education.

On July 20, 1911, written charges of "inefficiency, incapacity, conduct unbecoming a teacher and insubordination to the rules, requirements and orders" of the board of education were preferred against Miss Coles.

The Respondent held a hearing on these charges on August 30, 1911, and, at a meeting held September 18, 1911, the Respondent adopted the following resolution:

"Resolved, That this Board do find the charges preferred by Richard K. Layton against Sue H. Coles, supervising principal of the school district of the Township of Pilesgrove, are true in fact, and that the said Sue H. Coles is guilty of conduct unbecoming a teacher, and of insubordination, and that such insubordination and conduct unbecoming a teacher is just cause for a removal from her position as supervising principal of the school district of the Township of Pilesgrove, Salem County, New Jersey, and that she, the said Sue H. Coles, be and she hereby is dismissed from her employment as supervising principal as aforesaid and from the employment of this Board of Education in any position."

At the hearing before me the counsel for the Respondent said "the general charge in the charges of inefficiency and incapacity is not sustained by the evidence and must therefore be abandoned. The Iredell charge is, in my humble judgment, clearly sustained by the evidence and is pressed. The charge in regard to the Mrs. Shoemaker incident is not withdrawn."

The only charges to be considered, therefore, are, was the Appellant guilty of inefficiency, incapacity, conduct unbecoming a teacher and insubordination in the Iredell and Shoemaker cases?

The charges in these cases are not sustained by the evidence.

The resolution dismissing Miss Coles, adopted by the Board of Education of Pilesgrove Township at the meeting held September 18, 1911, is null and void, and the judgment rendered at said meeting is reversed.

August 29, 1911.

DISMISSAL OF SUPERVISNG PRINCIPAL UNDER TENURE

RUSSELL M. FITCH,

Appellant,

vs.

THE BOARD OF EDUCATION OF SOUTH AMBOY,

Respondent.

Thomas Brown, for the Appellant.

Samuel Schleimer, for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The Appellant has been the Supervising Principal of the Schools under the control of the Respondent for more than three years, and is therefore pro-

tected by the provisions of Chapter 243 of the Laws of 1900, commonly known as "The Teachers' Tenure of Service Act," and is liable to dismissal only for "inefficiency, incapacity, conduct unbecoming a teacher, or other just cause," and upon written charges and after a hearing by the Board of Education, at which he may be represented by counsel.

Charges of inefficiency were preferred against the Appellant, and after a hearing the Respondent found the charges to be true in fact, and thereupon adopted a resolution dismissing him from his position as Supervising Principal.

From this action he appeals, and prays that the action of the Respondent be declared null and void:

> 1st, Because the action taken was not in accordance with the provisions of the Teachers' Tenure of Service Act; and,
>
> 2d, Because the charge of inefficiency was not sustained by the evidence.

The Tenure of Service Act provides, in part, as follows:

"No principal or teacher shall be dismissed or subjected to reduction of salary except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause * * * and after the charge shall have been examined into and found true in fact by said Board of Education, upon reasonable notice to the person charged, who may be represented by counsel at the hearing."

It appears that written charges were filed against the Appellant, that a copy was served upon him, and that he received notice to appear, on a certain date, before a Committee of the Board of Education, at which time a hearing on the charges would be held. It also appears that he applied for, and was furnished with, blank subpœnas for such witnesses as he desired to have summoned, that he appeared at the time and place stated in the notice, and that witnesses produced to sustain the charges were cross-examined by his counsel. There is nothing before me to show whether or not witnesses were produced in his behalf, or that any person refused to appear and testify for him. It also appears that the Committee is composed of all the members of the Board of Education, that all the members were present, and that the President of the Board presided.

The Appellant asks that the action of the Board of Education in dismissing him be declared null and void, for the reason that the hearing was held before a Committee of the Board and not before the Board itself in regular session

In view of the fact that all the members of the Board were present at the hearing, and that his counsel cross-examined witnesses then present, and the further fact that at the hearing before me he had full opportunity to present witnesses in his behalf, and to cross-examine those produced by the Respondent, I am of the opinion that there was a substantial compliance with the provisions of the Act, and that his rights have not in anywise been jeopardized.

After a careful study of all the evidence, I am of the opinion that the Appellant has been inefficient in the discharge of his duties as Supervising Principal.

The appeal is dismissed.

October 13, 1913.

DECISION OF THE STATE BOARD OF EDUCATION

Mr. Fitch was supervising principal in the employ of the Board of Education of South Amboy and protected by the provisions of the Teachers' Tenure of Service Act. On or about the 2d of April, 1913, written charges were preferred against him. On the 11th of April he was notified that the Teachers' Committee would hold a hearing upon the 16th, and he was requested to submit, by the 14th, a list of any witnesses whose presence he desired, so that subpœnas could be prepared. A trial was held, the Committee rendered a report, and the Board, on or about the 30th of April, unanimously adopted a resolution sustaining the charges. The Board also unanimously resolved that Mr. Fitch's services would not be required after the close of the school year 1912–1913.

Mr. Fitch appealed to the Commissioner of Education, and evidence was taken *de novo*. The record and briefs submitted to us aggregate about six hundred pages, and we have carefully examined same. The record does not include a transcript of the proceedings on the trial before the Teachers' Committee. From the record, however, we assume that substantially the same facts excepting those relating to the defense of Mr. Fitch were brought out upon that trial as upon the hearing before the Commissioner. The Commissioner considered various objections urged in behalf of Mr. Fitch and overruled same. With regard to the merits, he wrote:

"After a careful study of all the evidence, I am of the opinion that the Appellant has been inefficient in the discharge of his duties as supervising principal."

Twenty-nine grounds are urged as reasons for the reversal of the determination of the Commissioner and of the Board of Education of South Amboy. We have examined all. Those on which the most reliance is placed are three-fold.

First: That the written charges were insufficient.

Second: That the hearing should have been held by the Board of Education of South Amboy and not by any committee.

Third: That the evidence failed to establish that Mr. Fitch was inefficient.

We do not understand that any claim is made that Mr. Fitch was misled as to the meaning of the charges preferred against him. It was not necessary that such charges should have been prepared with the precision of an indictment. In our opinion, the charges were sufficient if Mr. Fitch was by them so apprised of the complaints against him, that he understood their nature, and could, if he so desired, prepare to meet them. A reading of the charges clearly shows that the complaints against Mr. Fitch were that there was no system, supervision or help to the teachers, that the schools

were not up to the standard, and that they had been deteriorating for a period extending over three years. The charges could perhaps have been drawn with greater precision, but their meaning was quite clear, and to the average mind would indicate that Mr. Fitch was charged with inefficiency and incapacity.

The second objection which has been strongly urged is that the hearing was conducted by the Teachers' Committee and not by the Board of Education. The Commissioner carefully examined this objection, and we see no reason to differ from the conclusion reached by him. The Committee is composed of all the members of the Board of Education. All the members of the Board were present at the hearing, and the President presided. Under such circumstances we cannot see that the labelling of all the members of the Board as a Teachers' Committee, rather than as a Board, vitiated the proceedings.

The third objection relates to the merits. In a word, the serious charge against Mr. Fitch was that he was a supervisor who did not supervise. The Board unanimously decided that the charge was sustained. Upon a new hearing before the Commissioner he also was of the opinion that Mr. Fitch had been inefficient in the discharge of his duties as supervising principal. Mr. Fitch now urges that we should be convinced "beyond a preponderance of evidence" that he was inefficient and incapable. As we have to-day indicated in another case, it is our opinion that we should not interfere with the determination of a local Board of Education unless it appears that its conclusion was the result, not of honest judgment, but of passion or prejudice. The Tenure of Service Act provides that all charges shall be examined into by the local Board of Education, and that if such Board finds they are true in fact, the teacher may be dismissed. The Legislature has imposed the duty of determining if the charges are true in fact upon the local Board. Where evidence against a teacher is clear, or where, if not entirely clear, there is room for an honest difference of opinion, we should not interfere with the determination of the local Board. To do so would mean that we could substitute our judgment in place of its judgment, a substitution which, in our opinion, would be unauthorized and contrary to the intention of the Legislature. Where a Board unanimously decides that a supervising principal is inefficient and where the Commissioner after a very careful trial likewise concludes that he is inefficient, we should be slow to interfere. From an examination of the evidence we cannot say that the conclusion that Mr. Fitch was inefficient was the result of passion or prejudice rather than of honest judgment.

The decision of the Commissioner of Education is affirmed.

January 3, 1914.

DISMISSAL OF SUPERVISING PRINCIPAL UNDER TENURE

IN THE MATTER OF THE APPLICATION OF JARED BARHITE TO BE REINSTATED AS SUPERVISING PRINCIPAL OF THE SCHOOL DISTRICT OF THE TOWN OF WEST NEW YORK.

Tennant & Haight, for the Appellant.
Francis H. McCauley, for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The Petitioner was employed by the Respondent as Supervising Principal of Schools continuously for the four years ending June 30, 1910. He was dismissed from his position as Supervising Principal without charges having been preferred against him or a hearing given him as required by Chapter 243, P. L. 1909.

If the Petitioner was protected by the provisions of said law the action of the Respondent was illegal and null and void.

In the case of Marsteller *vs.* The Board of Education of Pleasantville, the State Board of Education held that a principal or teacher who rendered services after September 1, 1909, was protected by the provisions of Chapter 243, P. L. 1909, even though he was serving under a contract entered into prior to said date, and which contract did not expire until after said date.

The Petitioner was employed by the Respondent in 1907 and continued to serve without interruption until June, 1910. He was, therefore, protected by the law above referred to, and the action of the Respondent in discharging him was null and void.

April 2, 1913.

DECISION OF THE STATE BOARD OF EDUCATION

This is an appeal by the Board of Education of the Town of West New York from a decision of the Commissioner to the effect that its act in discharging Mr. Barhite was null and void.

No evidence was taken in the case. Mr. Barhite was a supervising principal in the public schools of the Town of West New York for four successive years prior to June, 1910. In that or the preceding month a successor was appointed in his place. Mr. Barhite protested against this act and thereafter wrote a letter to the Superintendent of Public Instruction, Mr. Charles J. Baxter. He received in reply a letter setting forth the rulings of the department in regard to the Tenure of Service Act, one of which was contrary to his contention that his discharge was unlawful. Mr. Barhite's application to the Superintendent of Public Instruction was informal. There was, however, nothing in the law which prescribed any particular form in which school controversies should be presented to the Superintendent of Public Instruction.

Neither is there anything now in the law which prescribes any particular form in which matters must be presented to the Commissioner of Education for his decision. Mr. Barhite sought the rulings of the Superintendent of Public Instruction with regard to the Tenure of Service Act. He received such rulings and there is no suggestion in the papers, neither was there upon the argument, that he did not understand that one of the rulings was contrary to his contentions. He did not appeal to the State Board, but acquiesced in the determination of the Superintendent, and did nothing further until after the ruling of this Board in the Marsteller case.

The Board of Education of the Town of West New York had every reason to believe that Mr. Barhite acquiesced in the rulings of Mr. Baxter. We believe Mr. Barhite has had his day in Court and that the Commissioner erred when he allowed him again to attempt to litigate the matter.

July 10, 1913.

CONCURRING OPINION OF DR. JOHN C. VAN DYKE

Whether action was begun in this case by Barhite in 1910 and decided by the State Superintendent against him seems uncertain. The papers do not indicate the exact facts about this. Apparently there was an informal petition made which was answered by the State Superintendent in a letter enclosing certain decisions of the State Superintendent under the Tenure of Service Act. Barhite seems to have accepted these decisions as covering his case, and abandoned any further thought of action. If he did not, what became of his suit? If he started one, why did he not press it? If decided against him, why did he not appeal to the State Board of Education at that time? Action now, before a new tribunal, after the lapse of three years, certainly argues negligence for which the Appellee alone should be held responsible. The argument of counsel for Appellant on that point seems well grounded. Barhite was guilty of *laches* or negligence in not pressing his cause. It is unreasonable to suppose that the Appellant, the Board of Education of West New York, could or should wait three years upon the movement of the Appellee.

Again, if the Appellee bases his present claim upon the ground that he has not been heard in Court; that his case has never been adjudicated, and that he expressly reserved all his rights in his protest against his dismissal in 1910, the same question arises. Why did he not urge his claim before the State Superintendent in 1910. Actions must be begun within a reasonable time.

The Statute of Limitations was established for the very purpose of barring actions not started within a reasonable time. Can the Appellee contend that three years is a reasonable time to put forth his claim? The Appellant had to make new contracts or go on with the old one, and it was not possible for the Board of Education of West New York, the Appellant, to wait such a length of time upon the Appellee's movements. The matter could have been decided in three months, and the appellee should have pushed his claim to a decision. The consequences of his not doing so should fall upon his

own head rather than upon the head of the Board of Education of West New York. Whatever rights he may have had in 1910 under the Tenure of Service Act he has lost by his own negligence, either by failure to start a suit in the first place, or failure to press his right of appeal in the second place.

The decision of the Commissioner is reversed.

The Supreme Court, under date of February 18, 1914, dismissed the appeal.

Affirmed by *Court of Errors and Appeals*, 86 N. J. L. 674.

DISMISSAL OF SUPERVISING PRINCIPAL UNDER TENURE

ASBURY FOUNTAIN,
Appellant,
vs.

THE BOARD OF EDUCATION OF
MADISON TOWNSHIP,
Respondent.

Jacob R. Van Mater Lefferts, for the Appellant.
Charles T. Cowenhoven, for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

Asbury Fountain, the Appellant in this case, was supervising principal in Madison Township, Middlesex County, up to June, 1916. He had occupied this position for more than three years.

In April, 1916, charges were made against the Appellant by citizens of Madison Township. The principal charges against Mr. Fountain are that he has not been sufficiently diligent in visiting the schools of the township and that on his visits to the schools he did not remain for a sufficient length of time to make any examination of the progress that the pupils in the schools were making in their studies and that he could not in so short a time while visiting ascertain the character of the tuition that was given or the qualifications of the teachers to impart knowledge.

These charges were regularly served upon Mr. Fountain. An appointed time was set and a hearing given by the Board of Education. At this hearing counsel appeared for Mr. Fountain and also for the persons making the charges. Several witnesses were called on both sides and sworn testimony was taken by an official stenographer. In Madison Township there are eight teachers to be supervised. A supervising principal is supposed to give his whole time during school hours to his duties as a supervisor. Among the witnesses sworn were the eight teachers. After hearing the testimony the Board of Education found the Appellant guilty of the charges preferred.

From this finding an appeal has been taken to the Commissioner, the case being submitted on the testimony taken before the local Board. An opportunity was given for oral argument before the Commissioner based

on this testimony. At this hearing, although both sides had notice, only the counsel for the Respondent appeared.

After carefully reading all the testimony offered, I have reached the conclusion that a fair hearing has been granted the Appellant, and that the findings of the Board of Education are in accordance with the evidence in the case.

The appeal is hereby dismissed.

March 21, 1917.

DECISION OF THE STATE BOARD OF EDUCATION

James F. Fielder, for the Appellant.
Charles T. Cowenhoven, for the Respondent.

The Appellant in this case was supervising principal of the schools in Madison Township, Middlesex County, up to February 3, 1916. At that time he resigned and was immediately reappointed to the same position. No one pretends to know or say why he resigned, not even the Appellant himself, but the effect of his resignation was to cut him off from the benefit of the tenure of service act. Two months or more later charges were brought against the Appellant. Waiving the question whether he was entitled to a trial under the tenure of service act, he was duly tried by the Board of Education of Madison Township, found guilty, and dismissed from service. He appealed to the Commissioner of Education, and his appeal was dismissed. He is now before this State Board of Education on appeal from the Commissioner of Education.

The trial was more or less informal, as is usually the case with trials before school boards; incompetent and inconsequent evidence was admitted from both sides, and of the twelve charges against the Appellant several were dropped and several others were not sufficiently substantiated by the evidence. The chief charges, however, "that he was not sufficiently diligent in visiting the schools of the township and that on his visits to the schools he did not remain for a sufficient length of time to make any examination of the progress that the pupils in the schools were making in their studies, and that he could not in so short a time while visiting ascertain the character of the teaching that was given or the qualifications of the teachers to impart knowledge"—these charges have been sufficiently proven by the evidence in the case. In summarizing the evidence, Appellant's counsel makes it appear that 98 visits were made to six schools in 180 days. We quote from counsel's brief:

"This covers a period of approximately six months, or 180 days. Deducting 55 days for Saturdays, Sundays and holidays, leaves about 125 school days. The teachers who testified represented six schools, and as there are eight schools in the district, two teachers were not called to testify. It must be assumed that Fountain paid the average number of 13 visits to the other two schools, otherwise the complainants would have called the teachers to testify against him, so that the total number of visits to the

eight schools were 124 for the 125 school days, or one school visited each day. Besides these specific visits, each teacher testified that he visited her school a number of times when he did not enter the school building. If the records showed that the teacher was managing her school properly, she did not require many visits. In addition to visiting schools, a supervising principal has many other duties to perform, such as acting as truant officer, preparing and filing state reports, county superintendent reports, and united attendance reports for each month; he must inspect toilets, deliver necessary supplies, and pay persons employed on school work. It would therefore appear that with the number of school visits actually testified to he must have been an exceedingly busy man if he performed his other duties, and that he did perform them is apparent from the absence of charges on that score. The township in question is seven miles wide and fourteen miles long, and the schools are three or four miles apart."

It is thus claimed that the Appellant "visited one school a day for 125 school days." On the witness stand Fountain himself said that his visits were from fifteen minutes to an hour and a half each, but this is not substantiated by the testimony of six teachers in the schools who say that the visits were from fifteen minutes to half or three-quarters of an hour, or with one witness from fifteen minutes to an hour. But taking Fountain's testimony at its face value the visiting of a school a day from fifteen minutes to an hour and a half does not constitute adequate or sufficient supervision on the part of a supervising principal whose whole time is supposed to be devoted to his office. In apportioning school moneys for a supervising principal article XVII, section 223, I. (a) of the School Law (1914) reads: "The sum of six hundred dollars to each district in which there shall have been employed a supervising principal or city superintendent of schools who shall have devoted his *entire time* to the supervision of the schools in such district." The duty of a supervising principal is primarily the supervision of instruction in the classroom. His other duties are of minor importance and call for no such expenditure of time as counsel suggests.

The best that the Appellant can claim in his testimony is that he was engaged in his duties of his office not more than an hour a day. This is such utterly inadequate service under the statute that it amounts to neglect of duty and on this count alone we think the Respondent, the Board of Education of Madison Township, was justified in dismissing the Appellant from service.

The decision of the Commissioner of Education is affirmed.

December 1, 1917.

ABOLITION OF OFFICE OF SUPERVISOR OF ARTS

LOUISE KUYL,

Appellant,

vs.

BOARD OF EDUCATION OF THE CITY OF PATERSON,

Respondent.

Michael Dunn, for Appellant.
Randall Lewis, for Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The facts of the case as disclosed by the pleadings and by the testimony taken by the Assistant Commissioner at the hearing conducted in Paterson on November 12, 1924, are as follows:

Appellant was first employed as a teacher in the public schools of the City of Paterson in 1913, and served as such continuously until December 13, 1923, when she was appointed Assistant Supervisor of Fine and Industrial Arts by the following resolution adopted by a majority vote of the Paterson Board of Education:

> *"Resolved,* That Miss Louise Kuyl be and is hereby transferred from the position of teacher at School No. 12 and appointed to the position as Assistant Supervisor of Fine and Industrial Arts, at a salary of $2,000 per annum, dating from December 15, 1923, with annual increases of $200 up to a maximum of $3,000 per annum as per schedule of salaries for assistant supervisors adopted October 13, 1921, and effective September 1, 1922."

Appellant continued to act as Assistant Supervisor of Fine and Industrial Arts until she was notified in February, 1924, that she would be transferred back to the position of instructor at Public School No. 12, which she had formerly occupied, as a result of the following resolution adopted by the Board at its meeting in February, 1924:

> "WHEREAS, At the December meeting of the Board of Education Miss Louise Kuyl was transferred from the position of teacher in School No. 12 and appointed to the position of Assistant Supervisor of Fine and Industrial Arts, and
>
> "WHEREAS, This attempted appointment would create an additional position of Assistant Supervisor of Fine and Industrial Arts in the school system of the City of Paterson, and
>
> "WHEREAS, Under the rules of this board, before such a position can be created it is necessary that the motion or resolution creating such position should be submitted at a regular meeting of the board and held over until the next following meeting, therefore, be it

"*Resolved,* That this board does hereby rescind and set aside the attempted appointment of Miss Louise Kuyl as Assistant Supervisor of Fine and Industrial Arts, and does direct that she be transferred back to the position held by her as teacher in School No. 12, and be it further

"*Resolved,* That the additional position of Assistant Supervisor of Fine and Industrial Arts attempted to be created as above set forth, be and the same is hereby abolished."

Appellant thereupon under protest entered upon her duties in the position to which she had been transferred, namely, that of an instructor in School No. 12, at a reduction of $50 in her annual salary, and proceeded to bring this appeal.

In the Commissioner's opinion there is no merit in the respondent's contention as to the barrier in the way of appellant's appointment on December 13, 1923, constituted by the rule of the board to the effect that any resolution creating a new position and adopted at a regular meeting must be laid over until the next following meeting of the board and then acted upon. This rule itself constituted an amendment of the board's previous rules of procedure and as such should, according to the board's own rules, have been passed only after having been read at two regular meetings or passed by the unanimous consent of all the members. The testimony shows that neither of these methods was employed in adopting the amendment above referred to requiring the laying over of a resolution creating a new position until the next meeting of the board. The latter rule, therefore, in the Commissioner's opinion, was not legally in existence at the time of appellant's appointment on December 13, 1923, and there could therefore be no violation of rules involved in the appointment being made without laying the resolution over until the next meeting of the board.

Appellant's contentions, however, as to her legal right to regain the position of Assistant Supervisor of Fine and Industrial Arts from which she was removed in February, 1924, cannot, in the Commissioner's opinion, be sustained owing to the fact of the actual abolition of the position of Assistant Supervisor of Fine and Industrial Arts by the resolution of the Paterson Board of Education in February, 1924, as above set forth. The right of a board of education to abolish in good faith any office or position under its control even though the incumbent be under tenure has been sustained by many authorities in this State, notably that of the case of Albert H. Gordon *vs.* Jefferson Township Board of Education, sustained by the State Board of Education in October, 1923. The right, moreover, of the incumbent to a notice and hearing under the Tenure Law exists only while the office itself remains and not when such office has been abolished.

Since, therefore, the evidence in the case before us shows the position of Assistant Supervisor of Fine and Industrial Arts to have been legally abolished by the Paterson Board of Education, the validity of such abolition in spite of Appellant's tenure is hereby sustained.

The appeal is accordingly dismissed.

January 7, 1925.

DISMISSAL OF TEACHER UNDER TENURE

ELLA CONROW,

Appellant,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF LUMBERTON,

Respondent.

Richard B. Eckman, for the Appellant.
Davis & Davis, for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The Appellant had been employed by the Respondent as a teacher in the schools under its control consecutively for the term of eight years at the close of the school year of 1911-12.

The Respondent failed to assign her to any school for the year of 1912-13, and gives as a reason that her hearing is so defective as to make it impossible for her to give satisfactory service. It is admitted that no charges, in writing, were preferred against her, and that she was not given a hearing.

Chapter 243, P. L. 1909, provides that the "service of all teachers, principals, supervising principals in the public schools in any school district in this State shall be during good behavior and efficiency after the expiration of three consecutive years of service in that district. * * * No principal or teacher shall be dismissed or subjected to reduction of salary in said district except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause, and after a written charge of the cause or causes shall have been preferred against him or her * * * and after the charges shall have been examined into and found true in fact by said Board of Education upon reasonable notice to the person charged, who may be represented by counsel at the hearing."

The discharge of the Appellant in the absence of written charges and without a hearing was in violation of the provisions of the statute above quoted. The Appellant is, therefore, still in the employ of the Respondent, and is entitled to her salary.

November 25, 1912.

DISMISSAL OF TEACHER UNDER TENURE

ELLA CONROW,

Appellant,

vs.

BOARD OF EDUCATION OF LUMBERTON TOWNSHIP,

Respondent.

Richard B. Eckman, for the Appellant.
Davis & Davis, for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

It is admitted that the Appellant was employed as a teacher in the schools under the control of the Respondent continuously for eight years at the close of the school year ending June 30th, 1912, and that the Respondent did not assign her to any school at the opening of the fall term in September last.

On January 9th, 1913, written charges that she was incapacitated from performing her duties as a teacher by reason of deafness were filed with the Board of Education of Lumberton Township; on January 13th said Board, after examining witnesses, declared the charges sustained and dismissed her.

Miss Conrow is exceedingly deaf, and, without the aid of some mechanical device is undoubtedly incapacitated from performing the duties of a teacher. Her deafness has been of long standing, and it is evident from the testimony that the condition has changed very little, if any, since she was first employed by the Respondent eight years ago. Miss Conrow, since the close of school in June, 1912, has procured a mechanical device known as the "acousticon" and with this she is able to hear distinctly. If the Respondent was of the opinion, as is shown by retaining her in its employ, that the services of Miss Conrow were satisfactory and efficient for eight years while her difficulty in hearing was about the same, there appears to be no good reason for dismissing her on account of her deafness, after she had secured an appliance which enables her to hear almost, if not quite, as well as a person with normal hearing.

The action of the Respondent in dismissing the Appellant was in violation of the provisions of Chapter 243, P. L. 1909, commonly known as the "Teachers' Tenure of Service" law, and is, therefore, null and void.

April 18, 1913.

DECISION OF THE STATE BOARD OF EDUCATION

Miss Conrow was a teacher in the employ of the Board of Education of Lumberton Township. In January, 1913, a charge was preferred that because of deafness she was incapacitated to serve as a teacher. Evidence was taken at a hearing of which she had notice. The charge was found to be true in fact and she was dismissed. She appealed to the Commissioner of Education, and he ruled that her dismissal was contrary to the Tenure of Service Act, and, therefore, null and void.

That act provides that a teacher who has been charged with incapacity may be dismissed if she has been given a trial after reasonable notice, and if the charge has been found true in fact by the Board of Education having charge of the school in which she was engaged.

In this case we have not been furnished with transcript of the proceedings of the trial before the local board, but, from the argument, we infer that the evidence adduced before it was substantially the same as that before the Commissioner. As the procedure prescribed by the statute was followed, but two questions arise: first, was the charge such as, if found true in fact, would justify dismissal; and, second, was the finding that the charge was true in fact so clearly against the weight of evidence as to lead to the conclusion that it was the result, not of honest judgment, but of passion or prejudice. The charge against Miss Conrow was that she was so deaf that she was incapacitated to properly perform the duties of a teacher. Hearing is so essential to a teacher that we cannot say that its substantial impairment is not just cause for dismissal. That Miss Conrow is quite deaf is admitted. She contends, however, that between the time when she last taught and the time of her trial she had purchased an acousticon with the aid of which, at the time of the trial, she could hear as well as the average person. It is urged that as teachers are permitted to wear glasses to improve their vision, those with defective hearing should likewise be allowed to wear acousticons. It is not necessary however for us to decide to what extent local boards must submit to the use of instruments by teachers to overcome defects. On the trial evidence was submitted tending to show that the acousticon is not the equal of the normal ear. In fact, it was admitted that hearing with it is, to some extent, dependent on the direction from which the sound comes.

There is a suggestion that the Board of Education of Lumberton Township is estopped to claim that Miss Conrow is incapacitated because she had been in its employ for many years during most, if not all, of which time her hearing was defective. We cannot subscribe to a doctrine that a Board which, because of sympathy or other reason, tolerates an inefficient teacher, thereby estops itself and the public which it represents from dismissing her. If such were the law, a sympathetic, or an incompetent, or a dishonest Board might confer a life tenure on an absolutely incompetent teacher.

The decision of the Commissioner of Education is reversed, and the determination of the Board of Education of Lumberton Township affirmed.

January 3, 1914.

DISMISSAL OF TEACHER UNDER TENURE

WALTER G. DAVIS,

Appellant,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF OVERPECK,

Respondent.

John Scott Davison, for the Appellant.
William J. Morrison, for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

From the "Agreed State of Facts" it appears that the Appellant was continuously in the employ of the Respondent from 1906 to the end of the school year in 1912; that from September, 1906, to June, 1909, he was a teacher in the High School, and from September, 1909, to June, 1912, was principal of the High School, and that his salary for the school year of 1911–1912 was $1,200. It also appears that in August, 1912, the Respondent forwarded to the Appellant for his signature a contract for the school year of 1912–13 at a salary of $1,200. Said contract does not specify the position to which the Appellant had been assigned, and it appears that when he reported for duty on the opening of the schools in September, 1912, the person who had been appointed to succeed him as principal assigned him to teach the eighth grade in School No. 1, which assignment the Appellant declined.

Chapter 243, P. L. 1909, provides that "the service of all teachers, principals, supervising principals of the public schools in any school district of this State shall be during good behavior and efficiency, after the expiration of a period of employment of three consecutive years in the district. * * * No principal or teacher shall be dismissed or subjected to a reduction of salary in said district except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause."

It is claimed by the Appellant that the recommendation of the committee adopted by the Respondent at the meeting held May 17th, 1912, was a dismissal, and therefore in violation of the Teachers' Tenure of Service Act, above quoted, no charges having been preferred against him as required by said act.

This recommendation reads as follows:

"The Committee on School Government recommends that Walter G. Davis be not re-employed as principal of and instructor in the High School of Overpeck Township for the coming year, it being our conviction that the best interests of the schools would be served by dispensing with his services."

Taken alone, this action, in the absence of any charges or hearing, would undoubtedly be a violation of the Tenure of Service Act, but taken in con-

nection with the fact that the Respondent tendered him a contract for the ensuing year is evidence that all that was intended was to relieve him of his duties as principal of the high school, and that the "dispensing with his services" applied only to his position as principal, and that it was not the intention of the Respondent to dismiss the Appellant from its employ.

The Tenure of Service Act prohibits a Board of Education from dismissing a teacher, except in the manner provided in the act, but makes no reference to the transfer of a principal or teacher to another position.

The counsel for the Appellant admits that a person protected by the Tenure of Service Act may be transferred from one position to another, provided such transfer is made by a vote of a majority of all the members of the Board of Education. In the absence of proof to the contrary, it must be assumed that the transfer of the Appellant to the eighth grade in School No. 1 was legally made.

The counsel for the Respondent argued that the positions of principal and teacher are separate and distinct, and therefore the Appellant was not protected by the Tenure of Service Act for the reason that he had held the position of principal only for three years, and that he would not be protected by said act until he had entered upon his fourth year of service as principal.

I am clearly of the opinion that the Legislature did not intend to divest a Board of Education of its power to transfer a teacher or principal from one point to another as the best interests of the schools demanded, and that a Board of Education may make such transfer, provided there is no reduction in salary.

A contract between a Board of Education and a teacher protected by the Tenure of Service Act is unnecessary for the reason that the terms of the contract are fixed by said act. The Appellant has not lost any of his rights by failing to sign the contract forwarded to him, neither would his rights have been impaired had he signed it.

The appeal is dismissed.

November 7, 1912.

Decision of the State Board of Education

On May 17, 1912, the Respondent's Committee on School Government recommended that the Appellant should not be re-employed as principal in its High School. The recommendation apparently was adopted and the Appellant appealed to the Commissioner of Education. His appeal was dismissed on the ground that he had been assigned to teach in an elementary school at the salary received by him as a principal and that such a transfer was within the power of the Board. From the decision of the Commissioner he has appealed to this Board.

In 1906 Mr. Davis was employed as a teacher in the High School of the Township of Overpeck. He was re-employed in 1907 and 1908. In 1909 he was appointed principal of the High School, and served as such until June, 1912. In May, 1912, a Committee of the Board recommended that he should

not be re-employed as principal and that the best interests of the schools would be served by dispensing with his services. Thereafter another principal was appointed in his place, and when he reported for duty in September, 1912, he was assigned to teach the eighth grade in an elementary school.

In Chapter 243 of the Laws of 1909, known as the Tenure of Service Act, it is provided that:

"The service of all teachers, principals, supervising principals of the public schools in any school district of this State shall be during good behavior and efficiency after the expiration of a period of employment of three consecutive years in that district."

It is further provided that:

"No principal or teacher shall be dismissed or subjected to reduction of salary in said school district except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause, and after a written charge of the cause or causes shall have been preferred against him or her, signed by the person or persons making the same, and filed with the secretary or clerk of the Board of Education having charge of the school in which the service is being rendered and after the charge shall have been examined into and found true in fact by said Board of Education, upon reasonable notice to the person charged, who may be represented by counsel at the hearing."

Mr. Davis comes within the terms of the Act and is entitled to its protection. The question to be decided is the measure of such protection. It is claimed by the Respondent and has been held by the Commissioner that the protection merely covers service, and that Mr. Davis not only could be changed about as a principal but could also be assigned to teach, provided that his salary was not reduced. He was so assigned, and, as stated in the argument, is now serving under protest as a teacher at the salary received by him as a principal. The township is now paying the salary allotted to the principal of the High School to two persons, though one is a teacher in an elementary school. If the decision appealed from is sound, there is nothing to prevent a Board from elevating any teacher who has served more than three years to a position as principal, increasing his salary and subsequently assigning him to teach with the assurance that though but a teacher he will thenceforth receive the salary of a principal. By such procedure a school district might be called upon to pay the salary of a principal not to one teacher, as in Overpeck, but to many. If the Respondent's construction of the law is correct, it is within the power of any Board to transfer a man who is a principal to a position as teacher in the lowest grade. In other words, it would be within the power of a Board to assign a man who is receiving a salary of $3,000 or more to teach in a grade where the usual salary paid in the district for such grade is only one-fifth or one-sixth of that amount. If such procedure can be adopted, it would not only be unjust to the taxpayers, but it would promote dissatisfaction among teachers, for what teacher would not feel aggrieved if another teaching the same grade, with no more experience, was paid the salary not of a teacher but of a principal?

We cannot believe that the Legislature by the enactment of the Tenure of Service Act intended to place it within the power of a Board of Education to pay for a $500 position a salary of $3,000 or more merely because in its opinion the person receiving such large salary is not competent to fill the position for which that sum has been allotted. Such a construction of the Act is not in accord with reason, and should not be adopted unless the language admits of no other. If a man who is principal is not competent, he should be removed, rather than given less responsible work at the same compensation. If he is fit only to teach, he should receive only the salary of a teacher.

The language of the statute is not such as to compel a district to retain an incompetent principal. It is provided that a principal may be removed for any just cause, and incompetency is certainly a just cause. The record is silent as to whether the Appellant in this case is competent or incompetent to act as principal of a high school. Does the statute, fairly construed and with due regard to consequences prescribe that a principal may, without cause be reduced to the rank of a teacher?

It reads: "No principal or teacher shall be dismissed" except for just cause after a trial. This language, in our opinion, is the equivalent of (1) no principal shall be dismissed and (2) no teacher shall be dismissed except for just cause after a trial. When a principal is reduced to the rank of a teacher he is dismissed as a principal just as surely as is an officer in the Army dismissed as such when he is reduced to the ranks and another assigned to his place or as would a teacher be dismissed as such if made a truant officer or a janitor.

No trial was given the Appellant, so that as we construe the statute its provisions were disregarded by the Respondent.

The case of McManus *vs.* Newark, 20 Vroom 175, has been cited in support of the contention of the Respondent. In that case a transfer from detective to patrol duty was held not to contravene the Police Tenure of Service Act. In that Act, however, it is provided that "no person shall be removed from office or employment in the police department of any city." If in the Tenure of Service Act under consideration it had been provided that no person engaged in the public schools shall be removed from office or employment, the case would be analogous. The Legislature, however, instead of saying that "no person" shall be dismissed has enacted that "no principal or teacher shall be dismissed."

The record shows that the original intention of the Respondent was to entirely dispense with the services of the Appellant. When it was found that he was protected by the Tenure of Service Act, it transferred him from the position of principal in the High School to that of teacher in an elementary school.

Instead of complying with the statute and preferring charges against the Appellant, it endeavored to evade the statute, and if its act is sustained it will be within the power of Boards, if so disposed, not only to pay the salary of principals to favorite teachers, but also to so degrade and humiliate worthy principals that the protection which the statute is supposed to afford them

would really become a myth. We do not believe that we should place a construction on the statute which will so readily enable Boards to evade its provisions.

In a very recent case, Standard Sanitary Mfg. Co. *vs.* United States, 226 U. S., the Supreme Court of the United States, in construing the Sherman Law, wrote:

"This court has had occasion in a number of cases to declare its principle. Two of those cases we have cited. The others it is not necessary to review or to quote from except to say that in the very latest of them the comprehensive and thorough character of the law is demonstrated and its sufficiency to prevent evasions of its policy 'by resort to any disguise or subterfuge of form,' or the escape of its prohibitions 'by any indirection.'"

The decision of the Commissioner is reversed and the reduction of the Appellant from the rank of a principal to that of a teacher is adjudged contrary to law.

March 1, 1913.

CONCURRING OPINION BY DR. JOHN C. VAN DYKE

(1) It seems from the agreed state of facts in this case that the Appellant, Prof. Davis, was the first employed by the Respondent, the Board of Education of the Township of Overpeck, in 1906, as a teacher in its High School; that he continued in that capacity until 1909, and after that, to wit, May 7th, 1909, he was employed as a Principal. He continued to hold the position of Principal until May 17th, 1912, when he was notified, by recommendation of the Respondent, that "the best interests of the school would be served by dispensing with his services." No charges were preferred against him. Three months later the Respondent offered the Appellant a second contract, for a service unspecified, at the same salary he had been receiving as Principal. When the Appellant reported for work he was assigned, not to principal's work, but to teaching in the eighth grade. He protested and claimed protection under the Tenure of Service Act.

(2) All told, the Appellant served six years in the Respondent's schools, three years as teacher and three years as Principal. Counsel for the Respondent contends that there should be three consecutive years as a Principal for the Appellant to come under the Tenure of Service Act. Even admitting for the moment that this is necessary, and that his three previous years as a teacher are not to count, he was still under contract with the Respondent from May 7, 1909, to May 17, 1912, a matter of three years and over. The twisting of the dates to read from school year to school year, beginning in September and ending in September is ingenious, but does not alter the facts that the Appellant served as a Principal for three years and ten days under contract with the Respondent, and for three years before that had been a teacher under the Respondent. Commissioner Betts in his decision recognizes that the Appellant is within the Tenure of Service Act, saying that the recommendation of the Respondent dispensing with the Appellant's services "taken alone

in absence of any charges or hearing was undoubtedly a violation of the Tenure of Service Act." It must be assumed that the Tenure of Service Act was designed to meet just such cases as this, and that the Appellant herein was, with his six years of service, well within the provisions of the act.

(3) When the Respondent on May 17, 1912, passed its recommendations that the Appellant's services should then and thereafter be dispensed with, there was no mention of service in any other capacity than as Principal. There was evidently an attempt made to dispense with Prof. Davis's services in any and every capacity. It can be construed in no other way than as a dismissal, and the contention of the Appellant that it was a dismissal, that it was a dismissal without charges, and that it was in violation of the Tenure of Service Act must be upheld.

(4) On August 12, 1912, three months after this dismissal, the Respondent offered the Appellant another contract for an indefinite service, at the same salary he had been receiving as Principal. This cannot be considered as a renewal of the old contract as Principal, but an entirely new undertaking, a new contract which the Appellant could accept or reject as he thought best. He accepted it under protest, still insisting that he was a Principal, not a teacher, and protected by the Tenure of Service Act. The second contract may perhaps be pleaded in explanation of the Respondent's intentions and good will, but it does not alter the essential fact that the Appellant was dismissed without formal charges, after he had served six years as teacher and Principal in the Respondent's schools and was within the Tenure of Service Act which forbids this very thing.

(5) The question of the Respondent's right to promote or demote the Appellant, to place him in one position or another, is dealt with in another opinion in this case, filed herewith, in which concurrence is herewith expressed. The main contention of the Appellant that the Tenure of Service Act has been violated, that the second contract is inoperative, and that he is still a Principal in the Respondent's employ should be sustained.

Decision of the STATE BOARD OF EDUCATION affirmed by SUPREME COURT, May 21, 1913.

NEW JERSEY SUPREME COURT

BOARD OF EDUCATION OF THE TOWNSHIP OF OVERPECK,
Prosecutor,
vs.
STATE BOARD OF EDUCATION ET AL.,
Defendants.

Submitted May 10, 1913—Decided May 21, 1913.

Certiorari to a decision of the State Board of Education reversing on appeal a ruling of the Commissioner of Education which dismissed the appeal of Walter G. Davis from the action of the Overpeck Board in superseding him as principal of the high school.

Argued before Parker J. at Chambers.

For the Prosecutor, William J. Morrison, Jr.

For the Defendants, John S. Davison.

Memorandum by Parker J., May 21, 1913.

This case was presented to me sitting as a single Justice with a view of an early decision, and as counsel join in requesting a speedy termination of the matter and no questions of particular difficulty seems to be involved, I will state my conclusion somewhat informally.

The case arises under what is called the Teachers' Tenure of Office Act C. S. Compiled Statutes 4763. That act provides *inter alia* that "The service of all teachers, principals ..... in any school district ..... shall be during good behavior and efficiency after the expiration of the period of employment of three consecutive years in that district ..... No principal or teacher shall be dismissed or subjected to a reduction of salary in said school district except for inefficiency," etc., and after charges and trial.

Mr. Davis served several years in the Overpeck district as a teacher and for three years as principal of the high school, the latter under written contracts pursuant to Section 106 of the School Act and which show that his three years of service expired early in September, 1912. In May, 1912, his discharge was recommended by a committee of the board; in August the employment of another as principal was recommended by the same committee; soon after the board tendered him a written contract for service as teacher in the public school at the same salary he had had as principal of the high school but he did not execute it. He reported as principal of the high school at the beginning of the year and was debarred from serving as such.

I agree entirely with the State Board that Mr. Davis was protected by the act; that his three years of service beginning with September, 1909, entitled him to the benefit of its provisions; that the fact of his service under contracts for a definite term did not prejudice his rights if that service was continuous and for the statutory period; and that his attempted assignment as teacher in a lower grade was legally tantamount to and in fact operated as an attempted dismissal as principal of the high school.

The technical objection that the appeal was taken on August 28, 1912, before the expiration of a calendar year, and was taken from a resolution of May 27th and the appointment of another on August 27th, would have no weight. The case has been successively heard by the Commissioner of Education and by the State Board on its merit and the point is too late now.

The decision or judgment of the State Board of Education is affirmed with costs.

NEW JERSEY SUPREME COURT

BOARD OF EDUCATION OF THE TOWNSHIP OF OVERPECK,
Prosecutor,
vs.
STATE BOARD OF EDUCATION, WALTER G. DAVIS ET AL.,
Defendants.

On Certiorari.

Additional memorandum May 28, 1913.

Counsel for prosecutor calls my attention to the fact that in the original memorandum no notice is taken of the point made by him that as Mr. Davis was serving under a written contract for a definite term of one year from September 5, 1911, the decision of the Court of Errors and Appeals in Hardy *vs.* Orange, 32 Vroom 620, controls this case. The point was not overlooked, but was considered and deemed to be without merit. The Tenure of Office Act of 1909 must be read in view of the law in force when it was passed. The School Act of 1903, which the Act of 1909 was intended to modify, provides in Section 106 that the boards of education may make rules and regulations governing the engagement and employment of teachers and principals, the terms and tenure of such employment, etc., that the employment of any teacher shall be dependent upon and shall be governed by the rules and regulations in reference thereto. In the absence of such rules and regulations, it requires the contract of employment to be written and in triplicate; and provides that the State Superintendent of Public Instruction shall prepare and distribute blanks for contracts between boards of education and teachers. The approved form of such a contract will be found annexed to the compilation of the School Law prepared by the State Superintendent of Public Instruction and printed in pamphlet form, and the several contracts under which Davis served from year to year follow that form and are evidently drawn on printed blanks. It does not appear in either the return or the additional proofs submitted to me that the Overpeck board made any rules or regulations. What does appear is that Davis was employed as principal under three successive annual contracts drawn in strict compliance with the Act of 1903 and in the official form promulgated by State authorities.

Now it seems to me perfectly plain that the Act of 1909 was intended to apply to "employment" under the Act of 1903, i. e., of either employment under rules and regulations or one under contract; and that it is this application that distinguishes the case from Hardy *vs.* Orange.

If the Act of 1909 does not affect "employment" under contract, we must read into its language that it applies only to employment under "rules and regulations." And, if such rules and regulations provided for example that the employment of teachers should be for a fixed period no longer than two years (or indeed for any such term) at the end of which time there

must be a re-employment, a term would be effectively fixed by a contract recognized by the statute as arising out of the rules and regulations, and the object of the Act of 1909 would again be as effectually defeated as if there were a written contract. The result would be that the Act of 1909 would apply only to cases where there had been a three years' service under an employment for an indefinite term. I do not see how the plain intent of the Act of 1909 could be more completely nullified; for the number of teachers who were not serving for fixed terms at and after the passage of the Act of 1909 must be comparatively small. Manifestly the Tenure of Office Act was intended to apply to all forms of "employment" contemplated by Section 106 of the School Act. If the board wished to avoid the Tenure of Office Act, it could have made the term of the 1911 contract less than a year, or it could have given thirty days' notice during the year, as provided in the contract, and thus cut off the employment short of three years. Not having done so, the Act of 1909 applies.

The counsel for defendant Davis, asks that certain depositions and evidence outside of the return be struck out and not considered, because not before the Commissioner or the State Board of Education. Section 2 of the Certiorari Act permits the consideration of such evidence, and I have considered it in disposing of the case, and see no good reason why it should be struck out or disregarded. It contains among other things the contract of 1911 which does not appear in the return proper, although its existence and contents were doubtless known to both the Commissioner and the State Board.

DISMISSAL OF TEACHER UNDER TENURE

ROBERT A. CLAYTON, ADMINISTRATOR OF
HELEN R. SUMNER, DECEASED,
Appellant,

vs.

BOARD OF EDUCATION OF THE CITY OF
ORANGE,
Respondent.

Herbert W. Knight, for the Appellant.
Arthur B. Seymour, for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The Appellant is the Administrator of the goods, chattels and credits of Helen R. Sumner, deceased.

Helen R. Sumner was employed as a teacher in the schools under the control of the Respondent from 1906 until June, 1910. In April, 1910, she was notified that "it will be necessary to engage a teacher in your place next year." The Appellant protested that her dismissal was in violation of the provisions of Chapter 243, P. L. 1909, known as the "Teachers' Tenure of Service" law, and reported for duty at the opening of the schools in Septem-

ber, 1910, but was not permitted to render any service and has not been paid any salary since the close of school in June, 1910.

Mrs. Sumner filed in this Department an appeal from the action of the Respondent and died while the appeal was pending, whereupon, Robert A. Clayton, the administrator of her goods, chattels and credits was substituted as the Appellant in this matter.

The Respondent denies that Mrs. Sumner was protected by the provisions of the Tenure of Service law, for the reason that the contract between her and the Respondent was entered into, prior to the passage of said law, for a definite term, which did not expire until after said law went into effect, and claims that she was not dismissed, but was not re-employed upon the expiration of her contract, also that the failure to re-employ her was not in violation of the provisions of said law, for the reason that the Legislature had no power to impose its conditions in the case of a teacher who had entered into a contract prior to the date on which said act went into effect, and for a definite term.

In the case of Marsteller *vs.* The Board of Education of the Borough of Pleasantville, the State Board of Education, at a meeting held December 7th, 1912, held that the provisions of Chapter 243, P. L. 1909, applied to all teachers who were employed after September 1, 1909, and who had been in continuous service in the district more than three years, and that making said act applicable to teachers who were serving under contracts entered into prior to said date was not in violation of the provisions in the Constitution prohibiting the enactment of laws violating the obligations of contracts.

The action of the Respondent, therefore, in refusing to re-employ Mrs. Sumner in September, 1910, was a dismissal and a violation of the provisions of the "Teachers' Tenure of Service" law, and was illegal, null and void.

April 18, 1913.

Decision of the State Board of Education

This case comes before the State Board of Education on appeal from the decision of Assistant Commissioner Betts. The facts are agreed upon by counsel and the case hinges upon the Tenure of Service Act; first, as to whether it is applicable in this case, and, second, as to whether the act itself is constitutional.

1. The statute specifically says "the service of all teachers, principals, supervising principals of the public schools in any school district of this State shall be during good behavior and efficiency, after the expiration of three consecutive years in that district, unless a shorter period is fixed by the employing board." The statute goes on to point out exactly when and how the period of these years shall be counted by saying "Provided, that the time any teacher, principal, supervising principal has taught in the district in which he or she is employed at the time this act shall go into effect, shall be counted in determining such period of employment." It is not disputed that Helen R. Sumner was a teacher employed by the Board of Education of the City of Orange when this act went into effect (Sept., 1909), that she remained in the

service of the said Board for nearly a year after it had gone into effect (*i. e.*, until June 30, 1910), that she had been in the continuous service of the said Board for some fourteen years prior to the passage of the act (*i. e.*, from 1896 to 1909). With this statement of the facts and the specific statements of the law it is impossible to reach any other conclusion than that the said Helen R. Sumner was well under the Tenure of Service Act and entitled to its protection.

2. In the case of Marsteller *vs.* the Board of Education of the Borough of Pleasantville, the State Board assumed the constitutionality of the Tenure of Service Act. It does so again in this case. The act does not prevent school boards from dismissing teachers and terminating contracts, but provides that this shall be done in a deliberate manner and upon sufficient grounds. It provides that the teacher be given a trial and heard in her own defense. There seems nothing in this that "impairs the obligation of contracts," as that clause of the Constitution has been interpreted.

The decision of Acting Commissioner Betts is sustained and the appeal dismissed.

February 7, 1914.

DISMISSAL OF TEACHER UNDER TENURE

LAURA C. WELCH,

Appellant,

vs.

THE BOARD OF EDUCATION OF WEST ORANGE,

Respondent.

Laura C. Welch, *pro se.*
Simeon H. Rollinson, for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The Appellant, prior to April, 1913, had taught continuously in the schools under the control of the Respondent for more than three years, and was, therefore, protected by the provisions of Chapter 243 of the Laws of 1909, commonly known as the "Teachers' Tenure of Service Act." She claims that she was principal of the St. Cloud School and that the action of the Respondent, on June 9, 1913, transferring her to a position as teacher in the St. Mark's School was in violation of the provisions of said act, as interpreted by the Court in the case of Davis *vs.* Board of Education of the Township of Overpeck.

She also claims that the action of the Respondent, on September 18, 1913, in discharging her from its service, was contrary to law, and she further claims that she has not been paid the full amount of salary due her for the school year of 1912–13.

If the Appellant was employed as a Principal, the action of the Respondent transferring her to a grade position in the St. Mark's School was illegal.

Section 182 of the School Law provides that the County Superintendent of Schools shall apportion to a district the sum of $400.00 for each principal employed, and the sum of $200.00 for each teacher, except certain high school teachers. The evidence shows that $200.00 was apportioned to the district of West Orange for Miss Welch. The Supervising Principal and the District Clerk both testified that Miss Welch was a teacher and not a principal, and Miss Welch testified that all the time the school was in session she was occupied in teaching.

A principal of a school is a person who devotes all or nearly all his time to supervising the work of the classes in his building, and very little, if any, time to class teaching. Miss Welch was a teacher and not a principal, and, therefore, could legally be transferred to another position.

Was her transfer from the St. Cloud School to the St. Mark's School made in the manner prescribed by the Statute?

Section 88 of the School Law prescribes that "no teacher shall be appointed, transferred or dismissed except by a majority vote of the whole number of the members of the Board of Education."

The Board of Education of West Orange is composed of five members, and the minutes of the meeting of the Board of June 9, 1913, at which meeting the resolution transferring Miss Welch was adopted, show that four members were present. The minutes do not show how each member voted on this resolution, but the District Clerk testified that the vote in favor of the adoption of the resolution was unanimous. I am of the opinion that the transfer of Miss Welch was legally made.

The Supervising Principal, under date of September 8, 1913, preferred charges of insubordination against the Appellant, and she was notified to appear before the Respondent on September 18, 1913, to answer said charges. The notice served upon the Appellant did not state on what ground the charge of insubordination was based. The Appellant, however, waived any rights she may have had by reason of any defect in the notice served upon her, by appearing at the hearing on September 18th, and failing to enter any protest. The failure of the Appellant to take charge of the class in the St. Mark's School, to which she had been assigned, and her action at the opening of the St. Cloud School sustain the charge of insubordination preferred against her, and justified the action of the Respondent in dismissing her.

The claim of the Appellant that she has not received the full amount of salary due her is not properly before me. Having taken the case to the District Court, and the case having been tried in said court on its merits, she is bound by its decision until said decision is reversed by a court having jurisdiction in appeals from district courts.

The appeal is dismissed.

February 13, 1914.

DECISION OF THE STATE BOARD OF EDUCATION

This is an appeal by Miss Laura C. Welch from a decision of the Commissioner of Education to the effect that her transfer from the St. Cloud to another school in West Orange was legal and that her subsequent dismissal for insubordination was justified and in accordance with law.

The charge of insubordination was predicated upon the fact that Miss Welch refused to obey the order transferring her, and endeavored, in defiance of the school authorities, to keep her position in the St. Cloud school so that it became necessary for them to appeal to the police authorities for assistance.

Her reason for such action was and is that she was principal of the St. Cloud school, a two-room building, and that the attempt to assign her to teach a class in another school was a demotion equivalent to a dismissal from the position of principal, and contrary to the provisions of the Teachers' Tenure of Service Act.

That Miss Welch was guilty of insubordination if her transfer was legal is conceded. In fact, it admits of no question. She maintains that when she came within the provisions of the Tenure of Service Act, she was a principal and that her transfer to teach in another school was a reduction in rank and unlawful.

The Act provides that—

> "The service of all teachers, principals, supervising principals of the public schools in any school district of this State shall be during good behavior and efficiency after the expiration of a period of employment of three consecutive years in that district."

Miss Welch's third year of service in the West Orange Schools terminated with the school year 1909-1910. If she was employed after the expiration of such school year, she came automatically under the protection of the Tenure of Service Act. She was thereafter employed, and it is, therefore, important to ascertain in what capacity she was engaged to serve. That fact is clear.

On the 4th of May, 1910, a written contract was entered into between the Board of Education of the Town of West Orange and Miss Welch, wherein and whereby the Board employed "Laura C. Welch *to teach* in the West Orange Public Schools" for one year from the 6th day of September, 1910, at a salary of $775.00, and wherein and whereby Miss Welch accepted "the employment aforesaid, and undertakes that she will faithfully do and perform her duty under the employment aforesaid."

Miss Welch was then serving in the St. Cloud school, and continued in it without change in her duties down to the time of her transfer. She insists that notwithstanding her contract she was held forth to the public as a principal. In a suit between an employer and a third party, the apparent as well as the real scope of the authority of the employee may be important, and to ascertain it, representations of the employer to the public are considered. In a suit, however, between an employer and an employee, their respective rights and liabilities are governed by the contract between them. The contract between the Board of Education of the Town of West Orange and Miss

Welch is clear. She was engaged to teach and she undertook to teach during the year which brought her within the protection of the Tenure of Service Act, and there is no evidence to show that any change has taken place in her relations to the Board since then.

It is not, therefore, necessary for us to consider on the one hand that in notices and reports she was described as a principal nor on the other that to the State authorities she was defined as a teacher, and that the County Superintendent apportioned to the district, because of her services, the sum of $200.00, whereas if she was a principal, the sum of $400.00 would have been allotted. Neither is it necessary for us to consider the definition of a principal propounded by her learned counsel, further than to point out that if it is sound, consolidation of rural schools would become practically impossible, for every teacher of a one-room school would insist that she was a principal and the staff of the consolidated school would consist of all principals and no teachers—all generals and no privates.

The decision of the Commissioner is affirmed

April 4, 1914.

DISMISSAL OF TEACHER UNDER TENURE

EDWARD FITZHERBERT,

Appellant,

vs.

THE BOARD OF EDUCATION OF ROXBURY TOWNSHIP,

Respondent.

Richard Fitzherbert, for the Appellant.
Carl V. Vogt, for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

It is admitted on the part of the Respondent that Edward Fitzherbert has taught in the schools of Roxbury Township for four consecutive years, three years at the Spencer School in said township and one year at the Alpaugh School, where he was teaching at the time of the closing of the school. Because of length of service in the same school district the Appellant comes under the provisions of the tenure of service act. The Alpaugh School, in which Mr. Fitzherbert was teaching in 1913, numbered on the roll seventeen pupils, six of whom were residents of another district, making in this school only eleven pupils who had legal claim for their education upon the Board of Education of Roxbury Township. At the meeting of the Board on December 1, 1913, Lewis J. Reeger presented a petition, filed by several residents of the Alpaugh District, asking the Board to close the Alpaugh School and transport the children to the Township School at Succasunna. At this meeting the county superintendent was present. After discussion, on motion the petition was received and referred to the teachers' committee for investi-

gation. At the Board meeting on December 8, 1913, the teachers' committee reported that it had met with Mr. Fitzherbert, the teacher, and discussed the matter of closing the school, and that Mr. Fitzherbert agreed to resign his position at the Alpaugh School at any time, providing the Board paid his salary to the end of the present school year. After that time he would not hold the Board for a position under the teachers' tenure of service act. Upon hearing the report of the committee the Board, on motion, agreed by a majority vote to close the school not later than the end of the present school year.

At the January, 1914, meeting of the Board another petition, more largely signed by taxpayers and residents of the Alpaugh section of the school district, was presented. This petition asked that the school be not closed. No action was taken on this petition. On May 25, 1914, at a regular meeting of the Board, a motion to rescind the previous action in reference to closing the Alpaugh School was lost. The school was closed at the end of the year and the pupils transported to the Succasunna School, as requested in the original petition. The Appellant claims that under the tenure of service act he is entitled to a position in the schools of Roxbury Township. Section 3 of the teachers' tenure of service act provides as follows:

"Nothing herein contained shall be held to limit the right of any school board to reduce the number of principals or teachers employed in any school district when such reduction shall be due to a natural diminution of the number of pupils in said district."

The number of pupils in the Alpaugh School for which the Board of Education was responsible had become reduced to eleven. It therefore seems that "a natural diminution" of the number of pupils in this district had taken place, this diminution was, in the judgment of the Board, sufficient to warrant the closing of the school. It cannot be held that the Board would be justified in keeping a school open when the number had decreased to such an extent as to prevent the maintenance of a thorough and efficient school. Not only is it more economical to consolidate small schools, but it is desirable to do so on the ground of greater efficiency and economy in the school system. A proper construction of the law would seem to suggest that a board of education, because of the falling off of the number of children, and because of the promotion of greater efficiency by consolidation, not only has the right, but it is its duty to close schools where such conditions exist. Moreover, in this case the original petition asking for the closing of the school was signed by residents of the district who had a majority of the children attending school.

I therefore hold that the Board of Education was justified in closing this school. Being justified in such act, it cannot be held that the Board should provide another school for the Appellant. The appeal is hereby dismissed.

December 16, 1915.

Decision of the State Board of Education

This is a case somewhat similar to that of Tobey *vs.* the Board of Education of the city of Newark recited in School Law Decisions 1914, p. 366.

1. It appears that there was "a natural diminution of the number of pupils" in the school where the Appellant taught, within the meaning of the statute. 2. That after consultation with the Appellant and on notice to him it was decided to close the school. 3. That at the end of the school year of 1914 the school was closed and the Appellant duly paid in full at that time.

The contract between the Appellant and the Board of Education of Roxbury Township was thus terminated and ended. There was no obligation under the tenure of service act to provide another school for the Appellant, or to place him on a waiting list, or to enter into a new contract with him. The Respondent was within its rights under the tenure of service act in closing the school and terminating the contract with the Appellant because of "the natural diminution of the number of pupils," and the evidence pro or con about the Appellant's resignation or its acceptance is more or less irrelevant.

The decision of the Commissioner is affirmed.

April 1, 1916.

RESIGNATION OF TEACHER

ELSIE B. NICHOLSON,

Appellant,

vs.

BOARD OF EDUCATION OF THE BOROUGH OF SWEDESBORO,

Respondent.

J. Warren Davis and Frank S. Katzenbach, for the Appellant.
David O. Watkins, for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The Appellant in this case appeals from the action of the Respondent accepting, on April 3, 1911, her resignation as Supervising Principal of Schools, said resignation having been previously rejected at a meeting of the Board of Education held March 31st.

Miss Nicholson had for some years been in the employ of the Board of Education of the Borough of Swedesboro as Supervising Principal of Schools, and on February 8th, 1911, she presented to the Board her resignation "to take effect when the work of the present school year will have been completed." The resignation was received and laid over.

At a meeting of the Board held March 31st a motion was adopted "that the resignation of the Supervising Principal be not accepted."

At a meeting of the Board held April 3d, 1911, the minutes of the meeting were "read and approved except motion as to Supervising Principal's resignation" and at the same meeting the following motion was unanimously adopted: "That the Supervising Principal's resignation be accepted."

At meetings of the Board held on August 31st and September 18th, 1911, it was ordered that Miss Nicholson be again notified that her resignation had been accepted and that she was no longer in the employ of the Board.

Section 238 of the School Law (P. L. 1903, Special Session) provides that the school year shall begin on the first day of July and end on the 30th day of June. The resignation, when accepted, would, therefore, go into effect on or about June 30th.

The Appellant has produced evidence that subsequent to the date when her resignation would become effective, she rendered service to the Board by furnishing lists of text-books and supplies needed for the coming school year, but there is no evidence that such lists were furnished at the request of the Board.

If the Board of Education had power on March 31st to act on the resignation of Miss Nicholson, then the subsequent action taken on April 3d was null and void. The first question to be determined, therefore, is, did the Board of Education on that date have power to act on a resignation which was not to go into effect until about June 30th?

Section 79 of the school law (P. L. 1903, Special Session) provides that an annual meeting for the election of members of a board of education incorporated under Section 84 of said act shall be held on the third Tuesday in March, and Section 85 of said act, as amended (P. L. 1907, p. 283), provides that the Board shall organize on the first Monday in April.

The Board of Education in the Borough of Swedesboro is incorporated under Section 84 and is composed of nine members, three members being elected each year who take office on the first Monday in April.

The Supreme Court in the case of Gulnac *vs.* The Board of Chosen Freeholders of Bergen County, 45 Vroom 543, said, "Although only a portion of a board of freeholders goes out of office each year, the body itself is not a continuous body (State *vs.* Rogers, 27 Vroom 480). The reasons which led to the decision that the Senate of New Jersey is not a continuous body are quite as cogent in the case of a board of freeholders." The same reasoning applied to a board of education leads to the conclusion that it is not a continuous body.

In the case of Pryor *vs.* Norton, 38 Vroom 23, the Supreme Court said, "The general rule is that the resignation of a municipal office, to be complete, must be accepted by the authority having the power to fill the vacancy thereby created," and in the case of Fitch *vs.* Smith, 28 Vroom 526, it said, "Assuming for the present purposes that the position of principal of a public school is, as the relator insists, a public office, still it appears that when the relator was chosen to that office by the former board of trustees, the office was held by an incumbent whose term would not end until after the expiration of that Board and the organization of a new board. Such a choice could give the relator no title to the office, as the power of appointment belonged to the board which would be in existence when the office became vacant."

The board of education which, on March 31st, refused to accept the resignation of the Appellant ceased to exist on the third day of April, and the action taken, in view of the decisions above quoted, was null and void.

The Board of Education which ceased to exist on April 3d, 1911, having no power to act on the resignation of Miss Nicholson, the next question to be

considered is could the Board which organized on that date act on said resignation?

The resignation not having been withdrawn it was properly before the Board of Education as soon as it had organized and said Board was acting within its powers when it accepted Miss Nicholson's resignation.

The appeal is dismissed.

November 10, 1911.

DECISION OF THE STATE BOARD OF EDUCATION

This is an appeal by Miss Nicholson from a decision of the Commissioner of Education sustaining the acceptance of her resignation by the Board of Education of the Borough of Swedesboro and its refusal to continue her employment.

In May, 1907, Miss Nicholson was elected Supervising Principal of the Schools of Swedesboro and thereafter yearly contracts were made with her. On the 8th of February, 1911, at which time she was protected by the Tenure of Service Act, she wrote the Board of Education as follows:

"I hereby tender my resignation as Supervising Principal of Schools in the District of the Borough of Swedesboro, to take effect when the work of the present school year will have been completed, to those members of the Board who have aided me in the discharge of my duties as Supervising Principal, I am most grateful, wishing you success in all your undertakings of the future."

This letter was presented at a meeting of the Board held on February 8th, the day of its date, and "read and laid over." The Board consisted of nine members, three being elected annually on the third Tuesday in March for a term of three years from the first Monday in April. On March 21st a school election was held. Thereafter on Friday, March 31st, three days prior to the first Monday in April, the Board at a meeting by a vote of five to four resolved not to accept her resignation, and she was notified by letter dated April 1st. On April 3d, that being the first Monday in April, the new Board convened. Seven members were present, and they unanimously resolved to accept her resignation. Notice of such acceptance was given her by letter dated April 4th. Miss Nicholson testified that on receipt of the notice of April 1st she concluded that her position in Swedesboro was secure, and she ceased all attempts to obtain other employment. Such conclusion she did not communicate to the new Board, and, so far as the record discloses, in no way did she protest against its resolution of April 3d. Between April 4th and the close of the school year neither she nor the Board referred to her resignation. Before the close of the school year the District Clerk, in pursuance of his usual custom, requested her to prepare a list of supplies for the ensuing year. On August 2d the District Clerk wrote her that the school would open on September 5th. On August 15th he wrote her that supplies for the next term had been delivered, and he requested her to check them. She did so. His letters of August 5th and 15th, and her checking, were not authorized by the Board, and were never approved. On August 31st, in

pursuance of a resolution of the Board, the District Clerk wrote her calling attention to its acceptance of her resignation, the notice to that effect written her on April 3d, and informing her that she was no longer in the employ or under contract with the Board. On September 18th, in pursuance of a resolution of the Board, the District Clerk wrote her as follows:

"You are hereby again notified that you are not under contract with nor in the employ of the School Board of the District of the Borough of Swedesboro, your resignation having been duly and properly accepted by the said Board. You will, therefore, please not trespass upon the said school property, and, if you persist in so doing, it will be necessary for the Board to take proper action to prevent such trespass."

"Done by order of the School Board of the District of the Borough of Swedesboro."

Such are the facts of the case. Miss Nicholson claims that she is still in the employ of the Board, and bases her claim briefly on the following propositions:

(1) That she rendered to the Board a list of text books and supplies for the school year 1911–1912.

(2) That the refusal of the Board on March 31st to accept her resignation was final; that the new Board had no right or authority to accept it, and that as a matter of law there was no resignation before it on which to act.

As for the first proposition, it seems clear that the list of text books and supplies was furnished during June, 1911; that is, prior to the close of the school year, and that no service after the close of the year was rendered by Miss Nicholson with the knowledge or approval of the Board.

The second proposition was very carefully considered by the Commissioner. He decided that a resignation can be acted on only by the body which can fill the vacancy which results, that the Swedesboro Board of Education was not a continuous body, that the Board of Education which on March 31st, 1911, refused to accept the resignation, ceased to exist on April 3d, 1911, that it had no power to fill a vacancy to occur on June 30th, 1911, that its attempt to act on a resignation to take effect on that day was null and void, and that the resignation as it had not been withdrawn, was therefore properly before the Board which came into existence on April 3d, and that as it accepted the resignation, Miss Nicholson is not now in its employ.

The authorities seem to support such conclusions, and we might well rest a recommendation of affirmance on the opinion of the Commissioner. It may be said that such a decision is technical, but we find that to support the claim of Miss Nicholson legal theories as abstruse, if not more so, are advanced.

There is one aspect of the case aside from legal refinements which impressed us. Miss Nicholson in February, 1911, was in the employ of the Board serving under a contract for a term of one year from July 1st, 1910, to June 30th, 1911. The Tenure of Service Act was a part of that contract. It in effect gave her an option to serve the Board during succeeding years. At the end of her yearly contract, she could leave the Board or stay with it as she chose. If she chose to leave, the Board could not interfere with her

wishes. In February, 1911, she wrote in effect that she would leave on June 30th, 1911. Had she offered to leave before the expiration of her contract, the Board, by a rejection of her offer, might have held her liable for damages if she did so. When, however, she said she would leave at the expiration of her contract, the Board was powerless to prevent her. By no act could it compel her to stay. She could leave on June 30th, and her testimony shows that she knew she could, no matter what the Board did. On February 8th, 1911, she tendered her resignation to take effect at the close of the school year. Knowing as she did that the Board was powerless to prevent her from carrying out her intention, it was only fair if she changed her mind to say so. When, on April 4th, the new Board, the Board that she knew would be required to re-employ her or to engage her successor, notified her that her resignation was accepted, it seems to us that she should have made clear her position unless she was still determined to stop at the close of the year. Possibly she thought that the action of the old Board was equivalent to an actual destruction or revocation of her resignation. She should at least have said so. Instead, she remained silent. Her resignation was on file with the Secretary of the Board at the close of the school year. The Board had nothing before it to indicate that her wishes were then any different from those expressed in it. The Board did not re-employ her, and in view of her resignation unrevoked by any act on her part, it was not obliged to do so.

February 3, 1912.

Reversed by SUPREME COURT, 54. Vr. 36.

DECISION OF THE SUPREME COURT

By this certiorari Elsie B. Nicholson challenges the validity of the action taken on April 3, 1911, by the Board of Education of Swedesboro accepting her resignation as Supervising Principal. This action which was taken at the first meeting of the new Board was based upon a communication that had been sent to the old Board and acted upon by it, the new Board differing from the old in that three old members went out and three new ones came in on April 1, 1911.

The action complained of started at the first meeting of the new Board on April 3, 1911, with the reading of the minutes of the last meeting of the old Board held on March 31, 1911, by which it appeared that "It was regularly moved and seconded that the Supervising Principal's resignation, which was laid over at a meeting held on February 8th, be accepted. After careful discussion the president ordered votes cast, the Board going on record as follows (5 no; 4 yes). The motion being lost the president declared the Supervising Principal's resignation not accepted."

The minutes which contained the foregoing were "approved except motion as to Supervising Principal's resignation," with respect to which "it was then regularly moved and seconded that the Supervising Principal's resignation be accepted, which was unanimously carried and the president ordered the Supervising Principal's resignation accepted."

The resignation on which this action of the new Board was based and to which the rejected minute of the old Board referred was as follows:

"Swedesboro, N. J., February 8, 1911.

To the Board of Education of the District
of the Borough of Swedesboro, Swedesboro, N. J.:

Gentlemen—I hereby tender my resignation as Supervising Principal of Schools in the District of the Borough of Swedesboro, to take effect when the work of the present school year will have been completed. To those members of the Board who have aided me in the discharge of my duties as Supervising Principal I am most grateful. Wishing you success in all your undertakings of the future, I am,

Very truly yours,
(Signed) ELSIE B. NICHOLSON."

The action taken upon this communication by the old Board on March 31, 1911, was officially communicated to the Supervising Principal by the clerk as follows:

"Swedesboro, N. J., April 1, 1911.

Miss Elsie B. Nicholson,
Salem, N. J.:

Dear Madam—At a regular meeting held March 31st, the Board, after carefully considering your resignation, decided not to accept it.

Very respectfully,
(Signed) C. S. CRISPIN, (Seal)
District Clerk."

The action of the new Board on April 3, 1911, was officially communicated to the Prosecutrix as follows:

"Swedesboro, N. J., April 4, 1911.

Miss Elsie B. Nicholson,
Salem, N. J.:

Dear Madam—At a regular meeting held April 3d, your resignation previously rejected, was accepted.

Very respectfully,
(Signed) C. S. CRISPIN, (Seal)
District Clerk."

Upon receipt of this notice Prosecutrix being advised by and acting through her counsel, notified the Board that its action was illegal and that she would continue her said office which she did without further communication from the Board until August 31, 1911, when the following was received:

"The Board of Education of the School
District of the Borough of Swedeboro.
Swedesboro, N. J., August 31, 1911.

Miss Elsie B. Nicholson,
Salem, N. J.:

Dear Madam—In accordance with our notice to you of the third day of April, A. D. 1911, you are hereby again notified that your resignation as

Supervising Principal of the Schools in the district of the Borough of Swedesboro was regularly and duly accepted by the Board of Education of the District of the Borough of Swedesboro on the third day of April, A. D. 1911.

You are therefore no longer in the employ of, or under contract with said Board as Supervising Principal or otherwise.

Done by order of the Board of Education of the District of Swedesboro.

Yours truly,

(Signed) C. S. CRISPIN,
Clerk of the Board."

Later the following was also received:

"The Board of Education of the School District
of the Borough of Swedesboro.
Swedesboro, N. J., September 18, 1911.

Miss Elsie B. Nicholson,
Salem, N. J.:

Madam—You are hereby again notified that you are not under contract with, nor in the employ of the School Board of the District of the Borough of Swedesboro, your resignation having been duly and properly accepted by the said Board. You will, therefore, please not trespass upon the said school property, and, if you persist in so doing, it will be necessary for the Board to take proper action to prevent such trespass.

Done by order of the School Board of the District of the Borough of Swedesboro.

Very respectfully,

(Signed) C. S. CRISPIN,
District Clerk."

These excerpts from the testimony which show the action of the defendant of which the Prosecutrix complains and the effect ascribed to its action by the defendant present the question in controversy, which is whether or not on April 3, 1911, there was pending before the Board of Education a resignation by the Prosecutrix of her office of Supervising Principal that required nothing but its acceptance by the Board to constitute a concurrence of the two parties to the voluntary relinquishment of her office by the incumbent, which is both the legal and the ordinary meaning of a resignation.

If the resignation was pending before the Board on April 3, 1911, it was because it was placed before them either by the Prosecutrix herself or by some one acting in her behalf either in fact or by imputation of law.

The language in which the Prosecutrix tendered her resignation, the date at which she tendered it, the action taken by the Board thereon and the communication of that action to the Prosecutrix on April 1, 1911, being fixed facts the only remaining question of fact is whether she or any one acting for her placed her resignation again before the Board after she had been notified of its decision not to accept it. As there is no claim made that this was done, the proper inference to be drawn from the incontroverted facts is that the resignation of the Prosecutrix was not as matter of fact before the new Board on April 3, 1911.

The Defendant, however, contends that nevertheless the resignation was as matter of law before the Board on that date, relying for this conclusion upon the difference being a continuous and a not continuous body pointed out in Rogers *vs.* The State (56 N. J. L., p. 480) and in Gulnac *vs.* Bergen Co. (45 Vroom, p. 543).

The argument is that inasmuch as the old Board could not have filled the vacancy that would have resulted from the acceptance of the proffered resignation, it was without power to decline to accept it and hence in legal contemplation did not so decide but in legal effect transmitted it to the new Board; in fine, that the legal effect of what happened was exactly the opposite of what actually happened—which leads one to remark that it is most unfortunate when the conduct of people who have acted upon their ordinary understanding of what they are doing is given a totally different meaning by force of technical legal rules of which they never heard or dreamed.

I shall not discuss, still less pass, upon the several important legal propositions included in this argument for the reason that conceding the ultimate doctrine for which counsel contends and applying it impartially to the case in hand it strengthens rather than weakens the conclusion that the Prosecutrix' resignation was not before the Board on April 3d either by her own act or by that of her agent in fact or by the legal imputation suggested.

The ultimate doctrine for which the Defendant contends as stated in the carefully prepared brief of counsel (the case being presented on written briefs) is as follows: "The old Board to which the resignation was presented served only as a messenger or conduit pipe to convey the resignation to the Board of Education of the District of Swedesboro, which was organized on the first Monday of April, 1911."

If this be so and if this legal rule is to be applied to the present case regardless of what the parties actually did and intended to do, it follows that the only purpose for which the old Board could accept the Prosecutrix' resignation was for the purpose of acting as such messenger or conduit from which it imperatively follows that the Board decided not to accept the resignation for this purpose and hence its notification to the Prosecutrix that her resignation was not accepted was a declaration to her that it would not be transmitted to the new Board through the old Board acting as her messenger.

Whether the Board was right or wrong in this decision is of no consequence upon the question we are considering—for Miss Nicholson clearly did not herself lay her resignation before the new Board and it is equally clear that the agent imputed to her by the legal rule contended for by the defendant declined, according to such rule to accept the special agency and hence did not act as her agent even by imputation.

Of course, if we regard what the old Board actually did and intended to do by its decision not to accept the resignation, the case presented is that of a quasi-judicial determination which rendered the resignation *functus* after the expiration of the body that had thus acted upon it.

So that whether we regard the case as one of fact as the parties themselves understood it or whether we regard it under the technical legal rule advanced

by the defendant, equally and in either case there was no presentation of a resignation to the new Board by the acceptance of which the office in question became legally vacant.

It is perhaps needless to add that with Miss Nicholson's willingness to submit her resignation to the Board as constituted at the time she tendered it and her unwillingness to have it passed upon by the Board as constituted at a subsequent period, we have nothing whatever to do, although her motive may be surmised from the outcome. The status of the resignation after it had been adversely acted upon by the outgoing Board is the sole matter of present legal concern.

If I thought that I was wrong in the foregoing conclusion as to such status both on the facts and the law I should still consider the action under review to be invalid as an exercise of a quasi-judicial function without notice to the party affected or an opportunity to be heard. The Board was charged with knowledge of its own minutes and of the official acts of its officers, the question therefore whether nothwithstanding these acts the Prosecutrix was still tendering her voluntary retirement from office for acceptance was to say the least an open question that lay at the foundation of the jurisdiction of the Board in the premises; the common fairness that enters into the judicial rule upon this subject therefore required that before deciding that question the party affected should have had notice that such a question touching her rights was under consideration and should have been accorded an opportunity to be heard in her own behalf.

I entertain no doubt as to the right of the Prosecutrix to prosecute this writ notwithstanding the adjudication of the domestic tribunals erected under the School Laws whose judgments are reversed by the judgment of this Court vacating and setting aside the action of the Board of Education brought up by this writ. The judgment may be entered with costs.

May 21, 1912.

DISMISSAL OF TEACHER BECAUSE OF LACK OF CERTIFICATE

MILDRED MCAULEY,
Appellant,

vs.

THE BOARD OF EDUCATION OF
PROSPECT PARK,
Respondent.

Henry Marelli, for the Appellant.
J. W. DeYoe, for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

This case is an appeal taken by Miss Mildred McAuley from the action of the Board of Education of Prospect Park in dismissing her, in January, 1914, as teacher in its schools. The appeal was filed with the Commissioner of Education on May 26, 1915. A hearing was held in the City of Paterson on September 15, 1915. At this hearing the following facts developed.

Mildred McAuley began teaching in the Prospect Park schools in September, 1907, and served in the schools continuously until the time of her dismissal. She held at first a third grade county teacher's certificate, and obtained in June, 1910, a second grade county teacher's certificate, which expired in June, 1915.

In April, 1913, just previous to the expiration of her second grade county certificate, she attended the examination and took two subjects, general history and drawing, which entitled her, so far as the examination goes, to an elementary limited certificate, and also entitled her to a renewal of her second grade certificate. Under the rules governing examinations for limited elementary certificates it is necessary to file with the county superintendent a physician's certificate stating as to the general health of the applicant, and also a testimonial as to moral character. The rule further states that in case of previous experience as a teacher a testimonial as to success in teaching shall also be filed.

At the hearing evidence was given by the Appellant to the effect that she attended the April examination, took general history and drawing, and filed with the attendant at the examination a health certificate and a testimonial as to her character. In June following the examination, as shown by the testimony, Miss McAuley received notice that she had successfully passed her examination in the two subjects which she had taken in April. Some time in the fall Miss McAuley wrote to the State Board of Examiners making inquiry in regard to her certificate. She was referred to the county superintendent, Mr. Edward W. Garrison. Mr. Garrison had informed her that she must obtain a recommendation from the Board of Education in order to obtain a certificate. The Appellant delayed making a formal request for this recommendation until December, 1913. The Board acted upon this request on December 26, 1913, refusing to give Miss McAuley a recommendation. On January 5, 1914, the Board of Education at a meeting passed the following resolutions dismissing Miss McAuley from service as a teacher:

"WHEREAS, For a long time the Board of Education has been dissatisfied with the work of Miss Mildred McAuley as teacher in Prospect Park school; and

"WHEREAS, Miss McAuley's certificate has expired and can not be renewed or a new one granted without the recommendation of this board; and

"WHEREAS, The Board of Education, by a majority vote on December 26, 1913, refused to furnish said recommendation, the said Mildred McAuley is not legally licensed to teach in the schools of New Jersey;

"*Therefore, be it resolved,* That her position be and hereby is declared vacant, and *be it further resolved* that the teachers' committee, together with the principal, be and hereby are authorized to procure a person with the proper credentials, as provided by law, to fill such vacancy.

"*Be it further resolved,* That a copy of these resolutions be forwarded to the county superintendent of schools of the County of Passaic, and that a copy also be forwarded to the principal of Prospect Park school No. 1 of the borough of Prospect Park."

It will be noted in the recital of the resolutions of dismissal that it is done because Miss McAuley did not have a legal teacher's certificate as required by law. It is also set forth in the recital of the resolutions that "the Board of Education has been dissatisfied with the work of Miss Mildred McAuley as teacher in Prospect Park school." This was given as a just cause for dismissal, as well as the fact that Miss McAuley did not possess at that time a teacher's certificate in full force and effect.

At a meeting of the Board of Education on June 11, 1914, the Board ordered that the district clerk write a recommendation for Miss McAuley. The district clerk, who is not a member of the Board and was not present at the meeting, declined to write the recommendation because he said he did not know how to do it. The Board of Education, at its meeting July 14 following rescinded its resolution ordering the district clerk to write a recommendation for the Appellant.

It appears from the foregoing that there are two questions involved in this case.

First. Is it required by the rules governing the licensing of teachers that a recommendation as to the success of a teacher shall be given by the employing Board of Education? I find nowhere in the rules that there is any such requirement made for the obtaining of a limited elementary certificate or any other kind of certificate. The Board, therefore, erred in assuming that a recommendation given by it was necessary to the procuring of Miss McAuley's certificate.

Rule 6 of the State Board of Education, governing the issuing of certificates, is as follows:

"Certificates in force July 1, 1911, and June 14, 1913, shall be renewed, upon application, by the State Board of Examiners, but shall be valid only as originally issued; provided, that in renewing or making permanent such certificates the State Board of Examiners shall be governed by the rules in force at the time the certificates were originally granted."

The Appellant in this case held a second grade certificate in force on July 1, 1911. The rules for renewing a second grade certificate in force at that time provided that an examination in any two subjects of a higher grade entitled the applicant to a renewal of a second grade certificate. Miss McAuley took the two necessary subjects at the April examination and successfully passed them, and this met the law as it existed at the time her second grade certificate was in force. The rules at that time nowhere provided that letters of recommendation must be obtained from the Board of Education employing the applicant. I am therefore clearly of the opinion that the Appellant was, upon application, entitled to a renewal of her second grade certificate which expired in June, 1913.

As to the limited elementary certificate for which the Appellant applied, this, under the rules, requires a testimonial as to success in teaching, obtained from any reliable authority. This is in addition to passing the required examination. Miss McAuley furnished a testimonial as to character and a medical certificate stating as to her general health, but has not filed a testi-

monial as to her success in teaching. Until this is done, under the rules, she is not entitled to a limited elementary State certificate.

The second question. Did the Board act illegally in dismissing the Appellant, who was protected under the tenure of service act, without first preferring charges and giving her opportunity to answer? Miss McAuley did not have, at the time of her dismissal, a teacher's certificate in full force and effect in her possession, and this in itself would seem to justify the Board of Education in dismissing her under the law. It must, however, be considered that the reason that the certificate was withheld was because of the action of the Board of Education in refusing to give her a recommendation as to her success in teaching. The Board, in the dismissal resolution, says, "Miss McAuley's certificate has expired and cannot be renewed or a new one granted without the recommendation of this Board."

This is an assumption of power over granting certificates that has no justification in the laws or rules governing the certificating of teachers. The State Board of Examiners, the proper body for granting certificates, had not finally passed on the question. Hence it did not lie with the Board of Education to revoke all certificate privileges and say that the Appellant could not get a certificate because the Board would not give her a recommendation. If this were the law, then boards of education would have the power of revoking arbitrarily hundreds of certificates coming up for renewal in this State.

The Board of Education dismissed Miss McAuley because she had no certificate in her possession. She had no certificate because the Board had convicted her of inefficiency without trial in that they had refused to grant her a recommendation as to her success as a teacher.

I am therefore of the opinion that the Appellant was dismissed in clear violation of the provisions of the teachers' tenure of service act and of her contractual rights as a teacher in the schools of the borough of Prospect Park.

December 2, 1915.

Decision of the State Board of Education

The Respondent in this case seems to have taught in the Prospect Park school since September, 1907, and to have continued to teach until her dismissal, January 5, 1914. She held at first a third grade county teacher's certificate, then a second grade county teacher's certificate, the latter expiring in June, 1913. Just before the expiration of the latter certificate—that is, in April, 1913—she tried to secure an elementary limited certificate. She succeeded in complying with the rules governing examinations for limited certificates in three respects, namely, passing an examination in general history and drawing, filing a physician's certificate of good general health, filing a testimonial as to good moral character. But there was a fourth requirement under the rules, that a teacher having previous experience should furnish *"testimonials* as to his or her success in teaching, and shall also present a written statement giving the places in which he or she has taught,

and terms of service in each." This fourth requirement was not fulfilled by the Respondent, and in consequence thereof no certificate was issued to her, and when she was dismissed January 5, 1914, she held no certificate entitling her to teach.

It seems that she made application to the Appellant, the Board of Education of Prospect Park, for a testimonial of success in teaching, but the Appellant refused to grant the application because the Respondent's teaching had not been satisfactory. The Respondent thereupon put the blame of having no certificate upon the Board of Education. But the Board of Education, the Appellant, was under no obligation to give a testimonial, and if the services of the Respondent were unsatisfactory the Board was in duty bound to decline to certify to the success of her services. There is no rule or law requiring the Respondent to get a testimonial only from the Board she was serving—that is, the Board of Education of Prospect Park. She could have obtained it from anyone who knew anything about her teaching. This she did not do. That she was ignorant of the rules and took advice from the wrong people is unfortunate and regrettable, but cannot be accepted as an excuse.

It seems further that the passing of the examinations in general history and drawing would have entitled the Respondent to a renewal of her second grade certificate, as the Commissioner in his opinion has pointed out. But here again there appears to have been negligence or oversight or bad judgment on the Respondent's part, for which she alone must be held responsible. Rule 6 of the State Board of Education states:

"Certificates in force July 1, 1911, and June 14, 1913, shall be renewed, *upon application,* by the State Board of Examiners, but shall be valid only as originally issued; provided, that in renewing or making permanent such certificates the State Board of Examiners shall be governed by the rules in force at the time the certificates were originally granted."

The Respondent could have gotten a renewal of her second grade certificate "upon application" but she did not apply, and therefore did not get it.

The glaring fact that protrudes itself is that the Respondent at the time of her dismissal had no teacher's certificate of any kind. It was her affair, her business to see to it that she had a certificate. Not having it she was not under the tenure of service act, and the Board of Education was not only justified in dismissing her in January, 1914, but should not have employed her or paid her after the expiration of her second grade county teacher's certificate in June, 1913. From that time on she was not entitled to teach in the public schools of New Jersey.

The decision of the Commissioner is reversed.

May 6, 1916.

RIGHT OF BOARD OF EDUCATION TO TRANSFER PUPILS FROM ONE SCHOOL TO ANOTHER

CITIZENS OF THE TOWN OF HARRISON, HUDSON COUNTY, N. J., BY FRANK CUNDARI,

Petitioner,

vs.

BOARD OF EDUCATION OF THE TOWN OF HARRISON,

Respondent.

John J. Lenahan, for Appellants.
Davis & Hastings, for Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

On September 1, 1921, a petition was filed with this department by Frank Cundari on behalf of one thousand citizens of the town of Harrison appealing from the action taken by the Harrison Board of Education at its regular monthly meeting in June, 1921, in transferring the high school from School No. 1, situate on Washington Street, south of Harrison Avenue, to School No. 2, situate on Hamilton Street, north of Harrison Avenue. Petitioner bases his protest against such transfer on the ground of the danger to which the children effected by such transfer will be subjected in being compelled to cross street car tracks and streets laden with traffic. Petitioner also alleges in his petition that at the time the construction of School No. 2 was authorized by the district voters it was understood and intended by the voters that such school should be used for primary and grammar departments and not for a high school.

On September 19, 1921, the Harrison Board of Education filed with this office an answer to the above mentioned petition of appeal, and in such answer defended its action in designating School No. 2 as the high school on the ground that such action had been taken by the board in the exercise of its best discretion with a view to the interests of the school children of the town as a whole. The Respondent contends, furthermore, that the transfer of grammar school pupils to School No. 1 only involves those of the 5th, 6th and 7th grades, since the other grammar grades are already accommodated in School No. 1. It is also the contention of the Respondent that the authorization by the voters in 1919 for the construction of School No. 2 was a general one and that there was no restriction in such authorization of the use of such new school building to grammar and primary purposes.

There seem to be no questions of fact involved in this dispute. The case, on the contrary, hinges entirely upon the question of whether the Harrison Board of Education has under the law a right to designate School No. 2 as a high school and thus require the transfer of high school pupils to such school and the transfer of pupils of the 5th, 6th and 7th grades to

School No. 1, and upon these questions of law briefs have been filed by both sides to the controversy.

The law requires only that suitable and proper school facilities shall be provided by every school district in the State for the pupils residing therein. The exact method of providing such facilities is left to the discretion of the boards of education, who are also empowered by statute to make rules and regulations for the government and management of the public schools and the public school property. It is also apparent from the proceedings on file in this office authorizing in 1919 the bonding of the School District of the Town of Harrison for the erection of the said School No. 2, situate on Hamilton Street, that the authorization is a general one with no designation of the proposed school building as either a high school or a grammar school.

In view, therefore, of the discretion given by law to a board of education as to management of the schools of its district and as to designation of the schools pupils shall attend, and in view of the fact that School No. 2 was not limited by the voters' authorization to either a high school or grammar school, it is the opinion of the Commissioner of Education that the action of the Board of Education in June, 1921, in designating such School No. 2 as the Harrison High School is entirely legal and should not be interfered with.

The appeal is accordingly hereby dismissed.

Dated November 28, 1921.

RESIDENCE OF PUPIL FOR SCHOOL PURPOSES

MARY M. TOWNER,

Appellant,

vs.

MANSFIELD TOWNSHIP BOARD OF EDUCATION,

Respondent.

J. M. Roseberry, for Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

This appeal was brought by Mary M. Towner, a resident of Mansfield Township, Warren County, New Jersey, who alleges in her petition that she stands in *loco parentis* to Lillian Baysdorf, a minor thirteen years of age, and that by virtue of such relationship she appeals from the action of the Mansfield Township Board of Education on July 31, 1923, in refusing to provide tuition and transportation to the Hackettstown High School for the said Lillian Baysdorf for the coming year.

Respondent in its answer, duly filed, defended its action of July 31, 1923, on the ground that the actual home of the said Lillian Baysdorf is with her parents in New York or Brooklyn and that she actually is not a resident of Mansfield Township but merely boards at Appellant's residence, which is

known as the "Junior School," and at which a number of children board and receive instruction in the elementary subjects.

A hearing in this case was conducted by the Assistant Commissioner of Education on September 14, 1923, at the Court House in Belvidere, at which hearing the testimony of witnesses on both sides was heard; and when the case was remanded by the State Board of Education for a stenographic record, a second hearing was held on January 4, 1924, at which the testimony was taken stenographically.

From the facts established at the hearings it appears that the so-called "Junior School" maintained by Appellant is more or less of a private home in which the children living with Appellant are instructed in elementary subjects only. Appellant does not in the Commissioner's opinion pretend to maintain such an educational institution as would prevent its inmates of actual all the year residence therein from looking to the public schools of such district for high school facilities, since there is no pretention on her part to instruct such children beyond eighth grade elementary subjects. The fact that there was no pretention on the part of the Appellant to furnish instruction for children beyond the elementary grades renders irrelevant any statement which the evidence might contain as to the amount of money received by Appellant from the parents of Lillian Baysdorf toward the child's living expenses after the completion by her of the elementary instruction.

The essential point to be determined, therefore, in the case at hand, is whether Lillian Baysdorf is an actual resident of the school district of Mansfield Township so as to entitle her to free high school facilities at the expense of that district.

It has been the ruling of this department that a child may be said to be a resident of a school district so as to be entitled to free school facilities when such child has its actual and bona fide all the year around home in such district, even though the parents reside elsewhere and the child's residence be merely with distant relatives or friends. In this case the actual good faith home of the child and not the parents is to be regarded as the determining factor in the question of the right to free school facilities. This view is upheld in the case of Yale *vs.* The West Middle School District, 59 Conn. 489, in which the opinion is in part as follows:

> "If any child is actually dwelling in any school district, so that some person there has charge of it, is within the school age and not incapable, by reason of physical infirmity, of attending school, and is not instructed elsewhere, then such child must go to the public school."

The above principle is further supported in 35 Cyc., page 1113, note 23:

> "A child whose parents are non-resident and who lives, with his parents' consent, with others who care for him and with whom he and his parents expect him to live permanently, has a right to attend the schools in the district in which he thus resides."

The facts in the case under consideration plainly indicate that the actual all the year around residence of Lillian Baysdorf is at the home of the

Appellant in Mansfield Township and not with her parents who live in New York or Brooklyn. The parents have not, according to the testimony, maintained a home together for ten years and accordingly consented that the child make her home with Appellant and this she is doing and has been doing for two years or more past. The testimony further shows that the child during such time has not visited either of her parents more than once.

In view of all the facts in the case, therefore, and of the authorities upon the subject, it is the opinion of the Commissioner of Education that Lillian Baysdorf is a resident of Mansfield Township, Warren County, New Jersey, and is thus entitled to be provided with free high school facilities by the board of education of such district.

The appeal is accordingly hereby sustained.

January 11, 1924.

Committee Report Adopted as Decision of the State Board of Education

I regret that I cannot agree with the majority of the Committee in their disposition of this case. The facts shown in the record are as follows:

The parents of the girl Lillian Baysdorf reside in the City of New York, but have not lived together for ten years or more. Ever since their separation the girl has been in the custody of the father, but has not lived with him. He has resided with his mother at the home of his aunt in Brooklyn, but the child, with an older sister, was placed in the care of another person in New York City until she was between eleven and twelve years old. At that time, the father placed her at school with and in the care of the Respondent, Mrs. Mary M. Towner, in the village of Port Murray, in Mansfield Township.

Mrs. Towner has for several years conducted a school there where she has had four or five boarding pupils, whom she does not teach beyond the eighth grade. Lillian Baysdorf finished that grade in June, 1923, but continued to make her home with Mrs. Towner to whom her father continued to pay $60 a month, the amount he had theretofore paid for her board and tuition, and since then she has not been a pupil of Mrs. Towner's school, but an inmate of her home and in her care and control.

The uncontradicted testimony is that after the child finished her school work with Mrs. Towner, who did not teach beyond the eighth grade, she continued to be an inmate of Mrs. Towner's home, not as a pupil, and on account of her increased requirements as she became older the father continued to pay Mrs. Towner for board and her care of the child the same amount that he had theretofore paid both for board and tuition.

The Commissioner, after hearing the testimony, has found as a fact that the "actual all the year round residence of Lillian Baysdorf is at the home of the Appellant (Mrs. Towner) in Mansfield Township," and also that the child does not receive any tuition from Mrs. Towner.

The Constitution and laws of New Jersey require that all children of school age shall attend school and that schools shall be provided for them. The language of the Constitution is that the Legislature shall provide a system

of free public schools for the instruction "of all the children in this State between the ages of five and eighteen years."

Section 116 of the General School Law provides that the public schools shall be free to all persons who shall be "residents of the school district."

Section 126 provides that school facilities shall be provided "for all children residing in the district."

Section 153 (New Jersey School Law, Ed. 1921, p. 111, Sec. 214) provides that "every parent, guardian or other person having custody and control of a child between the ages of seven and sixteen years, shall cause such child regularly to attend a day school," etc.

In my opinion, the evidence in this case shows that Mrs. Towner has the custody and control of Lillian Baysdorf, and the law requires her to send the child to school. The fact that it is in the power of the father to remove her from Mrs. Towner's control and custody does not relieve her of this duty or the school district of the duty of providing school facilities as required by the statute.

In Board of Education *vs.* Lease, 64 Ill. App., the Court said:

> "Very many conditions may occur which might render the residence of the parent or person in control of the child more or less indefinite as to the time and more or less dependent upon contingencies, and yet the child should not be deprived of school privileges."

In New York, People ex rel Brooklyn Children's Aid Society *vs.* Henrickson, 54 Misc 337, is to the same effect.

In Connecticut, the Court said:

> "If any child is actually dwelling in any school district, so that some person there had the care of it, and is within the school age, and not incapable by reason of physical infirmity of attending school, and is not instructed elsewhere, then that child must go to the public school."
>
> Yale *vs.* West Middle District, 59 Conn. 489.

The Commissioner states in his opinion that this has heretofore been the ruling of the Department of Public Instruction in this State. The subject appears not to have been presented to the Courts of New Jersey.

The question is one of good faith. If a child for any reason becomes a *bona fide* resident of a State or district other than that in which his parents reside, it is nevertheless entitled to attend the public schools.

In the present case the evidence, as it seems to me and as the Commissioner has found, shows that Mansfield Township is the *bona fide* residence of the child. Her father did not send her there to attend the public schools and I do not believe that he keeps her there because he prefers the schools of Warren County to those of the City of New York.

Nor do I believe that the circumstances of this case, which are unusual, will furnish a harmful precedent. If any case arises where children are sent to New Jersey from other States merely for the purpose of obtaining a free

education in our public schools, the local boards and the Department of Public Instruction can prevent such an abuse.

There is another aspect of the matter which it seems to me requires our affirmance of the decision. The determination of the case depends solely on the facts. The Commissioner has found, *as a fact,* that the *bona fide* residence of Lillian Baysdorf is in Mansfield Township. He made this finding after hearing the witnesses and having the opportunity, which we have not, to observe them and their demeanor on the witness stand and to judge of their credibility. Under these circumstances, his findings of fact have every presumption in their favor and while we have the power to reverse them they should not be disturbed unless we find from our examination of the evidence that he was clearly in error. In my opinion, the record in this case affords no basis for finding any such error. On the contrary, I think that the evidence clearly sustains his findings, and that being so, they should be affirmed, and I so recommend.

DECISION OF THE SUPREME COURT

This cause was submitted on briefs, at the October Term, 1924, on a writ of certiorari sued out by the prosecutor against the State Board of Education. The cause was erroneously entitled by counsel of the respective litigants as Mary Towner, Prosecutor-Respondent, *vs.* Mansfield Township Board of Education, Appellant, and is so reported in 3 Adv. Rep. No. 19, page 448; 128 Atl. Rep. 602; whereas it was the township which prosecuted the writ and the State Board of Education which was defendant. Neither Mary Towner nor Lillian Baysdorf, a minor, was made a party to the writ, nor was either served with a copy of it. The testimony taken in the cause developed that both Mary Towner and Lillian Baysdorf would be vitally affected by the outcome of the proceedings and hence were necessary parties thereto, and as it further appeared that Lillian was a minor that her interests should be taken care of by a guardian *ad litem.* Decision was therefore reserved until a proper record was completed and this appears now to have been done, and counsel of the respective parties have consented that the cause be disposed of on the state of the case and briefs originally submitted.

The facts present the legal question: Has Lillian Baysdorf acquired such a residence in Mansfield Township as would entitle her to the benefit of the provision of section 116 of the General School Law of 1903, 4 Comp. Stats., page 4675, and as amended P. L. 1912, page 284, which *inter alia* provides, that public schools shall be free to all persons over five and under twenty years of age, who shall be residents of the school district?

An application was made by Lillian Baysdorf, on June 25, 1923, to the Board of Education of the School District of Mansfield Township, in Warren County, for the privilege of taking the first year of work in a High School commencing on September 4th, the expense of tuition and transportation connected therewith, if any, to be paid by the Board of Education of said district; and that she desired to attend the Hackettstown High School. At the time of the making of this application Lillian was thirteen years of age. The Board of Education denied her application upon the ground that she was not a *bona*

fide resident of the township. Thereupon Miss Towner filed a petition with the State Commissioner of Public Instruction in which petition she set forth that she was a resident of the township of Mansfield, standing in *locus parentis* to Lillian, "who for the last two years has continuously resided with the subscriber appellant herein, at her home" in the said township of Mansfield, and that she appealed to the State Commissioner from the decision of the Board of Education by which it denied the application to furnish transportation to the Hackettstown High School and tuition fees therein for the said Lillian. To this petition the Mansfield Board of Education made answer that Miss Towner "has added an addition to her dwelling house and has advertised it as the 'The Junior School' for children to be educated as far as the eighth grade;" that at the present time she has about ten or twelve children and sometimes a much larger number at her house; that she makes it a business to furnish these children board and she teaches them as far as the eighth grade; that she follows this as a business, and receives compensation for her services as a teacher, and also received compensation for boarding said children; that the said Lillian is not a resident of the township but is simply a boarder at the home of the petitioner and that Lillian is a resident of the City of New York. The parties were given an oral hearing at which the testimony of Miss Towner, Lillian and Lillian's father and others was taken, from which it appears that Lillian's father and mother are residents of the City of New York, where they have resided for many years; that they are and have been living in a state of separation for ten years or more, and that Lillian's father makes his home at his mother's, where his aunt also lives, and there is a legitimate inference from his testimony that he provides for their support; that for a period of ten years Lillian and an older sister were placed by their father under the care of a Mrs. Rasch who resided in the Bronx and until Lillian was sent by her father to Miss Towner's school, paying to the latter sixty dollars a month for Lillian's board and tuition, and in addition provided Lillian with such necessaries as her comfort and well being required.

The State Board of Education considered its task to be to decide whether Lillian Baysdorf was an actual resident of the school district of Mansfield Township so as to entitle her to free high school facilities at the expense of that district, without regard to whether or not it was the place of her domicile, and accordingly held that because Lillian's all year around residence was at the home of Miss Towner, to which her father had consented for two years or more past, she was entitled to be provided with free high school facilities by the Board of Education of the district. There is no case in this State which deals with the precise point in question. There are cases to be found in other jurisdictions which deal with the subject mooted here. The case relied on by the State Board for the result it reached is Yale *vs.* West Middle Dist., 59 Conn. 489, which will be later commented upon.

To determine properly whether or not Lillian is entitled to free school facilities in view of the circumstances as disclosed by the testimony as to her residence in New Jersey we must not only have recourse to the constitutional provision and statutes relating to the education of children residing in this

State in our public schools but also to consider the sound public policy upon which these provisions were designed to rest.

Art. VI, Sect. 7, Plac. 6, of the State Constitution *inter alia* declares: "The legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in this State between the ages of five and eighteen years." It needs no argument to demonstrate the unreasonableness of any view that tends to uphold a theory that this declaration is designed to include children from other States who may be sent by their parents or guardian, into this State, and who actually take up their residence here for instruction in our public schools. By section 116 of the General School Law of 1903, *supra,* as amended in 1912, p. 285, it is provided: "Public schools shall be free to all persons over five and under twenty years of age, and to such persons over the age of twenty years as the board of education of any school district may deem it wise to offer instruction, who shall be residents of the school district. Non-residents of a school district, if otherwise competent, may be admitted to the schools of said district with the consent of the board of education upon such terms as said board may prescribe; provided, that the authority to charge tuition for non-resident pupils conferred by this section shall not apply to non-resident pupils transferred to any district by an order of the county superintendent of schools."

Considering the facts of the case most favorably to Lillian's application for admission to the high school, we cannot fail to observe that they fall short of establishing any legal right in her to the privilege she seeks, since the facts relied on in her behalf do not prove that she was a domiciliary resident of the school district, which, in our view, seems to be necessary. The fact that she intends to remain in the home of Miss Towner, during her attendance at the high school or for an indeterminate period, does not make her residence a permanent one, especially since it does not appear that she was emancipated or was under the legal control of Miss Towner, but on the contrary it appears that she was in neither situation, and that her father who is domiciled and actually resides in the State of New York will continue to make provision for her future support and comfort.

The term "a resident," in a broad sense, includes any person who comes into this State and remains here with the intention to make it his permanent abode. But this legal status is not applicable to a child who is brought or sent into this State by a parent or guardian who is a nonresident for the purpose of receiving an education in the public schools of this State. The permanent residence of the father is that of the child, until the latter is emancipated and chooses a place of residence of its own. Considerable force is derived by this view from the provisions of the School Law relating to compulsory education of children in our public schools. Thus, for instance, section 153 of the School Law, 4 Comp. Stats. 4775, provides that every parent, guardian or other person having control of a child between the ages of seven and seventeen years, inclusive, shall cause such child to regularly attend a day school, etc. The succeeding section 154 defines, in a measure, the character of the control of the child, by providing that any parent, guardian or other person having the legal control of any child who shall fail to comply with the

provisions of section one hundred and fifty-three, etc. So that it is clear that the persons who are designated by the statute upon whom the duties outlined by it rests are parents, guardians or persons having legal control of the child.

Now the phrase "legal control" signifies a *status* of the person in whose custody the child is. It cannot reasonably mean the relation between pupil and teacher, which control begins and ends with the school sessions; or the relation existing between the teacher and her pupil boarder, however intimate their friendship may be.

The phrase "other persons having legal control" would manifestly include foster parents, who have lawfully adopted children, or those to whose care and custody children are committed by operation of law, etc. By applying the maxim *noscitur a sociis* to the phrase used, the persons indicated by the sections, as those having legal control, must have the legal status of parent or guardian.

The testimony fails to show that any such situation existed in the instant case. The case of Yale *vs.* West Middle School District, 59 Conn. 489; 22 Atl. Rep. 295, relied on by the State Board of Education appears to have been decided strictly upon the language used in the school act of that State to which Andrews, C. J., refers and says: "All through these sections the expression, 'those having the care of children' is used as exactly equivalent to parents or guardians; and nowhere is it indicated that the duty to send children to school, or the duty of the district to furnish instruction, depends on anything other than the residence of the child. All distinction between domicile and actual residence seems to be carefully excluded." In these respects our school law differs essentially from the one in Connecticut in that the duty to send children to school devolves upon those having *legal control* of them, such as a parent or guardian, and that actual place of sojourn of the child, whether for a long or short period, does not establish its residence within the meaning of the school law unless it is the place of residence of its parent or guardian or other person having legal control of it. A child, in law, can have no residence of its own and can only lawfully acquire one when it has been emancipated. Its residence under the school law follows that of its parent or guardian or other person having legal control of it.

The various sections of our school law exhibit State policy to continue children to attend the public schools in the respective districts where their parents or guardians reside.

The school law requires the consent of the local board of education or of the county superintendent, to the attendance of a child at a public school in a district other than the one in which it actually resides. It does not seem consistent with sound public policy to open our public schools to the admission of pupils from other States and whose parents reside there, to be educated here at the expense of the taxpayers. The mere length of time of Lillian's sojourn at Miss Towner's residence is inconsequential. Such a situation might easily manifest itself in every case where parents or guardians send children in their care to be educated in the public schools here, and who were boarded and lodged at the residence of a relative or friend residing in the school district.

The testimony before us does not sustain the finding of the State Board of Education that Lillian was a bona fide resident of the school district and hence entitled to have the local board of education furnish her with transportation to and from the High School at Hackettstown and to pay her tuition therein.

For the reasons herein given the order of the State Board of Education is set aside, and the action of the local Board of Education is affirmed.

OBLIGATION OF SCHOOL BOARD TO PROVIDE TRANSPORTATION FACILITIES

ALBERT S. PHILLIPS,

Appellant,

vs.

WEST AMWELL TOWNSHIP BOARD OF EDUCATION,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

This action is brought by Appellant to protest against the refusal of the West Amwell Township Board of Education to provide for his two children transportation facilities to and from the Mount Airy School, located in West Amwell Township.

Appellant's demand for transportation facilities as aforesaid is based on his contention that the distance involved exceeds two miles and that the age of the children, namely, six and seven years respectively, together with the condition of the roads renders the provision of transportation necessary.

A hearing in this case was conducted by the Assistant Commissioner in Flemington on January 21, 1925, at which time testimony of witnesses on both sides was heard.

From the testimony it appears that the distance from Appellant's home to the Mount Airy School is approximately 2.1 miles. It also appears that the road in question is for a distance of about one mile an unimproved one and for a part of the latter distance is below the average of the usual unimproved rural road. The unimproved mile of road above referred to was also under consideration in the case of Otto Hausler *vs.* West Amwell Township Board of Education, previously decided by this department and was revealed by the testimony in that case to be in such condition as to afford the children no opportunity to walk along the side of the road, but compelled them to walk between heavy the ruts.

The fact that the distance from Appellant's home to the schoolhouse exceeds two miles, which factor alone is usually held to justify transportation for elementary pupils, together with the admitted youth of the children and the poor condition of the roads over which they must travel, all go to make up, in the Commissioner's opinion, such remoteness of residence from the

schoolhouse as to justify within the meaning of the statute the provision of transportation facilities.

It is, therefore, hereby ordered that the Board of Education of West Amwell Township proceed at once to make suitable provision whereby the schoolhouse in question is rendered convenient of access for Appellant's two children within the meaning of Section 180, Article X of the 1921 Edition of the School Law.

January 29, 1925.

DECISION OF THE STATE BOARD OF EDUCATION

This appeal is from a decision of the Commissioner requiring the Board of Education of West Amwell Township to provide transportation for two of Respondent's children. The route from the Respondent's house to the Mount Airy School is slightly over two miles long. About one mile of it is over a dirt road, which is not well kept up and along which there are but four houses. In the winter and early spring this part of the road is difficult to travel. The children are six and eight years old, the younger being a girl. In a similar case where children aged from six to ten lived 2 1/10ths miles from the school, this Board decided that transportation should be furnished. (Piell *vs.* Union Township Board of Education. Opinion printed in the Board minutes of March 10, 1923.)

None of the facts above stated are denied by the Appellant, although there is some difference between the parties as to the exact distance the children have to travel. The chief and substantially the only objection by the Board is the expense, which is said to be beyond the means of the school district. It appeared at the hearing that the Board has provided no transportation for any of the children attending the Mount Airy School, and it appears to have made no investigation for the purpose of determining whether transportation was necessary. It seems to have decided that it would furnish no transportation.

The Board invokes our decision in Hausler against the same Board of Education, made on April 5, 1924, in which we held that it was unnecessary for the Board to furnish transportation to the Lambertville High School for a child who lived some distance from a route established by the Board for transporting children to that school. In that case we decided that the Board has endeavored to comply with the law, had used its best judgment in choosing the transportation route, and that it would be an unjustifiable hardship to compel it to furnish the transportation there asked for. In the present case, the Board has not tried to comply with the law. Its desire for economy is to be commended, but as we have had occasion to say in previous cases, neither a local Board nor this Board can disregard the statute, which distinctly provides that school facilities must be furnished to all children of school age, and this as has often been held, requires that schools shall be located in places convenient of access, or that the pupils be transported.

There can be no question that these little children cannot be expected to walk over two miles to school over a poor and lonely road. The case comes directly within our decision in the Piell case, and other similar decisions, and we therefore recommend that the Commissioner's decision be affirmed.

July 11, 1925.

CONVENIENCE OF ACCESS INCLUDED IN SCHOOL FACILITIES

ALBERT S. PHILLIPS,

Respondent,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST AMWELL,

Appellant.

DECISION OF THE COMMISSIONER OF EDUCATION

On January 29, 1925, the Commissioner of Education rendered a decision, which was affirmed by the State Board of Education on July 11, 1925, to the effect that the residence in West Amwell Township of two small children of Albert S. Phillips was remote from the Mount Airy School located in that district, not only because of a distance exceeding two miles, but because of road conditions and youth of the children, and ordered that transportation facilities be at once provided for such children by the West Amwell Township Board. To date no attempt whatever has been made by the Board of Education to comply with the order contained in the decisions above referred to.

A petition is now presented on behalf of the West Amwell Township School Board asking that the case be re-opened and re-heard on the ground of alleged erroneous conclusions of law reached by the Commissioner and State Board of Education in their decisions. It is also requested that judicial notice be taken of certain facts not already included in the record tending to establish the generally central location of the Mount Airy village so far as the remainder of West Amwell Township is concerned, and the numerous good roads approaching and entering it from all sides.

Counsel for the Board of Education insists that the obligations of the School Board end with the establishment of a schoolhouse generally convenient for the inhabitants of the district, and that the law is only concerned with preventing the location of a schoolhouse in a place inaccessible to the community as a whole. He relies chiefly in his contention upon the case of Frelinghuysen Township Board of Education *vs.* Franklin T. Atwood, County Superintendent, decided by the Supreme Court in 1906 and later affirmed by the Court of Errors and Appeals in March, 1907, in which it was held that the refusal of a Board of Education to provide transportation facilities for children living remote from the schoolhouse was not such a failure to provide adequate and proper school facilities as to justify the withholding of State moneys from a school district. In that case, however, the Courts specifically based their decisions upon the fact that Section 126, of the School Act of 1903, as then enacted and requiring the furnishing by every Board of Education of suitable school facilities and accommodations, was the first of six sections of Article X dealing exclusively with school buildings. It was concluded, therefore, by the Courts that nothing further was required by the statute in the way of suitable school facilities and accommodations than the school buildings specifically referred to therein, and that consequently transportation could not be considered

as a part of the facilities required to be provided by every school district for its pupils. The Supreme Court also commented upon the fact that Section 117 of the School Act of 1903 was merely permissive in its provisions that a Board of Education may make rules and contracts for transportation of children living remote from schoolhouses.

In 1907, however, subsequent to the decisions of the Supreme Court and Court of Errors above referred to, Section 126 of the School Act of 1903 was amended to read as follows:

> "126. Each school district shall provide suitable school facilities and accommodations for all children residing in the district and desiring to attend the public schools therein. Such facilities and accommodations shall include proper school buildings, together with furniture and equipment, convenience of access thereto, and courses of study suited to the ages and attainments of all pupils between the ages of five and twenty years. Such facilities and accommodations may be provided either in schools within the district convenient of access to the pupils, or as provided in sections one hundred and seventeen, one hundred and eighteen and one hundred and nineteen of the act to which this act is an amendment."

Not only does the section as amended add the requirement of "convenience of access" to the specifically enumerated school facilities and accommodations to be provided by Boards of Education for all the pupils of their districts, but connects Section 126 as aforesaid with Sections 117, 118 and 119 by requiring that school facilities be provided either in schools within the district convenient of access to the pupils or that the provisions of Sections 117, 118 and 119 be complied with as alternatives. It is obvious from such alternatives that school facilities must either include the establishment within a school district of a schoolhouse convenient of access by location or transportation for all the pupils therein, or that pupils be transported to schools in other districts, or, if remote from the school in their own district, that their tuition be paid in a nearby school in an adjoining district. Convenience of access, however, by one means or another is specifically provided for in every one of the above quoted alternatives for providing proper school facilities for "all the children residing in the district."

In the opinion of the Commissioner of Education the West Amwell Township School Board produces in its present petition no facts, even though judicial notice be taken of them, nor arguments of law which in any way necessitate a re-opening or re-hearing of its case, or which in any way tends to change the conclusions reached by the Commissioner in his decision of January 29, 1925, above referred to. The cases upon which the Board's counsel relies were decided by the Supreme Court and the Court of Errors and Appeals upon the statute defining school facilities before it was amended in May, 1907, to include convenience of access by the several enumerated alternative methods as one of the essential school facilities, and are therefore not relevant as authorities in cases arising since the amendment. On the contrary, since the enactment of the statutory amendment, many cases have been decided by both

the Commissioner and State Board of Education in which school boards have been ordered to provide for individual pupils, as a part of the necessary school facilities, convenience of access by means of transportation in lieu of the location convenient of access of the schoolhouse itself. Such cases are the only relevant and binding authorities at the present time under the law as it now stands.

The petition is accordingly hereby denied.

December 15, 1925.

DECISION OF THE STATE BOARD OF EDUCATION

This case was before the Board a few months ago when we affirmed the Commissioner's decision requiring the West Amwell Township Board to provide transportation for the Respondent's children. The Appellant thereafter filed a petition for re-hearing, alleging some additional facts not in the record, of which it was asked that judicial notice be taken,—these facts being designed to establish that the school building attended by Respondent's children is in the most convenient location in the district for the majority of the pupils. On these facts, in addition to those already in the record, it was contended that the law does not compel the Appellant to furnish transportation to any children in the district. The Commissioner considered the petition, and, assuming that judicial notice might be taken of the additional facts above mentioned, denied it on grounds which are stated in full in his opinion. From his decision this appeal is taken.

The question involved is one of statutory construction, which can best be understood perhaps if treated historically. Prior to 1907, Section 126 of the School Law read as follows:

> "Each school district shall provide suitable school facilities and accommodations for all children residing in the district and desiring to attend the public schools therein. Wherever such school facilities or accommodations shall be inadequate and unsuited to the number of pupils attending or desiring to attend such schools, the county superintendent of schools shall transmit to the custodian of the school moneys of the school district an order directing him to withhold from the district all moneys in his hands to the credit of such school district received from the state appropriation or from the state school tax until suitable facilities or accommodations shall be provided, and shall notify the board of education of such district of his action, with the reasons therefor; such order shall not take effect until approved in writing by the state superintendent of public instruction, and said approval shall state when said order shall take effect."

At that date (1906) Section 117 provided in part—

> "Whenever in any district there shall be children living remote from the schoolhouse the board of education of such district may make rules and contracts for the transportation of such children to and from school."

In 1906 the Supreme Court in Frelinghuysen Township Board of Education *vs.* Atwood, County Superintendent, 73 N. J. Law 315, held that the failure of that Board to provide transportation was not a failure to furnish suitable school facilities as provided in Section 126, and also that Section 117 was permissive and not mandatory. In 1907 the Court of Errors affirmed the decision, concurring in the Supreme Court's holding as to Section 126, but declining to express an opinion as to Section 117. The Supreme Court gave as its reason for holding that Section 126 did not cover transportation, that it was the first of six sections which related solely to school buildings and that the words "suitable school facilities and accommodations" referred only to school buildings, and pointed out that Article X, which comprised these sections, was entitled "School Buildings."

Thereupon, in 1907, subsequent to the Court of Errors' decision in the Atwood case, Section 126 and the title preceding it were amended by Chapter 123 of the Laws of 1907 so as to read as follows:

"SCHOOLHOUSES, FACILITIES, AND ACCOMMODATIONS"

"Each school district shall provide suitable school facilities and accommodations for all children residing in the district and desiring to attend the public schools therein. *Such facilities and accommodations shall include proper school buildings, together with furniture and equipment, convenience of access thereto, and courses of study suited to the ages and attainments of all pupils between the ages of five and twenty years. Such facilities and accommodations may be provided either in schools within the district convenient of access to the pupils or as provided in sections one hundred and seventeen, one hundred and eighteen and one hundred and nineteen of the act to which this act is an amendment..*"

(The italics indicate new matter.)

Ever since this change in the statute the Commissioner of Education and this Board in a considerable number of cases have required transportation to be furnished where the school building was not convenient of access and the power to do so under Section 126 as amended has not been questioned, at least by any appeal to the courts. Counsel for the Appellant now contend, however, that the Atwood case still applies, that the 1907 amendment of Section 126 does not clearly require that transportation be furnished, that the statute being punitive in its nature it must be strictly construed, and therefore that inasmuch as Appellant has provided a school building convenient of access to the majority of the pupils of the district it cannot be compelled to furnish transportation to those to whom the school building is not conveniently accessible.

It would be a most serious matter to reverse the position of this Board and the Commissioner on this question, after the years in which the transportation system has been developed, but nevertheless Appellant is entitled to this Board's consideration and determination of his contentions, regardless of its former decisions. So considering them we are unable to agree with the arguments of Appellant's counsel. It seems to us that the clear intent of Section 126 as amended is, as held by the Commissioner, that school facilities must be fur-

nished either by providing schools convenient of access, or by the means recited in Sections 117, 118 and 119, which include the transportation within the district of children whose residences are not convenient of access to the school building or buildings. This reading is not only consistent but it is in line with the compulsory education statute which Appellant's interpretation of Section 126 would render unenforceable and unavailing as to all children whose homes are not convenient of access to school buildings in their districts and whose parents are unable to provide transportation for them. It is not to be supposed that the Legislature intended to create a condition which would suspend the compulsory education statute in the cases of such children. Rather the presumption is to the contrary and Section 126 itself provides that the "school facilities and accommodations" shall be provided for all children residing in the district.

Therefore, assuming the existence of the additional facts alleged in the petition for re-hearing, we recommend that the Commissioner's decision be affirmed.

January 9, 1926.

DECISION OF THE SUPREME COURT

PER CURIAM.

The writ of certiorari seeks to review an order of the Commissioner of Education dated January 27, 1926. directed to the County Collector of Hunterdon County to withhold school moneys, which ordinarily would have been apportioned to the Township of West Amwell in Hunterdon County. The order was made because the prosecutor would not provide transportation facilities for the two children of Albert S. Phillips, aged six and seven years. The Phillips' children reside about two miles from the nearest school located at Mount Airy, a distance of over two miles. The basis of the order was an order of the Commissioner of Education dated January 29, 1925, affirmed by the State Board of Education dated July 11, 1925; by which it was ordered that such school transportation facilities be provided for the Phillips' children.

The prosecutor relies upon the case of Frelinghuysen Township Board of Education *vs.* Atwood, 73 N. J. L. 315, affirmed 74 Id. 638. That case in the Court of Errors and Appeals was decided on March 7, 1907. On May 7, 1907, both the title of Article X and Section 126 of the Act were amended, P. L. 1907, p. 291, "convenience of access thereto, etc.," being added.

Our reading of the statute agrees with the construction and application made by the Commissioner of Education; hence, the order of January 27, 1926, now under review is affirmed, and the writ of certiorari is dismissed.

January 19, 1927.

AFFORDING TRANSPORTATION FACILITIES FOR PUPIL REMOTE FROM SCHOOL

ALEXANDER LOSKOT,

Appellant,

vs.

BETHLEHEM TOWNSHIP BOARD OF EDUCATION,

Respondent.

Harry L. Stout, for Appellant.
Marshall Miller, for Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

This action is brought by the above named Appellant to the end that the Bethlehem Township Board of Education may be required to provide transportation facilities for the school year 1922-1923 for Appellant's daughter, Mary Loskot, to and from the high school in High Bridge, at which school said Mary Loskot is a student.

Appellant states that on September 8, 1922, the Respondent offered to pay him an allowance of $100 for transporting his daughter himself for the school year 1922-23.

Appellant also alleges that in spite of an agreement entered into by Respondent for the school year 1921-22 to pay Appellant $200 as an allowance for that year for transporting his daughter to the high school aforesaid, the Respondent actually paid to Appellant but $162.25 for the year.

The Respondent denies the remoteness of Appellant's residence from the high school at High Bridge, and further asserts that the amount received by Appellant as a transportation allowance for the school year 1921-22 was the full amount agreed upon.

A hearing in this matter was granted by the Assistant Commissioner of Education and was conducted at the Court House in Flemington on November 3, 1922, at which hearing the testimony of a number of witnesses on both sides was heard.

From such testimony it was plainly established that while Appellant had demanded as a transportation allowance for the school year 1921-22 the sum of $200, there was offered to Appellant by the Board of Education and actually accepted by him the sum of $162.25. The acceptance by Appellant of the latter amount constituted therefore in the Commissioner's opinion a transaction which was binding upon Appellant, and one which consequently estopped him from any claim to a higher amount for the year 1921-22 aforesaid.

In regard to the question of distance of Appellant's residence from the High Bridge School in the matter of Appellant's claim that transportation facilities be provided for his daughter for the school year 1922-23, the testimony disclosed that the distance from Appellant's home along a lane or

drift road to the point where such road joins the main highway is 1 1-5 miles, and that from that point thence along such main highway to the high school the distance is 2.3 miles.

The main question therefore to be considered is whether the Appellant lives so remote from the high school in question as to justify transportation for his daughter.

It is the Commissioner's opinion that in order to determine actual remoteness of a child's residence from a schoolhouse, the entire distance to be traversed must be used as a basis of calculation, whether such distance be entirely along the main highway or partly along such a highway and partly along a drift road or a lane leading from Appellant's home. It has of course been frequently held by this department that in a case where the distance necessitating transportation is made up of both lane and highway, the obligation of the Board of Education is fully discharged by providing transportation merely along the main road, and that the child must consequently meet the transportation vehicle at the point where the lane meets the highway. This does not however alter the fact that whether it is the duty of a Board of Education to provide transportation for the whole or merely part of the distance, such obligation can only be determined by estimating the entire distance to be traversed from the child's actual residence to the school itself.

In the case at hand therefore where the entire distance for Appellant's daughter to travel from her home to the high school is over three miles, it is the opinion of the Commissioner that it is the duty of the Bethlehem Township Board of Education to provide suitable transportation facilities at least along the main highway, a distance of 2.3 miles, and it is hereby ordered that such facilities be at once provided by the Respondent for the remainder of the school year 1922-23.

It is also hereby ordered that Appellant be reimbursed by the Board of Education at the rate of $20 per month, which rate the Commissioner considers reasonable, from the beginning of the school year 1922-23 to the date when transportation facilities are actually provided as above ordered for the expense to which Appellant has been put in providing transportation himself for his daughter to the high school at High Bridge.

November 23, 1922.

Decision of the State Board of Education

This is another transportation case and is quite similar in its facts to Piell *vs.* The Union Township Board of Education, decided herewith. Bethlehem and Union Townships are adjoining rural townships in Hunterdon County.

Mary Loskot, the daughter of the petitioner, Alexander Loskot, lives in Bethlehem Township and attends the High School at High Bridge. She is fifteen years of age and completed the grammar school course of study at a school in Bethlehem Township. She attended the high school at High Bridge in the year 1921 to 1922, and the Bethlehem Township Board of

Education paid the Petitioner $162.25 for transporting her himself. At a meeting of the Board in August, 1922, a resolution was passed that transportation would not be provided for high school pupils. On September 8, 1922, however, the District Clerk wrote the petitioner that the Board would pay him $100 for transporting his daughter to High Bridge. He refused to accept this amount as insufficient and appealed to the Commissioner, who took testimony at Flemington, and on the evidence before him filed a decision in which he ordered that the Board should provide suitable transportation facilities along the main highway for the remainder of the present school year, and further that the Board reimburse the Petitioner at the rate of $20 per month from the beginning of the present school year to the date when the transportation facilities are actually provided. From that decision the Bethlehem Township Board of Education has appealed to the State Board.

The Petitioner's house is situated along a so-called private road about 1 1-5 miles from the public highway. The distance from the point where this private road meets the highway to High Bridge is about 2.3 miles so that it is necessary for the pupil to travel about 3½ miles to get to the High Bridge High School. The so-called private road extends through the property of some half a dozen farmers, all of whom use the road, and the record shows that it is sometimes used by the public as a means of traveling to Glen Gardner, notwithstanding it is very rough and stony and that gates are located at one or two points. The public highway referred to is the usual dirt road of the rural districts of that section of the State—muddy in winter, sometimes filled with snow, and with few houses along it.

As in the Union Township case, the Board did not investigate the remoteness of the Petitioner's residence before it refused transportation. It appears from the testimony that the Board did not think the Petitioner lived more than two miles from the school. It had formerly believed she lived remote, had paid transportation, and the County Superintendent had approved its action. Its refusal to provide transportation was due solely to its desire to cut down expenses. As we have pointed out in the case of the Union Township Board, its perfectly proper desire to economize did not justify the Board in refusing to provide transportation for a child who actually lived remote from the school. Therefore, for the reasons which are more fully set forth in our opinion in the Union Township case, we think the Commissioner was right in requiring the Board to furnish transportation to Mary Loskot, at least along the public highway.

The Commissioner, as stated, ordered that the Board should pay the Petitioner $20 per month for providing transportation by horse and wagon up to the time when the Board actually furnishes transportation itself This includes the expense of keeping a horse and wagon at High Bridge during the day as well as the other expenses of keeping them. The Petitioner's testimony, which is not denied by the Board, showed that he had to keep this horse and wagon solely for transportating his daughter to the school. The amount allowed by the Commissioner is based on the Peti-

tioner's testimony. The Board does not appear to deny that it is a reasonable amount since there was no cross-examination by the Board and no evidence was introduced on behalf of the Board to the contrary.

It is therefore recommended that the Commissioner's decision be affirmed.

OBLIGATION OF BOARD OF EDUCATION TO PROVIDE TRANSPORTATION FACILITIES

CHRISTOPHER C. PIELL ET AL.,
Appellants,
vs.
UNION TOWNSHIP BOARD OF EDUCATION,
Respondent.

Harry L. Stout, for Appellant.
Marshall Miller, for Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

This appeal is brought by Christopher C. Piell, Peter Moebus, John Gyuro, J. B. Probasco, A. W. Groom, Paul Schneider and J. C. Mulligan, all of whose children attend the public school at Jutland, and is directed against the action of the Union Township Board of Education in refusing under a resolution passed July 3, 1922, to provide any transportation facilities whatever for the children of Union Township School District for the year 1922-23. Appellants insist that transportation to and from the school in question is necessary and ask that the Board of Education be required accordingly to furnish such facilities for the pupils living remote from Jutland school for the year 1922-23 as aforesaid.

A hearing in this matter was granted by the Assistant Commissioner of Education and held at the Court House in Flemington on Tuesday, September 26, 1922, at which hearing testimony of a number of witnesses on both sides was heard. At the hearing, however, the Commissioner was informed that the Board of Education has agreed to transport by railroad to Jutland the children of Peter Moebus, J. B. Probasco, and J. C. Mulligan, which arrangement accordingly removes the grounds of appeal in the case of the three last-mentioned Appellants.

The School Law requires that schools must either be so located as to be convenient of access to all the children between the ages of five and twenty years residing in the district and desiring to attend the public schools, or that such schools be made convenient of access by the Board of Education by means of transportation.

The testimony clearly showed a distance of more than two miles to be traversed to the Jutland School in the case of the children of Christopher C. Piell, and in the case of a number of the other Appellants, when we consider the drift roads or lanes on which the children reside, which it is necessary to consider in order to determine the actual distance such children must travel, we find the distance equaling or even exceeding two miles.

There are many other factors besides distance which go to make up remoteness from a schoolhouse and the State Board of Education has held in decisions rendered by it that not distance alone, but all the other factors of each individual case must be taken into consideration by a Board of Education in deciding the necessity for transportation.

In the particular case at hand the testimony disclosed that within recent years the Union Township Board of Education abandoned the use of three schools in close proximity to the residences of the Appellants. The abandonment of such schools accordingly necessitated that the children be transported to the Jutland school, then designated by the board as the school for such pupils to attend, and the Board of Education has accordingly provided such transportation facilities until the passage of the resolution of July 3, 1922, above referred to.

The testimony further disclosed that no one of the roads over which the pupils must pass to the school in question is an improved road, and further that such roads are wooded and are lonely by reason of the fact that houses occur along them only at infrequent intervals. It moreover appears that the County Superintendent approves and has always approved the necessity for transportation in the case of the pupils in question to the Jutland School.

In view therefore of such approval by the County Superintendent; of the distance which some of the children in question must travel; the youth of others; the condition of the roads common in the case of all; and the fact that the Board of Education has created the present situation by its action, the wisdom of which is not questioned, in closing three schools in close proximity to the Petitioners, it is the Commissioner's opinion that with the exception of those for whom railroad facilities have been provided the Union Township Board of Education should furnish transportation for Appellants' children, all of whom in the Commissioner's opinion are remote from the Jutland School.

It is accordingly hereby ordered that suitable transportation facilities be at once provided by the Union Township Board of Education for the children of the Appellants for the remainder of the year 1922-1923.

November 10, 1922.

Decision of the State Board of Education

This case involves the question of transportation of children to the Jutland school in Union Township, Hunterdon County, and comes here on an appeal by the Board. The facts are as follows:

Some years ago three schools in the township were closed by the Board of Education and a new consolidated school built at Jutland. Prior to the school year 1922-23, transportation was provided to this school for the children who lived remote therefrom and this was always approved by the County Superintendent. On July 3, 1922, the Board of Education passed a resolution that no transportation would be furnished by it during the then approaching school year. On August 2, 1922, the Commissioner wrote the Board calling its attention to the law and stating that it had "no legal right to refuse to furnish

transportation in necessary instances." In reply to that letter the District Clerk of the Board, under date of August 14th, wrote the Commissioner as follows:

> "Your letter of August 2d, which refers to action of Union Township Board of Education at meeting on July 3d, abolishing all transportation of school pupils in the township for the coming year, was read at our Board meeting held on Saturday, August 12th, and the matter was discussed at considerable length but no action taken to rescind or annul the former action.
>
> "There were seven present, a majority being opposed to furnishing transportation and one, in particular, of the two absent members has always been strongly opposed to transporting pupils at the expense of the taxpayers of the township."

Thereafter seven parents of children who attended the Jutland school filed a petition with the Commissioner to compel the Board to furnish transportation. An answer having been filed the Commissioner took the testimony of a considerable number of witnesses at Flemington. At the beginning of that hearing the attorney for the Board stated that it would furnish transportation by rail to the children of three of the Petitioners, whose homes were convenient of access to a station on the Lehigh Valley Railroad, on which Jutland is situated. Testimony was then taken on the issue whether or not the remaining four Petitioners lived remote from the school.

The proof shows that the public roads on or adjacent to which the Petitioners live are dirt roads with few houses, muddy in the winter and often filled with snow, with bushes along the sides in many places. They are of the type of the country roads usual in that section of the State, away from the State and County highways.

The Petitioner Christopher C. Piell has two children, a boy and a girl, aged respectively fourteen and eleven. His house is 2.1 miles from the school on a public road. The Petitioner John Gyuro has three children, two boys aged respectively ten and six and a girl aged eight. He lives some distance from a public road and, if the drift roads or private ways by which the children get to the public road are included, about the same distance from the school as Piell. Gyuro is not a farmer, but works in a factory at Pittstown. The Petitioner A. W. Groom lives considerably over two miles from the school, if a private road to his house is included. On the public road the distance is well over a mile. The petitioner Paul Schneider has two children whose ages are not stated in the record. He lives about 2.3 miles from the school, including the distance along the private way by which the children get to the public road.

On these facts the Commissioner held that the Petitioners lived remote from the Jutland school and ordered "that suitable transportation facilities be at once provided by the Union Township Board of Education" for the children of the Petitioners.

The Board's appeal from his decision is based on two grounds: First, that the distance which the Petitioners' children traverse along the private ways or drift roads to get to the public road cannot be taken into consideration in

determining the question of remoteness; second, that the increase in the cost of conducting the schools is such that the Board should not be required to furnish transportation even for these children who might heretofore have been considered to live remote from the schoolhouse.

On the first point we agree with the Commissioner that, it being necessary to use these private ways to get to the public road, they must be taken into consideration in calculating the distance to the school. It is contended with respect to one or two of the Petitioners that they do not use the most direct path from their houses to the public roads. Whether this is so in the case of Gyuro, it is unnecessary to determine, because the age of his children is such that it seems to us they are entitled to transportation even if only the distance along the public highway and the shortest route from the highway to his house is included in the calculation. As to Groom and Schneider, their houses are remote from the school, whichever route may be used.

The second ground above stated is the one principally put forward on behalf of the Board and, as the record shows, was the real cause of its refusal to transport pupils. We fully sympathize with the feeling of the Board that it is its duty to reduce the expenses of the schools in its district as much as possible, and that the cost of transportation is a heavy burden, but that does not justify a disregard of the statute to which the actions of the Board, and of this Board, must conform and which, it is well settled, requires that transportation be furnished for all pupils who live remote.

It is true, as counsel for the Board points out, that the Commissioner and this Board have held that the local Board is the best judge of the circumstances of remoteness under the statute, and that neither the Commissioner nor the State Board should interfere where there appears to have been no bias or prejudice on the part of the local Board and the County Superintendent (Linch *vs.* Board of Education of Upper Pittsgrove Township, School Laws (1921), p. 608). The record here shows, however, that the Board did not determine the question of remoteness on its merits, but refused transportation in order to save expenses. This is shown, not only by the letter of the Clerk of the Board to the Commissioner, above quoted, but also by the fact that members of the Board did not, at the time it refused transportation, make any investigation to ascertain how far the Petitioners lived from the school and under what conditions the children would travel to school if transportation was not provided. It is also significant that the homes of the three Petitioners to whom the Board agreed to pay transportation by rail were not much, if any, further distant from the schoolhouse than the homes of the remaining Petitioners, but were not far from the railroad station, so that, as to them, the Board could furnish convenient transportation.

Also it is to be observed that, as has already been mentioned, up to the present year the Board had furnished transportation for some of these pupils and others living in the same vicinity and the County Superintendent had approved the contracts and arrangements for such transportation. It appears, therefore, that the Board's action was not founded on a consideration of the circumstances on which the law required it should make its determination of

the question of remoteness of the residence of these children, but was dictated solely by its desire to save expense.

The Commissioner heard and observed many witnesses and was enabled to obtain a clear understanding of the circumstances upon which the question of remoteness depends. His findings of fact are sustained by the evidence and, for the reasons above stated, we believe he was justified in overruling the action of the Board and making the order appealed from. It is therefore recommended that his decision be affirmed.

DANGER AS A FACTOR OF REMOTENESS IN TRANSPORTATION

MARSHALL W. READ, HARRY G. TODD, GEORGE T. WILSON, J. EMMONS, CARL A. NELSON, FRANK BALL, RAYMOND M. KAAR, GEORGE SCHEER, WEST BUCHANAN, ARTHUR W. STEEBER, HULSE TODD, FRANK FANCHER, HAWLEY G. WEAN, OSCAR BATES, WALTER TODD, CHARLES WACK, REG TWILLEY AND JACOB VALENTINE,

Appellants,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF ROXBURY, MORRIS COUNTY,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

This case is brought by the above-named Appellants against the Board of Education of the Township of Roxbury, Morris County, because of the refusal of the Board to furnish transportation for their children from the vicinity of their homes to the Roxbury School.

Counsel for Appellants claims that transportation should be furnished because of the age of the pupils in relation to the distance from their homes to the school, and also because of danger to the pupils due to automobile traffic.

Testimony taken at the Morristown Courthouse on February 25, 1927, discloses that with the exception of Jane Valentine, who lives about two and one-half miles from the school building and for whom the Board agrees to furnish transportation, the most remote are Mildred Steeber, 8 years of age, and Wilber Fancher, 15 years of age, who live one and seven-tenths miles from the school. The distances from the homes of the other children to the school range from one and one-quarter to one and one-half miles. The roads to be traveled by these children are hard surfaced county and State roads leading from Dover and Morristown to Phillipsburg and Easton. The width of the road ranges throughout the distance from twenty feet in the narrowest place to about twenty-four feet. Due to the summer population at Lake Hopatcong,

a part of this road has heavy traffic in the summer and early fall, at a time of day when children are on their way to school; but this danger is confined to a small part of the school year, namely, June, September and October. There was no testimony to show that this road has more extreme traffic or greater danger to pedestrians than other State and county highways in various sections of the State. In fact, it was admitted that the traffic is not nearly so great as that on highways leading to Atlantic City and other main arteries of travel.

The School Law, Section 193 (Edition of 1925), provides:

"Each school district shall provide suitable school facilities and accommodations for all children residing in the district and desiring to attend the public school therein. Such facilities and accommodations shall include proper school buildings, together with furniture and equipment, convenience of access thereto, and courses of study suited to the ages and attainments of all pupils between the ages of five and twenty years. Such facilities and accommodations may be provided either in schools within the district convenient of access to the pupils or as provided in sections one hundred and seventeen, one hundred and eighteen and one hundred and nineteen of the act to which this act is an amendment."

Section 117, above referred to, provides:

"Whenever in any district there shall be children living remote from the schoolhouse, the board of education of such district may make rules and contracts for the transportation of such children to and from school."

It is therefore obligatory that Boards of Education shall furnish buildings convenient of access, or in lieu of such facilities, they shall provide transportation for pupils remote from the school building. In many decisions upon school transportation and in the determination by County Superintendents of the necessity for transportation in their apportionment of State money, it has generally been held that children are not considered remote as to distance if they are of High School age and live within two and one-half miles of the school building, or if they are of elementary or grammar school age, and live within two miles of the building. Boards of Education may make facilities more convenient by locating school buildings so that children have less distance to walk than that above indicated or they may furnish transportation for shorter distances, but such provisions are not mandatory.

It has, however, been held by the Commissioner of Education that distance is not the only factor to be considered in determining remoteness. In Foose *vs.* Holland Township Board of Education (p. 621, 1925 Ed. School Law) it was held that, "The age and sex of the pupil, the condition of the roads, the distance, and, when part of the transportation is by car, the time of departure and arrival of trains, are all factors in determining the necessity for transportation."

Since the roads are hard surfaced, it does not appear from the testimony that the youth of any child in this case is such that combined with distance would constitute remoteness from the school building except in the case of Jane Valentine.

The only questions remaining to be decided is whether danger because of automobile traffic in addition to other factors named would constitute remoteness for any or all children of Appellants. The necessity for transportation because of dangerous highways has not previously been before the Commissioner for decision. The factors that contribute to remoteness in Foose *vs.* Holland Township Board of Education, namely, age, sex, condition of the roads, etc., are such as may increase the time necessary to reach a school building. A young child would require more time than an older child; a girl may require more time than a boy of the same age; a child in poor health would need more time than a child in good health, and hence the health of the child would also be a factor in considering the necessity for transportation. It is also true that very poor roads would require more time to traverse them than would good sidewalks or hard surfaced roads. Remoteness is therefore a relative term depending upon a reasonable time. It may, therefore, be conceived that traffic may be so constant and intensive over a limited road space as to delay the progress of a child and hence to contribute to remoteness. Danger does not in itself make a place remote unless it increases the time necessary to cover the distance to such an extent as to constitute remoteness. It seems, therefore, that only in its relation to delay can danger be considered and not because of the possibility of a child being hurt by automobiles.

Boards of Education are not authorized by law to provide for the safety of children in reaching school. While a Board should be concerned as to the safety of children and should report to the State Police or local officers the reckless use of highways, it is not directly responsible for the danger to pedestrians because of automobile traffic any more than it is responsible for sandy or muddy highways. Highway and street dangers demand parental concern and care of children to avoid accidents and also a civic enforcement of traffic laws rather than larger expenditures of public funds to provide transportation. While there may be danger to children because of the traffic on highways in this case, as there is now danger upon most of our State and county highways, the testimony does not disclose automobile traffic which would appreciably delay children in going to and from school.

It is therefore the opinion of the Commissioner that danger in itself does not constitute a necessity for transportation and that the various factors which may legally be considered in determining remoteness do not make necessary transportation for any of the children in this case, except Jane Valentine, for whom the Board is directed to provide transportation, and with this exception, the appeal is hereby dismissed.

March 17, 1927.

TRANSPORTATION OF PUPILS

WILLIAM L. FOOSE,

Appellant,

vs.

THE BOARD OF EDUCATION OF THE TOWNSHIP OF HOLLAND, IN THE COUNTY OF HUNTERDON,

Respondent.

O. D. McConnell, for the Appellant.
H. J. Able, for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The petition in this case charges that the Respondent has neglected and refused to provide proper school facilities and accommodations for the daughter of the Appellant, as required by law, in that it has not provided transportation for said daughter from her home to the railroad station at Bloomsbury.

Section 1 of Chapter 123 of the Laws of 1907 reads in part as follows:

"Each school district shall provide suitable school facilities and accommodations for all children residing in the district and desiring to attend the public schools therein. Such facilities and accommodations shall include proper school buildings, together with furniture and equipment, convenience of access thereto, and courses of study suited to the ages and attainments of all pupils between the ages of five and twenty years. Such facilities and accommodations may be provided either in schools within the district convenient of access to the pupils or as provided in sections 117, 118 and 119 of the act to which this act is an amendment."

Section 119 authorizes a board of education to send a child who has completed the course of study pursued in the schools in the district in which he or she resides to a school of a higher grade in another district, and pay a tuition fee. Sections 117 and 118 authorize a board of education to provide transportation for a pupil living remote from the school it is required to attend.

It is mandatory upon a board of education to provide suitable facilities and accommodations for all pupils between the ages of five and twenty years, but it is discretionary whether they shall be provided in schools within the district convenient of access to the pupils or by transportation to a school in another district. To comply with this requirement of the law a district must, in addition to schoolhouses or transportation, provide a course of study covering a period of at least twelve years, divided into three grades, commonly known as primary, grammar and high school grades. The School District of the Township of Holland provides in the schools within the district courses covering the primary and grammar grades, and provides for

the education of pupils who reside in the district and who have completed the grammar grade, by sending them to high schools in other districts.

In August, 1912, the Appellant requested the Respondent to make provision for the high school education of his daughter, she having completed the grammar school course.

When the Appellant presented his request he asked that the Respondent provide proper transportation for his daughter between her home and the High School. The Respondent expressed its willingness to pay carfare, but refused to make any provision for transportation between the home of the Appellant and the station at Bloomsbury.

After repeated requests by the Appellant for transportation to Bloomsbury, the Respondent, in December, 1912, offered to pay him the sum of one hundred dollars for the transportation of his daughter to Bloomsbury, during the school year of 1912–13. This he refused to accept and demanded that he be paid the sum of two hundred dollars.

The Appellant has transported his daughter between his home in Bloomsbury every day she attended the high school at High Bridge, except a few days when she walked, and has not received any compensation from the Respondent.

The questions to be determined are:

1. *Is transportation between the home of the Appellant and Bloomsbury necessary?*

2. *Is the amount demanded by the Appellant just and reasonable?*

3. *Has the Appellant a claim against the Respondent for services rendered?*

"1 *Is transportation between the home of the Appellant and Bloomsbury necessary?*"

It is impossible to fix any definite distance within which transportation is unnecessary, and beyond which it must be provided. The age and sex of the pupil, the condition of the roads, the distance, and, when part of the transportation is by car, the time of departure and arrival of trains, are all factors in determining the necessity for transportation.

The Appellant lives nearly four miles from the railroad station at Bloomsbury, on what is known as Musconetcong Mountain. The road bed is rough and in poor condition. The daughter of the Appellant was thirteen years of age in November, 1912. I am of the opinion that, under these conditions, the Board of Education is not providing suitable school facilities and accommodations when it refuses to transport the child between her home and the railroad station.

"2. *Is the amount demanded by the Appellant just and reasonable?*"

The charge of one dollar per day for providing a horse, carriage and driver, for two round trips, over a rough mountain road, the total distance traveled per day being nearly sixteen miles, cannot, by any stretch of the imagination, be deemed to be an unjust or unreasonable compensation. The amount offered by the Respondent, one hundred dollars, or about fifty cents per day, is an entirely inadequate compensation.

"3. *Has the Appellant a claim against the Respondent for services rendered?*"

Chapter 144 of the Laws of 1909 provides that "Every parent, guardian or other person having control of a child between the ages of seven and seventeen years inclusive shall cause such child to regularly attend a day school in which at least the common school branches of reading, writing, arithmetic, spelling, English grammar and geography are taught by a competent teacher, or receive equivalent instruction elsewhere than at school, unless such child is above the age of fifteen years and has completed the grammar school course (prescribed by the State Board of Education), and in addition thereto is regularly and lawfully employed in some useful occupation or service. Such regular attendance shall be during all the days and hours that the public schools are in session in the school district in which the child resides, unless it shall be shown to the satisfaction of the Board of Education of the school district in which such child resides, that the bodily or mental condition of such child is such as to prevent his or her attendance at school. If such child be under the age of seventeen years and has completed the grammar school course and is not regularly and lawfully employed in any useful occupation or service, such child shall attend the high school or manual-training school in said school district in which such child resides, if there be a high school or manual-training school in said district; if there be no high school or manual-training school in said school district, said child shall be transported to a high school or manual-training school as provided in the act to which this is an amendment."

Chapter 221 of the Laws of 1913 is a revision of the compulsory attendance law, but the provisions relating to the duty of a parent remain practically the same as in section above quoted. The Appellant was, therefore, compelled to make every reasonable effort to send his daughter to school or run the risk of prosecution as a disorderly person, under the provisions of Section 154 of the General School Law. The testimony shows that he made repeated demands upon the Respondent for suitable school facilities and accommodations for his daughter, and that the Respondent neglected and refused to provide them. He, therefore, in order that his daughter should not be deprived of an education, and in compliance with the law compelling him to send her to school, had her transported between his home and the railroad station at Bloomsbury. I am of the opinion that had the Appellant furnished this transportation without first having demanded that the Respondent perform its duty, he would not be entitled to any compensation, for the reason that a Board of Education cannot be held responsible for any expense incurred without its knowledge or consent. In this case, however, the Appellant made every effort to induce the Respondent to comply with the law, and the Respondent cannot now evade payment of just compensation on the ground that it has never consented to reimburse the Appellant for expenses incurred in transporting his daughter. In fact, the Respondent admitted that it was indebted to him when it offered to pay him one hundred dollars.

If the compensation offered by the Respondent had been adequate, the Appellant could have refused to accept it, for the duty of providing transportation rests in the Board of Education and not on the parent. The Appellant informed the Respondent that he would not accept less than one dollar per day. If the Respondent deemed that an unreasonable charge, it should have made a contract with some other person to transport the child. The Respondent made no attempt to comply with the law, except the offer of one hundred dollars, and this offer was not made until the County Superintendent of Schools stated that the district was in danger of having its State School moneys withheld.

Mr. Foose testified in part as follows:

"Q. What did they (the Board of Education) say with reference to transporting your daughter from your house to the station?

"A. They wouldn't do it unless they had to.

"Q. Who said that, Mr. Apgar?

"A. Yes, sir.

"Q. What is his name?

"A. Mr. Sylvanus Apgar.

"Q. Will you tell what Mr. Apgar said?

"A. Well, that's about all he said, they knew they had to transport her, but they weren't going to until they had to."

Mr. Apgar is a member of the Board of Education, and in his testimony admitted that they were a "little slow" in the matter.

If a Board of Education can ignore applications from parents for proper transportation for their children, and can neglect and refuse to provide suitable school facilities and accommodations for pupils, and then refuse to reimburse a parent for expenses incurred in sending his child to school, on the ground that it had never made any contract with him, it is possible for it either to deprive a child of an education, or to cast upon a parent a burden which the law places on the Board of Education.

I find that the daughter of the Appellant is entitled to transportation at the expense of the district from her home to High Bridge, and that the Appellant is entitled to receive from the Respondent the sum of two hundred dollars for expenses incurred by him in transporting his daughter between his home and the railroad station.

July 1, 1913.

TRANSPORTATION OF PUPILS

GEORGE BECKER,

Appellant,

vs.

THE BOARD OF EDUCATION OF THE TOWNSHIP OF HOLLAND, IN THE COUNTY OF HUNTERDON,

Respondent.

O. D. McConnell, for the Appellant.
H. J. Able, for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The petition in this case charges that the Respondent has neglected and refused to provide proper school facilities and accommodations for the son of the Appellant, as required by law, in that it has not provided transportation for said son from his home to the railroad station, either at Bloomsbury or Kennedy.

At the beginning of the school year of 1912–13 the Appellant requested the Respondent to make provision for the high school education of his son. In response to said request, the Respondent designated the High School at Phillipsburg, and said son has attended said High School during the current year.

The Appellant also requested that transportation for his son be provided, and the Respondent agreed to pay the railroad fare, but refused to pay for transportation between his home and the railroad station. Later, the Respondent offered to pay forty dollars for such transportation for the school year 1912–13, which offer the Appellant refused, and demanded the sum of two hundred dollars.

The son of the Appellant is over fifteen years of age, has completed the grammar school course, and is not regularly employed in any useful occupation or service. His home is about four miles from the railroad station at Bloomsbury, and about four and one-quarter miles from the railroad station at Kennedy. The questions raised in this case are the same as those in the case of Foose *vs.* The Board of Education of Holland Township, decided this day, and, for the reasons stated in the decision in that case, I find that the son of the Appellant is entitled to transportation at the expense of the district, from his home to Phillipsburg, and that the Appellant is entitled to receive from the Respondent the sum of two hundred dollars, for expenses incurred by him in transporting his son between his home and the railroad station.

July 1, 1913.

TRANSPORTATION OF PUPILS

FREDERICK STAATS

vs.

BOARD OF EDUCATION OF MONTGOMERY TOWNSHIP, SOMERSET COUNTY.

DECISION OF THE COMMISSIONER OF EDUCATION

No formal complaint, or answer, has been filed in this case, but at a hearing before me it was agreed that Frederick and Lloyd Staats, sons of the complainant, were residents of Montgomery Township; that they had taken the eighth grade work in a school in said Township during the school years of 1911–1912 and 1912–1913; that they took the county examination at the close of the school year of 1912–1913, but failed to pass; that the Appellant applied to the Respondent to have his sons sent to the High School at New Brunswick, which application was refused, and that the sole reason for such refusal was that they had failed to pass the county examination.

It was admitted by the Respondent that at the time the application was received no rule had been adopted by it requiring a pupil to pass the county examination as a condition precedent to promotion to a High School, but claimed that such had been the custom for some years. A rule to this effect has recently been adopted.

The law requires a Board of Education to provide suitable school facilities for all children residing in the district and desiring to attend school. It further provides that when a district does not maintain a High School that pupils who have completed the grammar school course shall be sent to a high school in another district, and that the district in which they reside shall pay the cost of tuition and also of transportation, if transportation be necessary.

The law gives to the local Board of Education, in the first instance, the right to decide whether or not a pupil should be promoted to the high school, but in exercising this right great care should be taken not to unnecessarily retard the progress of a pupil, whose school life, even under the most favorable circumstances, is very short.

Examinations are held each year. The questions are prepared by the Commissioner of Education. In Somerset County pupils who pass these examinations are granted certificates by the County Superintendent. These examinations are quite as much a test of the efficiency of the schools and the teachers as they are of the progress of the pupils. An examination is only one factor in determining the right of a pupil to promotion. A far more reliable test is the work actually done during the year.

I am of the opinion that refusing to promote a pupil to the high school for the sole reason that he has failed to pass the county examination is not only unwise but that it may result in depriving him of suitable school facilities For this reason the rule adopted by the Respondent is null and void.

The question to be decided is, does the record of the sons of the Appellant show that they were entitled to promotion to a high school? The

reports of their work in the eighth grade during the school year of 1912-1913 are remarkably good, with the exception of the month of September, which usually is low, neither boy had a monthly average below eighty-one, the general average of Lloyd Staats was 86 6-9, and of Frederick Staats, 87 4-9. It appears from the reports of the Superintendent and Principal of the schools in New Brunswick that both boys are doing good work except in English, and that their general standing is equal to that of other pupils in the same class.

The Respondent erred in refusing to provide high school facilities for the sons of the Appellant.

It is ordered that the Respondent provide proper High School facilities for Lloyd and Frederick Staats, and that it pay to the Appellant any expenses incurred by him in sending said boys to the High School at New Brunswick during the current school year.

February 20, 1914.

DECISION OF THE STATE BOARD OF EDUCATION

1. It appears in this case that two boys of the Respondent failed to graduate from the eighth grade of the Grammar School in Montgomery Township, but in spite of this failure to graduate, the Respondent insisted upon their being promoted and sent to a High School at New Brunswick.

2. The Appellant agreed to send them there and passed a resolution to the effect that the Board of Education of Montgomery Township would pay the transportation of the boys ($4.03 per month), if the boys passed the entrance examination at the New Brunswick High School and if the Respondent paid the difference in tuition between New Brunswick and Bound Brook or Hopewell.

3. The Respondent was present when this resolution was passed and assented to it.

4. The boys went to New Brunswick, but were given no examination and passed no examination. Without the knowledge or consent of the Appellant they were placed in the school on trial. They are apparently still there "on trial."

5. Before the first of the year 1914, Mr. Staats, the Respondent, presented the Appellant with a bill for full tuition, instead of paying the difference as agreed, and *full* transportation from his house to New Brunswick and return. This bill the Appellant declined to pay. The Respondent then brought this action.

6. The State Board of Education holds that a local Board of Education has authority to prescribe its own rules for promotion. It is given that express right by statute. The Appellant was within its rights in stipulating that the boys should pass an examination and thus demonstrate their fitness to attend High School. The result of the subsequent trial at New Brunswick, whether good or bad, is beside the question. The Appellant had stipulated for an examination—not a trial. If the ruling of the local School Board in this case is not binding, then anyone could send his children to what school he pleased, at what expense he pleased, and afterward send the bill to the local School

Board for payment. The Respondent should have lived up to his agreement with the Appellant. Instead of doing so he took upon himself the right and the risk of sending his boys to the High School at New Brunswick and incurring expense therewith. He has not come into court with clean hands and his contention should not be sustained.

The decision of the Commissioner of Education is reversed.

April 4, 1914.

TRANSPORTATION OF PUPILS

ELSEY C. POLK,

Appellant,

vs.

BOARD OF EDUCATION OF CENTRE TOWNSHIP,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

Charles C. Polk, son of the Appellant, completed the grammar school course pursued in the schools under the care of the Respondent in June, 1909, and application was made to the Respondent that the said Charles C. Polk be assigned to a high school, there being no high school in Centre Township. The Respondent assigned him to the high school at Haddon Heights, said high school being the most convenient high school he could attend. He was denied admission to said high school for the reason that the school was full and could not accommodate him. Thereupon, the Appellant laid the matter before the Respondent at a meeting held September 14, 1909, and at said meeting a resolution was adopted that "Charles C. Polk should attend the Camden High School at the expense of the Board of Education of Centre Township." In pursuance of said resolution, the said Charles C. Polk attended the Camden High School from September, 1909, until June, 1913. It appears that the Respondent has paid the entire cost of tuition of Charles C. Polk in the Camden High School, and that the Appellant has paid the entire cost of his transportation, amounting to $139.00.

The Appellant presented to the Respondent a bill for this amount and payment was refused. The reason assigned for such refusal was that at a meeting held September 22, 1909, the Respondent rescinded its action taken on September 14th, and adopted another resolution "permitting Elsey C. Polk to send his son to Camden High School provided he pay the difference in tuition and transportation. In explanation of its action of September 22d, the Respondent states that the cost of tuition in the Camden High School is $70.00 per year, and the cost of transportation $40.00 per year, while the cost of tuition in the Haddon Heights School is $40.00 per year, and the cost of transportation $20.00 per year, and claims that the Respondent cannot be compelled to pay more for tuition and transportation than is necessary to send a pupil to the nearest high school, and that when a pupil attends a high school other

than the one nearest his residence, the difference in cost must be paid by the parents of the pupil.

The Appellant prays that the action of the Respondent on September 22, 1909, be declared to be null and void, and that the Respondent be directed to pay to him the amount expended by him for the transportation of his son to the Camden High School.

The law provides that a Board of Education shall provide suitable school facilities and accommodations for all children of school age residing in the district and desiring to attend school. It further provides that such facilities and accommodations may be provided in schools within the district, or by the payment of the cost of tuition for a child assigned to a school in another district, and that the district shall also pay the cost of transporting the pupil to and from school, if transportation is necessary.

It is admitted that there is no high school in Centre Township, and that transportation was necessary whether the son of the Appellant attended the Camden High School or whether he attended the Haddon Heights High School.

The questions to be decided are:

First. Is the liability of the Respondent to be measured by the cost of sending a pupil to the nearest high school, and

Second. Is the Appellant bound by the action of the Respondent at its meeting on September 22, 1909?

If a district does not maintain a course of study suited to the age and attainments of a pupil it must send such pupil to a school in another district and must pay the entire cost of tuition and transportation. In selecting the school a pupil is to attend, the Board should usually select the school most convenient of access by the pupil; provided it has the proper course of study, and a parent has no right to insist that his child shall be sent to another school simply because he happens to prefer it. He may, however, with the consent of the Board of Education, send his child to the school he prefers, provided he agrees to pay the difference in the cost of tuition and transportation.

If there had been room in the Haddon Heights School, and the Appellant had sent his son to Camden, the Respondent would not have been liable for any expense incurred beyond the cost of sending him to the Haddon Heights School.

It appears that the Appellant was willing that his son should attend the Haddon Heights School, and that he sent him there, and that he was refused admission by reason of the lack of room. The Haddon Heights School being full, the Respondent was compelled to assign the son of the Appellant to another school, and, in fact, did so by its resolution of September 14, 1909. The Appellant certainly cannot, under such conditions, be held liable for the increased cost of sending his son to the Camden school. The Appellant is not bound by the action of the Respondent taken September 22, 1909.

As hereinbefore stated, it was the duty of the Respondent to assign the son of the Appellant to a convenient high school, and that in pursuance thereof it did actually assign him to the Camden High School. The Appellant could

not be held liable, except by agreement, for any portion of the expense. There is no evidence that he ever entered into such an agreement.

A Board of Education cannot compel a parent to pay for the transportation of his child to and from school even though the Board agrees to reimburse him. A parent may legally make such an agreement, and such is the general practice, particularly when the transportation is by trolley, but if the parent refuses, the Board must purchase the transportation.

If the Appellant had not applied to the Respondent for tuition and transportation for his son, but had sent him to the Camden School without its knowledge or consent, he would have no claim for the amount expended by him.

If the action of the Respondent on September 22d were sustained, the Appellant would be compelled to pay a portion of the cost of providing his son with suitable school facilities, or if he refused to advance the cost of transportation, his son would have been deprived of an education to which he legally was entitled.

The Appellant performed his full duty when he made the application in 1909, and he was justified in sending his son to the Camden School. He is entitled to be reimbursed by the Respondent to the full amount expended by him for the transportation of his son.

May 12, 1914.

TRANSPORTATION OF PUPIL

WILLIAM E. SEARLES,

Appellant,

vs.

BOARD OF EDUCATION OF WASHINGTON TOWNSHIP, MORRIS COUNTY,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

William E. Searles, the Petitioner in this case, appeals to the Commissioner of Education from a decision made by the Board of Education of Washington Township, Morris County, in refusing to pay for the transportation of his daughter, Mabel E. Searles, to the public school at Long Valley, in said Township, which he claims is located about two and one-half miles from his home.

This case was first submitted to the Commissioner of Education on petition and answer in July, 1919. In the case originally as presented on petition and answer the question of the County Superintendent making allowance of three-fourths of the cost of transportation was an element, and in the decision rendered by the Commissioner he also regarded the question of the allowance by the County Superintendent in his annual apportionment of money as provided in the School Law. It was contended by the Board of Education in the answer to the petition of appeal in the original papers that the refusal on the part of the Board to pay Mr. Searles $120 for the trans-

portation of his daughter, as agreed in a resolution of the Board, was because of the refusal on the part of the County Superintendent to make an apportionment allowance.

The decision of the Commissioner of Education was against the Appellant because of this element in the case. An appeal was then taken by the Appellant to the State Board of Education, and after considering all the papers the State Board of Education remanded the case to the Commissioner of Education for a new hearing to determine the necessity for transportation, and this regardless of the action of the County Superintendent.

A hearing was accordingly held at Morristown on Thursday, April 29. At the hearing several witnesses were examined and their testimony transcribed. All of these witnesses testified to the fact of the remoteness of William E. Searles's residence from the school at Long Valley, in Washington Township, and it was given in evidence that the distance in miles was at least two and one-half, and by some witnesses it was stated that the Petitioner lived two and six-tenths miles from the schoolhouse. In addition to the matter of distance there was also cumulative testimony to the fact that road conditions were bad in that locality most of the year, and that the highway was a lonesome one. Witnesses further testified that in their opinion William E. Searles should be granted transportation allowance.

In the minutes of a meeting of the Board of Education of Washington Township, held on August 5, 1918, the following resolution appears:

> "Moved, that Louis Roberts, Harvey Ort and William Searles each be given $120 for the transportation of their children to school for the school year of 1918."

This resolution has no qualifications or restrictions whatever, and it does not appear in the resolution or anywhere in the minutes that the offer was conditioned upon the apportionment of three-fourths of the cost of transportation by the County Superintendent. This resolution was never rescinded or in any way modified at any subsequent meeting of the Board of Education.

It thus appears that the Washington Township Board of Education admitted the necessity for transportation in this case, and that, furthermore, the Board actually agreed in the resolution above quoted to pay to William E. Searles $120 for the transportation of his daughter to the school at Long Valley for the school year 1918-19.

The law commands that suitable school facilities and accommodations, which shall include proper school buildings with furniture and equipment, convenience of access thereto, etc., shall be furnished by the board of education of the district in which the child resides. The law therefore clearly requires that a suitable building, placed so that it may be convenient of access to the home of the child, be furnished by a board of education. A board of education has, however, under the law an alternative of furnishing transportation in lieu of a school building convenient of access to the child. In other words, the school building must be placed near to the residence of the child or the child must be brought to the school, and it is

the duty of the board of education to see that one or the other of these facilities is provided.

In this case it is admitted by the Board of Education that the school building at Long Valley is not convenient of access to the home of William E. Searles, and such being the case, the Board must furnish transportation or an allowance for transportation to Mr. Searles.

Since the Board of Education admits that there is necessity for transportation in this case because of the school not being convenient of access and since it has passed a resolution, which was never rescinded, to pay to William E. Searles $120 as a transportation allowance, the Board is bound to furnish this transportation allowance regardless of any action on the part of the County Superintendent. The matter of the allowance by the County Superintendent is a question in itself.

Considering the matter, therefore, entirely separate from what action the County Superintendent may take in the exercise of the discretion which the law gives him of apportioning three-fourths of the cost of transportation, the Commissioner of Education holds that it is the duty of the Board of Education of Washington Township to carry out the agreement made by resolution of the Board to pay to William E. Searles the sum of $120 for the transportation of his daughter, Mabel E. Searles, to the school at Long Valley for the school year 1918-19.

The appeal is hereby sustained.

May 20, 1920.

APPORTIONMENT FOR TRANSPORTATION

BOARD OF EDUCATION OF THE BOROUGH OF WEST LONG BRANCH,

Appellant,

vs.

COUNTY SUPERINTENDENT OF SCHOOLS OF MONMOUTH COUNTY,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

West Long Branch school district is a Borough which was formerly a part of Eatontown Township. While it was a part of the latter Township there was a school located in the village of West Long Branch, consisting of two rooms, and a school at Kensington Park consisting of one room. After a portion of Eatontown Township became the Borough of West Long Branch the school located in the Borough was enlarged by the addition of two or three rooms, and after the enlargement of the West Long Branch school the primary school at Kensington Park was closed and the children brought from that section to the West Long Branch school.

Allowance for transportation was made by the County Superintendent at first in his apportionment of school moneys, but in the year 1918-19 the County

Superintendent refused to allow three-fourths of the cost of such transportation to the district. West Long Branch Board of Education appealed the case to the Commissioner of Education in May, 1919, and decision was rendered on August 8, 1919, by the Commissioner sustaining the County Superintendent in his refusal to apportion the allowance for transportation. Appeal was then taken from the Commissioner's decision to the State Board of Education, and the State Board in April, 1920, remanded the case to the Commissioner for hearing, instructing him to secure evidence by way of affidavit or oral testimony to determine whether the children now required to attend the school at West Long Branch are so remote as to call for vehicular transportation from their homes in the Kensington Park section. The State Board of Education incidentally advised that the County Superintendent and the local Board of Education consider together whether the increase in the number of pupils in the primary grades warrants a reopening of the Kensington Park school, which was closed some years ago.

A hearing was accordingly held by the Commissioner of Education on November 9, 1920, in the Town Hall at Long Branch, at which the exact conditions were brought out. The testimony of a number of witnesses was taken. First, it was found that there were some ninety-odd children transported from the Kensington Park section to the West Long Branch school, the greater part of whom were in the primary department. At the hearing there were present about forty of these children, ranging in age from five to nine years, all of whom were in the primary grade at the West Long Branch school. Many witnesses, who were parents of children in the West Long Branch school and residents of the Kensington Park section, were called to give testimony as to the necessity for transportation. All of these witnesses testified to the effect that transportation was demanded for their children, and some of the witnesses stated that if their children were to be compelled to walk to the West Long Branch school they would feel obliged to send them to the adjoining school district of Long Branch and pay their tuition themselves.

Much testimony was taken as to the bad condition of the road over which it would be necessary for the children to travel if there were no means of transportation afforded. It was generally testified that a piece of this road extending for about seven-eighths of a mile was bad in the winter time.

The counsel for the School Board showed through the principal that better school facilities could be provided at the West Long Branch school than would be provided if the Kensington school were kept open. These better facilities consisted mainly of playground facilities and supervision. The principal of the West Long Branch school testified that there were 57 children on the roll in one room and that the first and second grades were in that room with one licensed teacher in charge of them, assisted by an unlicensed teacher or monitor.

The question also of reopening the school at Kensington Park was taken up and some of the witnesses stated that they preferred to have the latter school reopened if a good teacher could be obtained.

As a result of all the testimony taken there is but one conclusion that can be reached as to the existing conditions, and that is that these children are

because of their ages certainly remote from the school at West Long Branch; and that, if no other school facilities are available in the district, transportation should be furnished.

The other question involved is one of considerable gravity and should be considered from the standpoint of the whole system of education as provided in the county unit, so far as finances are concerned. The provisions of our school law are such in the matter of financing the schools as to make the county the unit from the standpoint of the public moneys apportioned to the school districts.

The law pertaining to schoolhouses is found in Article X of the School Law (Edition of 1918) and provides in part as follows:

> "Each school district shall provide suitable school facilities and accommodations for all children residing in the district and desiring to attend the public schools therein. Such facilities and accommodations shall include proper school buildings, together with furniture and equipment, convenience of access thereto, and courses of study suited to the ages and attainments of all pupils between the ages of five and twenty years. Such facilities and accommodations may be provided either in schools within the district convenient of access to the pupils or as provided in sections one hundred and seventeen, one hundred and eighteen and one hundred and nineteen of the act to which this act is an amendment."

Section 117 of the School Law referred to in this quotation provides that: "Whenever in any district there shall be children living remote from the schoolhouse, the board of education of such district may make rules and contracts for the transportation of such children to and from school."

Thus it will be seen by the above quoted law that the thing that is mandatory upon a board of education is the furnishing of proper school facilities including schoolhouses convenient of access. When this cannot be done, then the board must resort to the alternative of furnishing transportation in lieu of schoolhouses convenient of access.

The schoolhouse in the borough of West Long Branch is not convenient of access to the children of Kensington Park, and it can only be made convenient of access by means of transportation, which to conform with the law a board of education can be compelled to furnish. Under the existing conditions, therefore, the children residing in the Kensington Park section, and ranging in age between five and nine years, are in the judgment of the Commissioner of Education remote from the West Long Branch school, and under such existing conditions transportation must necessarily be furnished.

Whether the County Superintendent, however, should apportion to the West Long Branch school district three-fourths of the cost of such transportation is altogether a different question. It is for the County Superintendent in his discretion to determine whether there is necessity for such transportation such as to justify him in apportioning three-fourths of the cost thereof.

There is a school at Kensington Park, a primary school, erected for the very purpose of accommodating the children of that section when it was a part of Eatontown Township. It was provided because this section was a center of population and because it was remote from other schools in Eatontown Township. When the borough was formed Kensington Park still remained a growing center of population, so that according to the records there are ninety or more pupils transported from this section to the West Long Branch school.

The question then, though apparently involved, is really a simple one. It is this: When a school is closed in a center of population and the children are transported to a school two miles more or less distant, shall the County Superintendent apportion the county school moneys to such school district, when it chooses to close a school at a point where many children reside? There is no question as to the right of a board of education to close a school and have the children transported to another school; it is thus furnishing, as the law commands, school facilities by taking the children to a distant school rather than having the school placed so as to be convenient of access to the children. When the county funds are apportioned, however, the question arises immediately as to the right of the county to furnish proper school facilities in such cases.

At the hearing before the Commissioner of Education the County Superintendent of Schools plainly gave it as his opinion that the school at Kensington Park should be reopened for the primary children, thus obviating the necessity of transportation to the West Long Branch school. This, it appears to the Commissioner, is sound administrative judgment. If a board of education chooses to locate its schools in such places as to make transportation of pupils necessary, then such board should provide the transportation itself, which would be carrying out the general provisions of law which require the furnishing of proper school facilities either by bringing the school to the children or the children to the school.

With this view of the case, it is the judgment of the Commissioner of Education that the County Superintendent of Schools of Monmouth County acted with sound discretion in concluding that the necessity for transportation was of the Board's creation and was not such necessity as the law contemplated when it provided for apportionment of school moneys in part payment of transportation. The Commissioner therefore concurs in the conclusion reached by the County Superintendent in his refusal to apportion three-fourths of the cost of transportation to the school district of the Borough of West Long Branch.

December 22, 1920.

TRANSPORTATION AND TUITION

C. W. BLUE,

Appellant,

vs.

THE BOARD OF EDUCATION OF THE BOROUGH OF CLIFFSIDE PARK,

Respondent.

For the Appellant, *pro se.*
For the Respondent, John F. Kelly, District Clerk.

DECISION OF THE COMMISSIONER OF EDUCATION

In this case it appears that the school district of the Borough of Cliffside Park had no high school up to the year 1913, the course of study in this district including only the eighth grade. The pupils, after completing the course of study prescribed up to and through the eighth grade, were permitted to attend the Englewood High School, and the Board of Education of the Borough of Cliffside Park paid for their tuition in and transportation to the high school grades of the Englewood district. In September, 1912, the Borough of Cliffside Park established a one-year high school course in its own district, with the understanding that the board would ultimately provide for a full four-year high school course of study.

The appellant in this case had a son, Robert E. Blue, who in June, 1912, completed the eighth year course of study in Cliffside Park, of which borough he is a resident. Robert E. Blue, instead of attending the first year high school in his own district, entered the high school of the City of Englewood, and there pursued his studies in the first year high school. The said Robert E. Blue has continued to pursue his studies in the Englewood high school through the second and third years. In the meantime, Cliffside Park had established a second and third year high school course in its district. The first year high school course in the Cliffside Park school was regularly registered as of one year's work, during the year 1913. In April, 1915, the school was approved as doing three years of high school work.

The rules of the State Board of Education require, before approval can be had of a three-year high school, that there shall be carried on in the district an actual three years of work; that is to say, it is not an approval of a three-year course of study, but an approval of three years of work actually done. It thus appears that Cliffside Park has established an approved three-year high school, the first year of which began in September, 1912. The law provides that any child who shall have completed the course of study pursued in the schools of the district in which he or she shall reside may, with the consent of the board of education of such district, have his or her education completed in another district.

The claim made by the appellant is that the cost of transportation and tuition in the case of Robert E. Blue should be paid by the Borough of Cliffside Park, because the school was not an approved school until April, 1915.

It is shown above that the school, under the rules of the State Board of Education, could not be approved until after the actual three-year school had existed. The approval in April, 1915, is evidence that the school in the Borough of Cliffside Park had been maintained as a three-year high school since the year 1912. It therefore follows that Robert E. Blue did not complete the course of study in his own district and, because of this fact, he cannot claim under the law to have the tuition and transportation paid by the district in which he resides for his education in an adjoining district

The appeal, therefore, is dismissed.

July 28, 1915.

ALLOWANCE FOR TUITION AND TRANSPORTATION

WILLIAM W. WALTERS,

Appellant,

vs.

THE BOARD OF EDUCATION OF THE BOROUGH OF DUNELLEN,

Respondent.

William W. Giddes, for the Appellant.

A. J. Hamley, District Clerk, for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

Leslie Vail was suspended from the Dunellen grammar school by the principal on February 28, 1912. His grandfather, William W. Walters, is the Appellant in this case.

The reason given for the suspension was that the boy had been continuously disobedient and troublesome in his classes. He had been reported to the principal on several occasions. The principal had visited his mother and tried in various ways to have the boy behave himself properly in school. His suspension was reported to the Board of Education which met on March 5, 1912. The Board at this meeting, by resolution, agreed to hold a special meeting on March 12, in order to give a hearing in the case of the suspension. The boy's mother, Mrs. Lydia Vail, and his grandfather, William W. Walters, were notified of this meeting. The boy appeared at the meeting with his mother, but refused to promise that he would behave himself, whereupon the Board continued his suspension indefinitely. His grandfather, Mr. Walters, entered the boy in the Plainfield school as a tuition pupil in the latter part of March, 1912. The boy has remained in the Plainfield school ever since, and his tuition and transportation have been paid by the Appellant. The boy's conduct in the Plainfield school, as reported by the teachers, is greatly improved. No fault has been found with him in this respect. The conditions upon which he was accepted at the Plainfield school were that he must be obedient and respectful to his teachers or he would not be permitted to remain.

This appeal is made to compel the Board of Education of Dunellen to reimburse Mr. Walters for the amount of tuition which he has paid the Plainfield Board of Education and for the amount expended for transportation to the Plainfield school. There has been no request by either the mother of the boy or his grandfather to have him reinstated in the school at Dunellen. The appeal that is made asks not for reinstatement now, but, as stated, for reimbursement for the amount expended for tuition and transportation. At the hearing in the case evidence was given that the boy had been troublesome, and that only as a last resort was he suspended from school. There was no evidence given that there had ever been any attempt on the part of his mother or grandfather to have the boy return to the Dunellen school. It would have been entirely legitimate to have made an appeal to the Commissioner to have the boy reinstated in his own school at Dunellen. Instead, a choice was made of a school in another district, and tuition and transportation were paid by Mr. Walters.

Reimbursement for tuition and transportation paid for attendance in the Plainfield school for an education in the grammar grades which is furnished in the Dunellen school is out of the question. It cannot be done and should not be done. If this could be legally claimed suspension would be inadequate as a punishment and as a thing that would tend to maintain the discipline of the school. The Appellant, therefore, has no claim for the payment of tuition and transportation on the Board of Education of the borough of Dunellen.

The appeal is dismissed.

December 22, 1915.

DECISION OF STATE BOARD OF EDUCATION

Appellant's grandson was suspended in March, 1912, from a school in Dunellen, in which place he was a resident. Thereafter he attended a school in Plainfield, and Appellant, with whom he resided and by whom he was supported, seeks an order directing the Board of Education of Dunellen to reimburse him for tuition and transportation charges thereby incurred. From a decision of the Commissioner denying the application this appeal is taken.

For some years prior to March, 1912, the boy was continuously and wilfully disobedient to his teachers and principal.

At a special meeting of the Board of Education of Dunellen held in March, 1912, of which notice was given to the Appellant and also to his daughter, the mother of the boy, and at which all three were present, the boy was suspended. No appeal was taken from the suspension and no application was made for reinstatement.

To support his application that he be reimbursed for tuition and transportation charges Appellant cites no authority. We know of none. It seems to us that the application is entirely without merit, and to grant it, we believe, would be destructive to school discipline.

In our opinion the Commissioner of Education properly denied it and his decision therefore is affirmed.

April 1, 1916.

ALLOWANCE TO PARENT FOR TRANSPORTATION

W. CLAYTON SMITH,
Appellant,
vs.

THE BOARD OF EDUCATION OF
PILESGROVE TOWNSHIP,
Respondent.

Mr. Atkinson, for the Appellant.
J. Forman Sinnickson, for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

This case was decided in favor of the Appellant on the submission of petition and answer, without a formal hearing. The Pilesgrove Township Board of Education appealed to the State Board of Education from the decision of the Commissioner. Counsel for the Board complained that a hearing was not given and for that reason proper proof of the facts was not submitted. The State Board of Education remanded the case to the Commissioner with a request that a de novo hearing be granted by him. Accordingly, a hearing was held at Salem on September 13, 1916.

It appears that Louie M. Smith, daughter of W. Clayton Smith, attended the high school at Woodstown, in Pilesgrove Township, during the years 1911–12, 1912–13, 1913–14 and 1914–15. The Board of Education of Pilesgrove Township paid the cost of her transportation to the high school during the years 1911–12 and 1912–13. On October 6, 1913, the Board passed the following resolution:

"*Resolved,* That for the purpose of this Board in the transportation of pupils to attend the high school that it construe the word remote in the law providing for the same to mean a distance greater than five miles from the home of the pupil to the said high school in Woodstown measured by the most direct line of travel; and that the said Board will not hereafter pay for the transportation of any pupil to said high school except they reside a greater distance than five miles from said high school. Provided that this shall not apply to any pupil whose parents are without the usual means of transportation or unable financially to provide the same."

Refusal to pay transportation is based on two provisions in the above resolution: first, the said Louie M. Smith is within the five mile limit named in the resolution; and, second, the parents of Louie M. Smith have the usual means of transportation or are financially able to provide them.

It is admitted that the distance from the home of Louie M. Smith to the high school at Woodstown is 4.2 miles. This is a distance that under the law is clearly remote from the high school. The law provides that suitable school facilities shall be furnished all pupils between the ages of five and twenty years residing in a school district who desire to attend school. The

law very justly disregards the financial ability of the parent to pay for such school facilities. The resolution passed by the Board is in conflict with the provisions of the law because the law provides that "public schools shall be free to all persons over five and under twenty years of age who shall be residents of the district." Schools must be provided that are convenient of access. If such schools are not provided in a district in which a child resides, but are provided in a neighboring district, transportation must be furnished if such schools are remote. A school may be remote though it be in the district in which a child resides, as in this case.

It is argued by counsel that the furnishing of transportation is optional with the Board of Education. It is claimed that the law does not directly command that transportation be furnished. In a sense this is true. The law, however, does command that suitable school facilities and accommodations, which shall include proper school buildings, together with furniture and equipment, convenience of access thereto, etc., shall be furnished. If there is not "convenience of access" to the school the Board may furnish transportation. The thing the Board of Education is commanded to do is to provide a suitable building, placed so that it may be convenient of access to the home of the child. It is only as an alternative proposition that a Board of Education under the provisions of the law may choose to furnish transportation in lieu of a school building convenient of access to the children. The Board must provide either one or the other.

I am of the opinion that a distance of 4.2 miles is remote and that transportation should be allowed to the parents of Louie M. Smith for the years 1913–14 and 1914–15. The amount asked, namely, $40 per year, is a reasonable amount, and is the sum that was actually paid by the Appellant, as appears by the evidence, for the transportation of his daughter during the two years in question.

September 28, 1916.

ALLOWANCE FOR TUITION AND TRANSPORTATION

M. S. BLACK ET AL.,

Appellants,

vs.

THE BOARD OF EDUCATION OF THE BOROUGH OF ELMER,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The Borough of Elmer is a school district providing a full course of study through the grades, and, in addition thereto, has a regularly approved four-year high school course of study. The objection raised by the Appellants in this case is that the course of study in the high school does not include classical languages and a commercial course. For this reason the Appellants ask the Board of Education to select a high school outside the borough

limits that has a course of study with a larger variety of subjects, and to furnish transportation to such school and tuition therein for nine children. This the Board of Education refuses to do, on the ground that there is a high school within the district approved by the State, with a full four-year course of study.

Article IX, section 143, of the School Law reads in part as follows:

Any child who shall have completed the course of study pursued in the schools in the district in which he or she shall reside may, with the consent of the Board of Education * * * be admitted to a school of higher grade.

It is not claimed by the Appellants that the course of study in the Elmer high school has been completed by the children desiring to attend high school in another district. It appears that the Elmer high school is a small high school, and, therefore, cannot have the variety in courses of study that large high schools have without going to considerable extra expense. The money required may be furnished by taxation ordered by the voters. The Board of Education has the right to submit to the voters the question of voting moneys in order that a varied and extensive course of study may be maintained in the schools. This question, as I understand it, has been submitted to the voters, and they have voted against the proposition. The Board of Education cannot provide a varied and extensive course of study without the money to pay for it. Neither the Commissioner of Education nor the State Board of Education has power to prescribe a course of study for a high school. The State Board has power only to approve a high school course for two purposes: first, for the apportionment of moneys; second, for the purposes of passing on academic credits to be allowed in compliance with the laws relating thereto.

For these purposes the State Board has approved the Elmer high school as one that provides a four-year high school course in certain branches of study. This course does not include the classical languages nor commercial subjects. These subjects can be placed in the course by the local Board of Education with the approval of the County Superintendent, and by no other authority.

The Board of Education could not under the law be allowed an apportionment of $25 for a child whose high school tuition was provided in another district while it was maintaining an approved high school in its own district, because the course of study in its own district had not been completed.

I find that the Board of Education has provided a course of study suitable to the ages and attainments of all its pupils through the eight grades and for four years of high school, in compliance with section 152 of the School Law. This course may be enlarged so as to include the classical languages and commercial subjects, providing the district is willing to furnish the means for supporting such courses.

It is my opinion that the Board of Education of the Borough of Elmer is not justified under the law in providing for transportation to and tuition in another high school while maintaining an approved high school in its own district.

October 20, 1916.

DECISION OF THE STATE BOARD OF EDUCATION

The main facts in this case were recited in a report of the Advisory Committee to this State Board of Education printed in the minutes of this Board under date of February 3, 1917. They may be briefly rehearsed.

The Appellants, in July, 1916, requested the Board of Education of Elmer to designate a high school in a neighboring district that their children might attend where classical and commercial subjects were taught, those subjects not being taught in the Elmer high school. They further asked that transportation and tuition be furnished their children to such school. The application was denied. Appellants appealed to the County Superintendent and to the Commissioner of Education, and both appeals were dismissed. They then came before this State Board of Education on appeal, asking that the Elmer Board of Education be asked to designate a high school where Elmer children could attend and pursue commercial and classical subjects, and that the four-year curriculum at Elmer be disapproved and a two-year course substituted. Finally, the Appellants, before this Board, interjected a new issue in asking that they be reimbursed by the Board of Education of Elmer in the sum of $268 for expense incurred during the year 1916–17 in sending their children to Glassboro high school—an action taken on their own initiative and without the consent of the Elmer Board of Education.

The four-year curriculum of the Elmer high school was approved by the State Board of Education October 18, 1913. A slight modification was made in 1914–15, and the curriculum again approved September 12, 1914. In 1915–16 the Elmer Board desired to substitute general science for physical geography as the first-year science subject, and this was also approved December 2, 1916. In addition to these changes, and in response to the Appellants' appeal, the State Board of Education cited the Elmer Board of Education to appear at Trenton on March 3, 1917, and show cause why the approvals of the four-year high school at Elmer should not be withdrawn or the school reduced to a two-year or three-year high school. At that hearing all the parties, including the Appellants, were represented, the case was gone into at considerable length, and in the end a compromise was effected whereby the Elmer Board of Education was to attempt to meet the objections of the Appellants by a further revision and extension of the Elmer high school curriculum. This extension required time for its accomplishment, and it was understood that this appeal should remain undecided pending the carrying out of the proposed new additions and extensions to the curriculum. The new additions and extensions have been reported from time to time as progressing toward completion.

But, notwithstanding the attempt to meet the Appellants' wishes as to increased curriculum at the Elmer high school, the Appellants again came forward, in recent requests, asking that their appeal be decided by this State Board of Education and that their demand for $268 expense incurred in sending their children to Glassboro high school be adjudicated.

1. As to the claim for $268 expense incurred, it is a new issue, one that has not been heard or passed upon by the Commissioner of Education, and one that cannot properly be interjected over his head in an appeal to this State

Board of Education. This Board is an appellate court and does not undertake to hear new issues on appeal.

2. Without entering again into the merits or shortcomings of the Elmer high school curriculum, the record shows that the school stands approved by the State Board of Education as a four-year high school. We do not think that the Board of Education of Elmer would be justified in furnishing transportation and tuition for its pupils to another high school outside of its district while maintaining an approved high school within its district. It receives money from the State to maintain its present high school and cannot in reason ask the State for money to transport pupils from that high school to a school in another district. The one act would undo the other.

3. The law in effect places the matter of transportation (and tuition) of pupils to a neighboring district in the hands of the district boards of education and the county superintendents. Their consent to a transfer must be obtained. If individuals in a community, without the consent of their local board or county superintendent, take it upon themselves to send their children to a district other than their own, they do so at their own risk.

The decision of the Commissioner of Education is affirmed.

October 6, 1917.

ESTOPPEL FOR DISTRICT'S CLAIM OF HIGHER TUITION IN ABSENCE OF CHANGE IN TERMS

BOARD OF EDUCATION OF THE BOROUGH OF LODI,

Appellant,

vs.

BOARD OF EDUCATION OF THE CITY OF GARFIELD,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

This case, a hearing in which was conducted by the Assistant Commissioner on April 21, 1927, in the City of Hackensack, reveals the following facts:

The School District of the Borough of Lodi, which has grammar schools of its own but no high school, has for a number of years been sending its high school pupils to other districts including the City of Garfield at an annual tuition charge, which up to and including the school year 1925-26 was fixed by the Board of Education of the latter district at $100 per student, payable quarterly at the rate of $25 per pupil. On September 7th at the opening of the school year 1926-27 there were presented for enrollment in the Garfield High School approximately 123 pupils from the Borough of Lodi, who were accordingly accepted and enrolled by the former district. On or about September 9th the Lodi Board of Education received a letter from the secretary of the Garfield board to the effect that the tuition rate for high school students for the year 1926-27 would be $130 per annum representing the actual cost per pupil of maintaining the high school. There then arose a dispute between

the two districts as to whether the Lodi Board was legally bound to pay $100 or $130 as a tuition charge per pupil, but on January 25, 1927, the clerk of the Lodi Board was informed by letter by the secretary of the Garfield district that payment for the Lodi pupils would be accepted at the $100 rate until decision in the controversy be rendered by the Commissioner of Education, with the understanding that the excess be paid by the Lodi district should the decision be adverse to its claim.

There appears to have been no dispute between the two districts in question as to whether the $130 rate was a just one but only as to whether or not an agreement was already entered into for the school year 1926-27 at the lower rate of $100. Hence the controversy is one to be determined by the Commissioner rather than by the State Board of Education in the first instance.

In the Commissioner's opinion the matter is entirely what Ansen in his work on Contracts describes as "a tacit contract" between the two districts for the school year 1926-27, a contract in which "conduct may take the place of written or spoken words, in offer, acceptance, or in both * * * the intention of the parties is a matter of inference from their conduct, and the inference is more or less easily drawn according to the circumstances of the case."

The Lodi Board of Education offered approximately 123 pupils on September 7, 1926, for enrollment in the Garfield High School and the pupils in question were accordingly accepted and enrolled by the latter district, thus constituting a tacit contract between the two districts for the year 1926-27. In determining what were the terms of that contract including the rate of tuition, etc., an analogy may be drawn from contracts of employment described in 26 Cyc. 976, in which it was held that "When one enters into the service of another for a definite period, and continues in the employment after the expiration of that period, without any new contract, the presumption is that the employment is continued on the terms of the original contract." Likewise it is a well recognized legal principle that "An existing state is presumed to continue" (Stevens' Digest of the Law of Evidence, page 477). From the continuance on September 7, 1926, after the expiration of the preceding school year, of the arrangement or contract relationship between the two districts as to high school pupils, with no stipulation at that time of any new or different terms there arises a presumption that the terms of the original contract including the $100 per pupil tuition rate were intended by the contracting parties to continue for the school year 1926-27. The Equitable doctrine of estoppel by conduct may also be invoked in a case of this kind since, as it was held in the case of Church *vs.* Florence Iron Works, 45 N. J. L. 153, "where one, by his words or conduct, wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time."

It is therefore the opinion of the Commissioner that the acceptance and enrollment by the Garfield Board of Education on September 7, 1926, of the high school pupils from Lodi, with an entire absence of any specified change of conditions or terms from those of the preceding year, raised a conclusive

presumption of a continuance of the terms of the original agreement including the $100 per pupil tuition rate, upon which continuance of terms the Lodi Board of Education was justified in relying and which the Garfield Board is accordingly estopped from denying.

It is also the Commissioner's opinion that while the Garfield Board was not legally bound to notify the Lodi Board of any change in the tuition rate in time for the making up of the annual budget by the Lodi district in February but only in time for the enrollment of pupils in September, it should nevertheless be made a practice by receiving districts to notify the sending districts of any change in the terms of admission of tuition pupils, if not in time for the making up of the annual budget, at least as early as it is possible to do so.

The appeal is accordingly hereby sustained and the Garfield Board of Education is ordered to accept for the year 1926-27 the $100 per pupil tuition rate offered by the Lodi Board of Education.

April 27, 1927.

DECISION OF THE STATE BOARD OF EDUCATION

The Lodi school district for a number of years has sent some of its high school pupils to Garfield at an annual tuition charge which, up to and including the school year beginning in September, 1925, was $100 per student. On September 7, 1926, one hundred and twenty-three of these pupils from Lodi were accepted and enrolled by the Garfield Board of Education. On September 9th, the Lodi Board received a letter from the secretary of the Garfield Board, stating that the tuition for the current year would be $130 per pupil. After some argument between the two Boards, the Garfield Board agreed to accept payment at the rate of $100 per pupil until the Commissioner of Education could decide the controversy with the understanding that if the decision should be in favor of Garfield, the Lodi district would pay the excess of $30.

The dispute is not whether the $130 rate was just but simply whether or not, on September 9th, a contract had been consummated at the rate of $100 per pupil which the Garfield Board did not have the right to cancel or amend. The Commissioner has held that although there was no written agreement, there was a "tacit contract" existing by reason of the course of conduct of the two districts, particularly including the acceptance and enrollment of the Lodi pupils on September 7, 1926, and that by reason of the continuance of the former arrangement with no stipulation of any new or different terms, there arose a presumption that the terms of the original contract, including the $100 per pupil, were intended to continue for the school year 1926-27, so that the Lodi Board was justified in relying upon that agreement and the Garfield Board was estopped from denying it.

Counsel for both Boards were given the opportunity to be heard and to file briefs but they rested the case on the papers and proceedings before the Commissioner so that this Committee has not had the benefit of briefs or argument.

After careful consideration of the Appellant's grounds for appeal, we can find no error in the Commissioner's decision but on the contrary agree with his conclusions and therefore recommend that the decision be affirmed.

November 5, 1927.

LEGALITY OF THE AWARD OF TRANSPORTATION CONTRACT

JOSEPH ENGEL,

Appellant,

vs.

PASSAIC TOWNSHIP BOARD OF EDUCATION AND WALTER SWENSON,

Respondents.

Gilbert M. Cornish, for Appellant.

DECISION OF THE COMMISSIONER OF EDUCATION

Appellant asks in his petition of appeal that a transportation contract awarded on November 15, 1923, by the Passaic Township Board of Education to Walter Swenson upon advertisement for and receipt of bids be set aside as illegal on the ground that a violation of the School Law is involved in the award by the board of education of a contract to a person whose wife is a member of such board.

Respondent defends the action on the ground that Mrs. Swenson, the wife of the party receiving the contract in question, took no official part in the award of such contract but on the other hand refrained from voting whenever the question came before the board.

In view of the fact that questions not of fact but solely of law are involved in the case under consideration, it was agreed by both sides that the matter be submitted for decision upon the pleadings and upon written argument.

Section 117, Article VII of the School Law, reads in part as follows:

> "He (a board of education member) shall not be interested, directly or indirectly, in any contract with or claim against said board."

According to the legal authorities and previous rulings of this department a board of education member who has a financial interest in a contract with the board of which he is a member will be deemed to be indirectly interested and thus to come within the prohibition of the statute even though such contract be actually between the board of education and a party other than himself.

In the case under consideration, therefore, Mrs. Swenson, a member of the Passaic Township Board of Education and the wife of the party with whom such board of education has contracted, must be presumed to have a financial interest in such contract and consequently an indirect interest in the agreement even though she be not actually one of the contracting parties.

Not only has it been decided in Equity cases that there cannot legally be a conflict between public duty and private interest in the case of a person occupying a position of public trust, but the section of the School Law above quoted explicitly prohibits a member of a board of education from being directly or indirectly interested in a contract with the board of which he or she is a member.

It must also be observed from the phraseology of the statute that the prohibition contained therein extends not only to cases where the board member has actively participated in the official award by the board of the contract in which he or she is directly or indirectly interested, but even to those cases in which the party interested in the contract is merely a member of the board of education making the award without regard to any participation in the official act.

In view of the phraseology of the statute therefore it is the opinion of the Commissioner of Education that Mrs. Swenson, the member of the Passaic Township Board of Education and the wife of Walter Swenson to whom the transportation contract was awarded, is financially and therefore indirectly interested within the prohibition of the statute; and that therefore such contract with Walter Swenson cannot legally be made by the Passaic Township Board of Education. Such contract is therefore in view of the existing facts hereby declared to be illegal and accordingly void and of no effect.

January 10, 1924.

LEGALITY OF AWARD OF TRANSPORTATION CONTRACT TO OTHER THAN LOWEST BIDDER

MENDHAM GARAGE COMPANY,
Appellant,

vs.

MENDHAM TOWNSHIP BOARD OF EDUCATION,
Respondent.

Herman M. Cone, for the Appellant.

DECISION OF THE COMMISSIONER OF EDUCATION

This action is brought by the above named Appellant to contest the legality of the award on August 13, 1923, of a transportation contract by the Mendham Township Board of Education to George C. Young. Both Mr. Young's bid of $110.00 per month and that of the Appellant, the Mendham Garage Company, of $99.00 per month, were submitted in answer to the following advertisement of the above named board of education:

> "Sealed bids for transporting the high school pupils to Morristown High School will be received by the Mendham Township Board of Education at Brookside, August 13, 1923, at eight o'clock, new time."

There is no provision of law in this State by which a board of education is required to advertise for bids in the matter of awarding school transportation contracts or to award such contract to the lowest bidder even though such advertisement be made. It is apparent moreover that while no express

reservation by the Mendham Township Board of Education of the right to reject any or all bids in the above quoted advertisement was made, neither was there any promise contained therein that the contract would be awarded to the lowest bidder.

The authorities in this State in matters of this kind hold that where there is no statutory requirement that a contract be awarded by a municipality to the lowest bidder, a municipality after inviting bids or proposals may disregard the lowest bid and award the contract to a higher bidder, providing such action is taken in the exercise of a fair discretion and with a view to the welfare of the municipality.

In the case of James Oakley and the Electric Light Company of Atlantic City, Prosecutors, *vs.* the City of Atlantic City and John H. Rothermel, defendants, 34 Vroom 127, the opinion was in part as follows:

> "I think it has been quite clearly established in this Court that, under the statute of 1894, even where proposals more or less general in their character are advertised for and received, the municipality is not bound to award the contract to the lowest bidder or even to award the contract upon such bids. No statute has been cited applicable to Atlantic City which requires such a course, and in the absence of such restriction it cannot be imported into this statute by construction when the power to contract is so absolutely conferred. I can find no violation of any legal principle in awarding a contract if it be done according to other prescribed formalities, in a municipality taking advantage of the information received by such a course of proposals, and in awarding a contract quite independent of them if it be done in the exercise of an honest discretion and judgment, and without the abuse of the discretion vested in the municipal body possessed of authority."

Moreover in the case of Martin Murray *et al.*, Prosecutors, *vs.* the Mayor and Common Council of the City of Bayonne *et al.*, 44 Vroom 313, it is held in part as follows:

> "There is no requirement in the charter of the defendant or any general law to which our attention has been called, requiring that contracts for street paving in Bayonne shall be let to the lowest bidder only. Under such circumstances, in awarding contracts, the municipal body has a large measure of discretion, and in the absence of fraud or the palpable abuse of such discretion on the part of the municipal authorities the Courts will not set aside their action. In reviewing such action the Court will only inquire into the good faith and honesty of the exercise of discretion."

In the case under consideration the Mendham Township Board of Education was under no statutory obligation to award the contract to the lowest bidder, namely the Mendham Garage Company; and while there was no reservation in the advertisement of the right to reject bids, neither was there any promise to award the contract to the lowest bidder. In view of

these facts it is the opinion of the Commissioner that the board had the right to treat the proposals it had advertised for and received as merely information for its guidance and consequently to award the contract without regard to the lowest bidder.

Moreover in awarding the contract to Mr. George C. Young, whose reliability as a transportation contractor had been tested and proved by previous employment, there was in the Commissioner's opinion no evidence of abuse of discretion or evidence that anything but the welfare of the schools had been considered.

The action therefore of the Mendham Township Board of Education in awarding the transportation contract as aforesaid on August 13, 1923, to George C. Young is hereby sustained, and the appeal is accordingly hereby dismissed.

October 10, 1923.

LEGALITY OF PAYMENT OF ARCHITECT'S FEES BY BOARD OF EDUCATION

JOHN MAHONEY AND JESSE R. FIFER,
Appellants,

vs.

LYNDHURST BOARD OF EDUCATION,
Respondent.

Shaffer & Conkling, for Appellant.
Francis S. Castyglone, for Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

This appeal is brought by Petitioners on four grounds: First, the alleged illegal action of Respondent in appointing at a regular meeting on March 21, 1921, from which meeting two members had retired, one Frank A. Schneider, who had at said meeting resigned as a board member, to the office of Clerk of the Works in connection with the construction now under way of the new school building; Second, the alleged illegal action of the Respondent in appointing on September 27, 1920, one Max Simon as counsel to the board of education at a time when it is alleged no suit was pending either in law or equity to justify such appointment; Third, the alleged illegal action of Respondent in voting at a regular meeting on June 21, 1921, to pay to Dominick J. Livelli, district clerk of the board, a bonus of $200, and, fourth, the alleged illegal payment on or about March 21. 1921, by Respondent of the sum of $1,600 to one Anton L. Veglianti, an architect, for preparing plans and specifications in connection with a school building proposition actually defeated by the voters in July, 1920, and payment for which, Appellants contend, was made contingent in the contract governing the transaction upon the consent of the voters to the building proposition.

It is the understanding of the Commissioner of Education that there is no disposition on the part of Appellants to insist upon the first three grounds of appeal, and upon careful investigation of the facts as set forth in the pleadings no actual illegality is apparent on the part of the Respondent in its action appointing Frank A. Schneider Clerk of the Works, and Max A. Simon counsel to the board of education and in awarding a bonus of $200 to Dominick J. Livelli in further compensation for his services as district clerk. The first three grounds of complaint are therefore dismissed.

Objection is made by Respondent to the jurisdiction of the Commissioner of Education to consider any appeal involving a money judgment on the ground that such a case is cognizable only by a court of law. This contention is not supported by the statute which authorizes the Commissioner of Education to decide, subject to appeal to the State Board of Education, all disputes and controversies arising under the School Law, and the case in question clearly involves a dispute arising under the School Law. Furthermore, the issue in the fourth ground of complaint being entirely one of law the Commissioner finds it unnecessary to grant any hearing for the purpose of taking testimony.

From the facts as set forth in the pleadings concerning the main ground of complaint, namely, the payment of $1,600 to Anton L. Veglianti, the architect, it is apparent that on February 9, 1920, the Lyndhurst Board of Education entered into a contract with said Veglianti engaging his services as architect in connection with the proposed new school building to be erected upon a site described in the contract. By the terms of this contract the architect was to receive a fee of 6% based upon the actual cost of the building and to be paid in the installments described therein. Paragraph 2 of said contract further provided that the payment as aforesaid should be conditioned upon the authorization by the legal voters of the district of a bond issue for the construction of the proposed school building. Paragraph 9 of the agreement provided that the building might be increased or decreased in size without invalidating the contract and that the compensation of the architect should in every case be controlled by the terms mentioned in Paragraph 2.

The proposition for the erection of the school building and the bond issue was submitted to the voters and defeated by them June 25, 1920. On June 28, 1920, the architect submitted sketches and plans for a smaller schoolhouse to the Board of Education and this proposition, when submitted to the voters on July 23, 1920, was also defeated. On August 30, 1920, resolutions for a new $210,000 school building were passed by the board and this proposition was passed by the voters September 22, 1920. On December 7, 1920, a new contract of employment was entered into by the Board of Education and the architect in connection with the $210,000 proposition which had just been passed by the district voters.

The question to be decided therefore is this: Was the architect entitled to be paid $1,600 for the sketches and plans prepared by him for the building proposition which was defeated by the voters on July 23, 1920, or was his right to compensation in that case governed by the provisions of the original

contract by which he was employed and according to the terms of which he was to receive no compensation unless the construction and bond issue should be authorized by the voters?

The submission of the school building proposition to the voters each time included the same site as that described in the contract with the architect, and it is also very clear to the Commissioner that the people voted each time not upon the contract but quite in conformity with the contract, which provided for the submission of modified building propositions without impairing the contract or its requirement that the consent of the voters must be had. It is the opinion of the Commissioner of Education that the contract of February 9, 1920, between the Lyndhurst Board of Education and Anton L. Veglianti with its provision requiring the previous consent of the voters to the building proposition before the latter should be entitled to any compensation governed the services rendered by him in connection with the proposition defeated by the voters on July 23, 1920, and, therefore, made any payment to such architect for such services illegal.

Aside from the question of contract Section 120, Paragraph IV of the School Law requires that for the erection of any school building the Board of Education shall have the previous authority of a vote of the legal voters of the district. It is, therefore, the opinion of the Commissioner of Education that regardless of contract a board of education would exceed its statutory authority in making any payment to an architect for services in connection with a building proposition not consented to by the district voters.

In view, therefore, of the law and the governing contract it is the opinion of the Commissioner of Education that the payment by the Lyndhurst Board of Education of $1,600 in March, 1921, to Anton L. Veglianti was illegal, and it is hereby ordered that such payment of $1,600 be credited on the payments yet due the architect on the construction work on the new school in which he is now engaged and which was duly sanctioned by the district voters, or, if this is not possible because of completion of payments to the architect on the new construction work, it is hereby ordered that the sum of $1,600 illegally paid as aforesaid be returned to the Custodian of School Moneys for the School District of Lyndhurst by the members of the board of education who voted to make such payment in March, 1921.

Dated January 3, 1921.

Decision of the State Board of Education

On February 9, 1920, the Board of Education of the Township of Lyndhurst, in Bergen County, employed Anton L. Veglianti as architect to prepare plans and specifications for a school building which it was proposed to erect in the said township. The architect having prepared preliminary plans or sketches for a building which it was estimated would cost $310,000 and the Board of Education having submitted the proposition for the erection of such a building to the voters of the township, the proposition was defeated on June 25, 1920. The architect was then employed to prepare new plans and specifications, and having done so a proposition to build a smaller building according to said plans,

to cost $275,000, was submitted to the voters on July 23, 1920, and likewise defeated. Thereafter, the architect prepared plans for a $210,000 building, which was approved and passed by the voters. Mr. Veglianti submitted a bill for his plans and specifications for the second proposed building condemned by the voters on July 23, 1920, and after some proceedings which it is unnecessary to describe, the Board of Education paid his bill, which amounted to $1,600. The petitioners, who are taxpayers in Lyndhurst, brought this proceeding to compel the members of the Board of Education to repay to the Custodian of Funds for the School District the said sum of $1,600 which they allege was illegally paid to Veglianti.

The Board of Education denied that the payment was illegal and set up that the Commissioner had no jurisdiction in the premises. The Commissioner took no testimony on the pleadings held (1) that the case involved a dispute arising under the School Law, and that therefore he had jurisdiction; (2) that the payment to Veglianti was illegal, and, (3), ordered that said amount of such payment, viz., $1,600, be credited on the payments due him on the construction work on the new school sanctioned by the voters, or if that was not possible, that that sum be returned to the custodian of school moneys by the Board of Education.

First: That matter in dispute, in our opinion, involves a question arising under the School Law and therefore the Commissioner had jurisdiction to determine whether or not the Board of Education had the right to pay Mr. Vegliante for his preliminary plans or sketches for the building condemned by the voters on July 23, 1920. He did not, however, have power or authority to direct that the sum of $1,600 should be withheld from future payments due Veglianti under his present contract for the erection of the school buildings subsequently authorized, Veglianti not being a party to the proceeding, and neither the Commissioner nor this Board having any authority in law to award what amounts to a money judgment against a stranger to the proceeding and to the school system of the State.

Second: There is very little in the record concerning the nature of the second series of plans or sketches prepared by Mr. Veglianti, but the members of the Board of Education attended before us with their Minute Book, and it appeared therefrom and was admitted by all concerned at the argument, that these plans or sketches were not detailed or working drawings, but preliminary sketches, sometimes called plans, which were prepared for the purpose of enabling the Board of Education to make a substantially accurate estimate of the probable cost of the building which could be submitted to the voters. In our opinion, the architect was entitled to compensation for these plans and the Board of Education had the power and authority under the law to pay for them. There is no allegation or proof of fraud or dishonesty in connection with the payment, nor is there any showing that the Board did not have sufficient funds in its general appropriation to cover the amount paid. In our opinion, Boards of Education have the power to employ architects to prepare preliminary plans or sketches upon which the Boards may estimate the cost of school buildings for submission to the voters of their districts, and to pay for such services out of their general funds. They may,

by contract with the architect, provide for payment out of the funds provided for the building when voted, but such a contract did not exist with respect to the plans involved in the present case.

The decision of the Commissioner is therefore reversed with instructions to dismiss the petition. Our disposition made of the case makes it unnecessary to pass upon the petition filed with us by Anton L. Veglianti for leave to intervene.

GRADUATING EXERCISES NOT A PART OF THE COURSE OF STUDY

JOHN H. BARTLETT, JR.,
Appellant,
vs.
THE BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE,
Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The Appellant is the father of John H. Bartlett, III, who was a pupil in the twelfth year of the West Orange Schools during the school year of 1910–11, and he appeals from the action of the Respondent in refusing to deliver to his son a diploma at the graduating exercises held in West Orange on June 23d, 1911.

The facts in the case as they appear in the evidence are as follows:

Bartlett was notified on May 15th, 1911, that he had been selected by the faculty of the high school as valedictorian of his class. He asked to be excused for the reason that he was busy preparing for his entrance examinations to college, and did not have time to prepare the valedictory. His request was refused and he thereupon prepared a paper and presented it to Miss Drew, his teacher in English, on or about May 29th. On the same day the paper was rejected as unsuitable, and he again requested that he be excused. He repeated the request the next day and Miss Drew then told him that she was willing he should be excused, provided, Mr. Todd, the Principal, consented. Bartlett testified that Todd did consent, and Todd testifies that he was willing to excuse him and tried to get another boy to take the valedictory. Failing in this the consent was withdrawn. On June 14th Bartlett presented a second paper which was rejected on the ground that, while it was suitable for a Class Day paper, it was not sufficiently dignified for a valedictory.

On June 22d, the day before the graduation exercises were to be held, Bartlett presented a thesis in lieu of a valedictory. This was refused on the ground that it was submitted too late.

Bartlett testified that he believed he had been excused, and this is corroborated by his mother who testifies that Miss Drew said to her:

"It was positively funny the relief John showed at having been excused from giving the valedictory."

The Board of Education took no action in this case. It is true that there was an informal meeting of the members of the Board with the faculty of the high school, but not all the members were notified of the meeting, and no minutes were kept. Any expression of opinion by the members of the Board at that meeting must be considered as an expression of their individual opinions and not as the action of the Board. Bartlett was not notified of the meeting, was not present, and was not, at any time, given a hearing. The action, such as it was, was *ex parte*.

There are two questions before me for decision, viz.:

Are the graduating exercises a part of the Course of Study in the West Orange Schools?

Did Bartlett complete the course of study, and, if so, is he entitled to receive a diploma notwithstanding the fact that he did not deliver the valedictory or submit a thesis satisfactory to the faculty of the school?

Section three of the School Law gives to the State Board of Education power "to prescribe and enforce rules and regulations necessary to carry into effect the School Laws of this State," and section 182, paragraph (b) provides for an apportionment of State moneys for a high school "having a full four years' course of study approved by the State Board of Education."

A rule of the State Board of Education reads as follows:

"Diplomas shall be granted only to pupils who shall have completed a full four year course aggregating at least seventy-two academic counts. The counts shall be reckoned in accordance with the number of recitations per week of a school year of at least thirty-eight weeks, and the recitation periods shall average at least forty minutes."

The course of study in the West Orange High School has been approved by the State Board of Education. It requires for graduation from its College Preparatory Course eighty-four counts, but does not provide that papers prepared for the graduating exercises shall be a part of the required course. In fact, it makes no reference whatever to the graduating exercises. A diploma is evidence of the completion of a required course of study, and, in the absence of any requirement that the preparation of a paper for the graduating exercises is a part of the course, a pupil who has completed the course and received the required number of credits is entitled to a diploma even though he may not have prepared such a paper.

It is in evidence that Bartlett had completed the course with the exception of the valedictory. The Principal, Mr. Todd, testifies that "his work would have been satisfactory if he had presented that valedictory properly written." He also testifies that a "diploma indicates a satisfactory completion of a course of study prescribed by the Board of Education for the High School," and that there was no reason, other than his failure to present and deliver the valedictory, why Bartlett should not have received his diploma.

Mr. Farr, the President of the Board, testifies that Bartlett was an unusually bright pupil, and that the Board would have been only too happy to have permitted the diploma to have been given to Bartlett and would "have been willing to strain a point had his record in previous cases and also at this time shown the right attitude."

It is also in evidence that Bartlett stood at the head of his class. If, therefore, the other members of the class received the required credits, Bartlett also received them.

The testimony of Miss Drew, Mr. Todd and Mr. Farr leads inevitably to the conclusion that the refusal to grant a diploma to Bartlett was not because he had not completed the required course, but as a matter of discipline.

I find that the graduating exercises are not a part of the course of study prescribed for the West Orange High School, and that Bartlett completed the prescribed course.

It is hereby ordered that the Board of Education deliver to John H. Bartlett III a diploma dated June 23d, 1911.

May 27, 1912.

RIGHT OF TEACHER TO MAKE RULES FOR DISCIPLINE OF SCHOOL

THOMAS J. MCCURRAN ET AL.,
Appellants,

vs.

THE BOARD OF EDUCATION OF THE CITY OF TRENTON,
Respondent.

Paul H. Wendel, for the Appellants.

H. G. Mueller, President of the Board of Education, for the Respondent

DECISION OF THE COMMISSIONER OF EDUCATION

The question involved in this controversy centers around the right of a teacher or principal of a school to make rules and regulations governing the discipline of the school during recess periods. The law bearing upon this is found in Article VIII, section 125, of the 1914 edition of the School Law, and reads as follows:

"A teacher shall hold every pupil accountable in school for disorderly conduct on the way to or from school, or on the playgrounds of the school, or during recess, and shall suspend from school any pupil for good cause; *provided*, that such suspension shall be reported forthwith by the teacher to the Board of Education; *provided further*, that in any school in which more than one teacher shall be employed the principal alone shall have the power to suspend a pupil."

This paragraph of the statute law clearly holds the teacher or principal responsible for the conduct of the children under his charge during recess

as well as all of the school hours of the day. It also implies that he shall have power to make rules and regulations concerning the discipline of his school.

Section 144 says:

"Pupils in the public schools shall comply with the regulations established in pursuance of law for the government of such schools. * * * Continued and willful disobedience, open defiance of the authority of the teacher * * * shall be good cause for suspension or expulsion from school."

Here again we have the statute law giving authority to the teacher to govern his school.

In compliance with the laws above quoted the principal of the junior high school made a regulation that during the noon recess children who did not go to their homes should not leave the school grounds without permission. The rule specifically applied to those who were not to return to their homes during the noon recess for lunch.

It is claimed by the Appellants that the principal had no right to make a rule restraining the pupils from leaving the school grounds because it worked an injury to the trades-people in the neighborhood where children might have an opportunity to purchase their lunch.

Petitions of various kinds and letters have been filed with the Commissioner in the matter. After carefully considering these and the whole question before me I have reached the following conclusion:

1. The principal of the junior high school has authority under the law to make rules and regulations that tend to the better control and discipline of his school.

2. The regulation that prohibited the children who did not return to their homes during the noon recess from leaving the school grounds during that period is a fair and necessary regulation looking to the general welfare of the children and to the better control and discipline of the school.

The petition of the Appellants is hereby dismissed.

January 25, 1917.

DECISION OF THE STATE BOARD OF EDUCATION

Paul H. Wendel, for the Appellants.
Malcolm G. Buchanan, for the Respondent.

In this case the principal of the junior high school in Trenton made a rule that during the noon recesses the school children who did not go home to their luncheon should not leave the school grounds. To those who remained on the grounds a luncheon was provided by the school at a reasonable figure. The Appellants insist that this rule works a hardship to them; that they are makers and sellers of luncheons without the grounds; that they have an "unalienable right" to sell luncheons to the children; that the principal has no authority to make such a rule; that the authority rests with the School Board, and that the board cannot delegate its authority to the principal.

It may be generally true that a school board cannot delegate its own peculiar powers to a principal, but it can give authority to that principal to establish rules regarding schedules, recitations, recesses and general discipline. Article VIII, section 125, of the School Law reads: "A teacher shall hold every pupil accountable in the school for disorderly conduct, on the way to or from school, or on the playgrounds of the school, or during recess," which shows that the law itself contemplated such general authority should be vested in the principal or teacher.

Again, it may be vaguely true that merchants have a right to sell luncheons to school children, but the reverse of the contention, namely, that the principal of a school must unlock the school gates and give up his control and guardianship of the children in order to facilitate the luncheon business of the merchants is by no means equally true. The school children are in charge of the principal when not under the direct supervision of their parents. He has as much authority to close the gates upon them on the playground as to close the doors upon them in the schoolroom.

Objections to such restraint might come with better grace perhaps from the parents of the children; but no such objection is forthcoming because those children who wish to go home during the noon recess are allowed to do so.

We can see no merit in the contention of the Appellants, and the appeal is, therefore, dismissed, and the decision of the Commissioner of Education affirmed.

June 2, 1917.

POWER OF BOARD OF EDUCATION TO BIND SUBSEQUENT BOARD

SERENA M. BROWN,
Appellant,
vs.
BOARD OF EDUCATION OF THE BOROUGH OF OAKLAND,
Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The Appellant in this case, Serena M. Brown, entered into a contract with the Board of Education of the Borough of Oakland on August 22, 1918, to serve for one year as principal of the Oakland schools at a salary of $950.

The contract was executed in accordance with the statute requirements and contained a clause providing for its termination by either party upon giving to the other thirty days' notice. The Appellant continued to teach under the terms of this agreement until April 1, 1919. At a meeting of the Oakland Board of Education on Tuesday evening, April 1, Miss Brown appeared before the Board and handed in her resignation. Following is an extract from the minutes of the Board at its meeting on that date:

A hearing in this case was conducted by the Assistant Commissioner at Bridgeton on Friday, November 19, 1926.

The following appears from the testimony:

The section which became annexed to Upper Deerfield Township School District includes the school buildings of Friendship, Loder and Woodruff. The buildings which are located in what is now Deerfield Township are Rosenhayn, Carmel and Carton Road.

The following expenditures for repairs were made during the school year:

Friendship,	$19.80
Loder,	1,262.74
Woodruff,	1,573.75

The question as to whether Appellant could be legally dismissed under a notice clause which appears in the three-year agreement entered into by the expiring Board on April 1 the Commissioner does not feel it necessary to decide, since such three-year agreement is illlegal for the reasons above stated and is therefore voidable by the incoming Board on those grounds.

The appeal is accordingly hereby dismissed.

September 13, 1920.

Affirmed by the State Board of Education.

DECISION OF THE SUPREME COURT

This writ of certiorari is to review the determination and decision of the State Board of Education in sustaining the action of the Board of Education of the Borough of Oakland in its dismissal of the prosecutrix, Miss Brown, a school teacher. She was engaged as principal on August 22, 1918, by the Oakland Board, and a contract was executed for the term of one school year at a salary of $950. This contract, like many earlier contracts that the prosecutrix had made, contained a provision for its termination by either party upon thirty days' notice.

The prosecutrix served under the contract for seven months when, on April 1, 1919, she terminated it by personally presenting to the Board a communication requesting that the thirty days' notice clause be waived, and her resignation accepted, to take effect at once. She resigned, apparently, to take a better position at Milburn. Thereupon the chairman of the teachers' committee suggested that she be re-engaged for a period of years at an increased salary. A motion was then made that she be re-engaged as principal

schools known under the old school district as No. 3, No. 5 and No. 6. Under the law the Board of Education of Little Falls Township continued in control of the schools up to June 30, 1914.

All claims against the Board of Education of the Little Falls school district, as it existed before the separation, had to be paid by the Board out of funds belonging to the old district. It was found by Mr. Hopkins, the inspector of accounts of the State Board of Education, that on June 30, 1914, after meeting all the claims against the old district, there was a deficit of $3,227.62. In addition to this, on July 1, there came due semi-annual interest on a bond issue of $26,000 covering the cost of building a school within the territory of West Paterson Borough, amounting to $585. This was paid by the Board of Education of the old district. After this payment there would thus be a total deficit of $3,812.62.

Claim is made by the Board of Education of the Township of Little Falls that the new borough should pay its proportionate share in this indebtedness. This proportionate share is based upon the ratables in the two districts as they now exist. It is agreed by the two municipalities that the ratio of ratables is as 30 is to 70, the West Paterson district having 30 per cent. of the ratables and the Little Falls district having 70 per cent. of the ratables.

This appeal is taken by the Board of Education of the Township of Little Falls for the purpose of compelling the Board of Education of the Borough of West Paterson to pay 30 per cent. indebtedness existing at the time of the separation.

If, instead of a deficit, there had been a surplus, then it would be quite clear that West Paterson would be entitled to 30 per cent. of such surplus. It does not change the justice of the matter that instead of a surplus there is an indebtedness. In my opinion, the West Paterson Board of Education should pay its just share of an indebtedness for which it had a benefit before the separation.

The amount of indebtedness was plainly set forth in the examination of the accounts by Mr. Hopkins. This indebtedness, with the $585 interest on the bonds paid by the old Board, amounting all told to $3,812.62, is the total

recover. On that date, also, according to the audit of the inspector of accounts of the State Board of Education, there was a general unpaid indebtedness of the Board of Education of Little Falls amounting to $3,227.62. The Board of Education of Little Falls contends that the new district of West Paterson, being a portion of Little Falls at the time the indebtedness was incurred, benefited by the expenditure of the money, and is, therefore, liable now for its share of that money indebtedness. The parties agree that according to the ratables the proportion of West Paterson was and is 30 per cent. of the whole, and that percentage of the indebtedness is now claimed by the Board of Education of Little Falls as due from the new Board of Education of West Paterson.

The Respondent, the Board of Education of West Paterson, denies that it is responsible for any *general deficiency* under the law, and denies its obligation to pay any portion of the $585 interest due on the $26,000 bonded debt. The issue thus joined was duly heard before the Commissioner of Education and a decision reached. The appeal is now from that decision to the State Board of Education.

1. In the matter of the interest on the $26,000 of bonds it was an indebtedness incurred by the old Board of Education of Little Falls during the six months just before the West Paterson district was formed. As an obligation of the old Board it was shared in by the whole district, as were also the benefits resulting from it. It should be added to the general indebtedness of the Little Falls district of $3,227.62. The total indebtedness thus amounts to $3,812.62.

2. As regards this general indebtedness of $3,812.62 it is ingeniously argued by the counsel for the Board of Education of West Paterson that the State School Law makes no provision for sharing a deficit. But they do make provision (Article V, section 40) for sharing a surplus, and the lack of such provision for an indebtedness seems to have been a mere oversight. At any rate, it is a reasonable contention that where a school district in a division of territory profits by acquiring school property it should also share in the expense formerly incurred in maintaining and administering that property. The learned counsel for the Respondent cites numerous cases in corporation law upholding the contention that when a new corporation breaks away from an old corporation all liabilities are assumed by the old corporation. The citations are just a little beside the mark. They state that the old corporation also assumes *all of the assets*. That is quite different from the present case because here the new West Paterson district shares in the division, takes over property belonging to the old Little Falls district, and should, therefore, pay its proportionate share of the indebtedness of the old district. It cannot share in the assets and go scot-free of the liabilities. It is responsible to the Board of Education of Little Falls for 30 per cent. of the deficit of $3,812.62, or the sum of $1,143.78.

With these emendations the decision of the Commissioner of Education is affirmed.

June 2, 1917.

RELATING TO SCHOOL FRATERNITIES

NEWTON SPENCE AND JOHN SPENCE,
Petitioners,

vs.

THE BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY,
Defendant.

For the Petitioners, Lee F. Washington.
For the Defendant, Theo. W. Schimpf.

DECISION OF THE COMMISSIONER OF EDUCATION

On April 27, 1914, the Defendant adopted a preamble and resolutions condemning high school fraternities, sororities, and other school secret societies, and providing that unless certain conditions prescribed by the Defendant were agreed to by the pupils in the high school, such societies would be prohibited after October 1, 1914. The conditions prescribed by the Defendant not being accepted by the pupils, the Principal of the High School, in accordance with other provisions of said resolutions, presented to each of the pupils of the High School a printed blank, or pledge, as follows:

"I, the undersigned, a pupil of the Atlantic City, N. J., High School, hereby declare upon my word of honor that I am not a member of a fraternity, sorority, club, society, or other organization composed wholly or in part of pupils of the High School, which has been disapproved by the school authorities because its influence among the High School body is, in the judgment of the principal and teachers, injurious to the best interests of the High School, and I promise not to become a member of such a society or organization during the time I remain a member of this school.

"I further declare that I sign this statement with a complete understanding of its contents and without any evasion or mental reservation of any kind whatever and with the full knowledge that any false statement herein contained or any violation of my promise will subject me to expulsion from school.

Signature .....

"Dated ....."

One of said blanks or pledges was presented on October 1, 1914, to John Spence, a pupil in the High School, and one of the Petitioners in this case. The said Spence, after striking out the words "and I promise not to become a member of such society or organization during the time I remain a member of this school," signed said blank or pledge and tendered it to the school authorities, who refused to accept it. On the same date, the Principal of the High School handed to said Spence the following printed notice of his suspension from school:

Mr. Newton Spence
2013 Atlantic Ave.
Atlantic City, N. J.

ATLANTIC CITY, N. J., Oct. 1, 1914

DEAR SIR:

Your son, John A. Spence, is hereby suspended from this school for his failure to obey the following regulations of the Atlantic City Board of Education:

"No pupil in the Atlantic City High School shall be a member of, or in any way connected by pledge or otherwise with any fraternity, sorority, club, society, or other organization composed wholly or in part of pupils of the High School, whose influence among the High School body is, in the judgment of the principal and teachers, injurious to the best interests of the High School.

"FOR THE PERSISTENT VIOLATION OF THIS REGULATION THE PRINCIPAL SHALL SUSPEND THE PUPIL AS PROVIDED BY LAW and make an immediate report to the Superintendent of Schools.

"Further resolved that for the purpose of giving effect to this regulation all students of the High School be and they are hereby required to sign before four o'clock on the first day of October, 1914, the following statement, and THAT ALL STUDENTS WHO REFUSE OR NEGLECT SO TO SIGN SHALL THEREUPON BE SUMMARILY SUSPENDED FROM SCHOOL:

"I, the undersigned, a pupil of the Atlantic City, N. J., High School, hereby declare upon my word of honor that I am not a member of a fraternity, sorority, club, society, or other organization composed wholly or in part of pupils of the High School, which has been disapproved by the school authorities because its influence among the High School body is, in the judgment of the principal and teachers, injurious to the best interests of the High School, and I promise not to become a member of such a society or organization during the time I remain a member of this school.

"I further declare that I sign this statement with a complete understanding of its contents and without any evasion or mental reservation of any kind whatever and with the full knowledge that any false statement herein contained or any violation of my promise will subject me to expulsion from school."

This notice is sent that you may know exactly what has been done in the matter, and that those charged with the administration of your schools may bespeak your hearty co-operation in an effort to secure the prompt return of this pupil under conditions that will insure successful school work.

After one o'clock, October 6, 1914, to be reinstated the pupil must appear before the City Superintendent of Schools in the High School Building, between the hours of 4:00 and 5:30.

Principal

CHAS. B. BOYER, Superintendent

From this action the Petitioners appeal, and pray that the said John Spence be restored to his position in the High School. Section III of the School Law reads as follows:

"A teacher shall hold every pupil accountable in school for disorderly conduct on the way to or from school, or on the playgrounds of the school, or during recess, and shall suspend from school any pupil for good cause; provided, that such suspension shall be reported forthwith by the teacher to the Board of Education; provided further, that in any school in which more than one teacher shall be employed the principal alone shall have the power to suspend a pupil."

It does not appear that the suspension of John Spence was reported to the Defendant, or that it has taken any action thereon.

The Defendant, in its answer, admits so much of paragraph 13 of the petitioner as states "that your petitioner, John Spence, has since such expulsion, been denied the right to attend his classes, and is being deprived of his instruction and losing the benefit of lectures being attended by his former classmates." It is evident from this admission, and from the fact that it has not denied that the said Spence has been expelled, that the Defendant assumes full responsibility in the matter. The first proviso in section III, above quoted, requires that the suspension of a pupil shall be forthwith reported to the Board of Education. Section 50 gives to a Board of Education in a City School District "supervision, control and management of the public schools," etc., and section 86 gives to a Board of Education in a township or borough district the power "to suspend or expel pupils from school." The duties and powers of a Board of Education in a township or borough district are prescribed in greater detail than those for a board in a city district, but it is clear that, so far as they are applicable, the powers and duties prescribed for the one are prescribed for the other. The provisions of section III apply to every school district in the State. It follows, therefore, that the suspension of a pupil by the principal is temporary, and can be continued, or the suspended pupil expelled, only by the Board of Education. The notice of suspension served upon the Petitioner, John Spence, contained the following: "After one o'clock, October 6, 1914, to be reinstated the pupil must appear before the City Superintendent of Schools in the High School Building, between the hours of 4:00 and 5:30." There is nothing in the papers before me to show that the Defendant ever authorized such condition precedent to reinstatement.

A Board of Education cannot delegate to a superintendent or principal judicial powers conferred upon it by law. It cannot legally delegate to the superintendent or principal the power of deciding whether or not a pupil shall be expelled, any more than it can delegate to one of its committees or to its business manager, the letting of contracts. Our courts have held that the employment of a teacher "is an act judicial in its character and should be done at a meeting of the trustees, of which all should have notice, and in which all have an opportunity to participate." (Townsend *v.* Trustees, 12 Vr. 312.) Certainly the inquiry as to whether or not the act for which

a pupil has been suspended by the principal is such as to warrant expulsion or a continuation of the suspension, is quite as judicial in character as the determination of the qualifications of a teacher. The Defendant never having taken any action in the case of the Petitioner, John Spence, he has never legally been expelled, and the failure of the principal to report "forthwith" his suspension, makes his continued suspension illegal, for a pupil cannot be deprived of his right to attend school by the failure of a teacher or principal to perform a duty cast upon him by the statute.

In order to reach a decision in this case it is not necessary to pass upon the other questions raised by the Petitioners, but they are of such importance that they should be decided at this time.

As stated in the decision in the case of Laehder *vs.* the Board of Education of Manasquan, recently rendered by me, the right of a board of education to punish pupils for acts committed when the school was not in session has never been before the courts in this State, but there are numerous decisions by the courts in other States. I have no doubt as to the right of a board of education to prohibit pupils from joining fraternities, sororities, or other school societies which, in its judgment, are prejudicial to the best interests of the school or the pupils, even though the meetings of such societies are not held in the schoolhouse, or on a school day. School secret societies are generally regarded as detrimental to discipline, and to the best interests of the pupils. The National Education Association, composed of leading superintendents and teachers, recently adopted resolutions condemning such societies. The resolution reads, in part, as follows: "We condemn these organizations because they are subversive of the principles of democracy which should prevail in the public schools; because they are selfish and tend to narrow the minds and sympathies of the pupils; because they dissipate energy and proper ambition; because they set wrong standards; * * * because they detract interest from study." 35 Cyc. 1136, Section D, reads as follows: "The school authorities may also punish, as by suspension for acts committed outside of school hours, even after a pupil has returned to his home, when such acts have a direct and immediate tendency to influence the conduct of other pupils while in the schoolroom, or set at naught proper discipline, to impair the authority of the teachers, and to bring them into ridicule and contempt." In the case of Kinzer *vs.* Directors, 105 N. W. Rep. 686, the court said: "The general character of the school and the conduct of its pupils as affecting the efficiency of the work to be done in the schoolroom, and the discipline of the scholars, are matters to be taken into account by the school board making rules for the government of the school. They have no concern, it is true, with the individual conduct of the pupils wholly outside of the schoolroom and school grounds and while they are presumed to be under the control of their parents * * * but the conduct of pupils which directly relates to and affects the management of the school and its efficiency, is within the proper regulation of the school authorities." 35 Cyc. 1137 says: "It has been held that a rule of a school board forbid-

ding pupils to play football games under the auspices of the school is not unreasonable or an excess of the authority of the board, although applied to conduct on holidays and away from the school grounds."

The Defendant in prohibiting pupils in the High School from being members of fraternities, sororities or other school societies composed of High School pupils, acted well within its powers, but the resolutions go further than that. They prohibit a pupil from belonging to any "other organization composed wholly or in part of pupils in the High School, whose influence, among the High School body is, in the judgment of the principal and teachers, injurious to the best interests of the High School." Here again the Defendant attempts to delegate to the principal and teachers matters which can be determined only by the board of education. The character and purpose of the organization to which a pupil belonged might be the controlling factor in determining whether or not he should be expelled, and the board of education cannot delegate to any person or persons the power to determine a question which may later come before the board in its judicial capacity.

The Defendant also erred in directing each pupil to sign a pledge promising "not to become a member of such a society or organization during the time I remain a member of this school." I do not believe that a board of education has the power to punish a pupil for refusing to promise that sometime in the future he will not commit some act prohibited by the board. In this case, it is admitted that the Petitioner, John Spence, does not belong to any fraternity or other organization prohibited by the Defendant. His sole offence is that he refused to promise that he would not in the future join any society deemed by the principal and teachers injurious to the best interests of the High School. A pupil should not be denied school privileges except for the most serious offences. In this case, the punishment, if the Petitioner was liable to punishment, was entirely too drastic.

It is ordered that the Petitioner, John Spence, be immediately restored to his class in the High School under the control of the Defendant.

January 4, 1915.

DUTY OF CITY AUDITOR TO COUNTERSIGN WARRANTS PASSED BY BOARD OF EDUCATION

BAYONNE BOARD OF EDUCATION,
Appellant,

vs.

STEPHEN E. EVANS, AUDITOR OF THE SCHOOL DISTRICT OF BAYONNE,
Respondent.

Mark A. Sullivan, for Appellant.
Eugene Sharkey, for Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

This appeal is brought by the Bayonne Board of Education to protest against the action of the Respondent in refusing on or about November 1, 1923, as auditor of the School District of Bayonne, to countersign a warrant in the amount of $17,500, comprising additional compensation for the school architect, Donald G. Anderson, in connection with his services incident to the erection of the Junior High School, and in so refusing to countersign such warrant after it had been presented to him by the board of education duly signed by the president and secretary of the board. Appellant alleges that subsequent to Respondent's refusal to countersign the warrant as aforesaid his reasons therefor were duly considered by the board of education and the board on November 5, 1923, passed a resolution to the effect that the claim for which the warrant was given was correct and just, ordered that the same be paid, and returned the warrant to the Respondent together with a copy of such resolution; and upon which Respondent again refused to countersign the warrant in question.

Respondent defends his action on three grounds: First, that the money for the erection of the Junior High School was appropriated for "construction, equipping, and grading grounds of Junior High School" and that it would be an unlawful diversion of these funds to pay any part of them to an architect whose services were all supposed to be included in an annual salary paid out of the Current Expense Funds of the board; second, that the architect's bill for $17,500 as aforesaid was not regularly presented and passed upon at a board of education meeting; and third, that the warrant was not presented to the auditor in the manner prescribed by the School Law in that it was not accompanied by an itemized statement of the services for which it was drawn.

A hearing in this matter was conducted by the Assistant Commissioner of Education on Friday, February 1, 1924, at the Administration Offices of the Board of Education in Bayonne, at which hearing testimony of witnesses on both sides was heard. Briefs upon the legal questions involved have also been filed subsequent to the hearing by counsel for both Appellant and Respondent.

It appears that the Board of School Estimate in making the appropriation for the erection of a Junior High School specifically eliminated the amount

fixed by the board of education as architect's fees, but did not so restrict the expenditure of the balance of the appropriation. It has been decided in such cases, notably that of Townsend *vs.* State Board of Education, 88 N. J. L. 97, that, although a specific item may have been eliminated by a Board of School Estimate, if the appropriation of the reduced total amount is not restricted as to such item, but the designated purpose of the reduced appropriation is broad enough to cover it, then such item may be paid out of such balance. The Commissioner, moreover, cannot agree with Respondent's contention that because of the architect's annual contract with the board of education he could not legally be awarded out of the appropriation for the "construction, equipping, and grading of grounds of Junior High School" additional compensation for what were actually additional services and expenses in connection with the erection of such Junior High School.

The intention of the appropriation for construction, equipping and grading of the Junior High School will in the Commissioner's opinion be determined from the terms of such appropriation and these terms are in his opinion sufficiently broad to cover whatever construction expenses the board of education finds it necessary to make including an additional remuneration for the board architect for special services and for extraordinary expenses entirely incidental to such Junior High School construction. Such special remuneration would be in the nature of an additional agreement separate and apart from his annual contract as school architect.

As far as the presenting of the architect's bill and its being passed upon by the board of education is concerned, it appears that after the architect's statement for his fees and expenses in connection with the Junior High School was considered by the board of education as a committee of the whole, the amount of $17,500 was duly ordered paid by the board of education at a regular board meeting. This, in the Commissioner's opinion, is a substantial compliance with the statutory requirements. While, moreover, no itemized statement accompanied the warrant when sent to the school auditor, the law was also in the Commissioner's opinion substantially complied with when the general purpose of the warrant was stated thereon. It would hardly seem to be the intent of the statute that a detailed itemizing be made of architect's expenses as would be necessary in case of purchase of goods, etc.

Moreover, the School Law, Section 78, Article VI, is mandatory upon the school auditor to countersign warrants returned to him by the board of education after his objections have been considered and over-ruled by such board of education. The statute gives him no alternative, and in the case at hand the return of the warrant to Mr. Evans, the school auditor, was duly made by the Bayonne Board of Education with a resolution over-ruling the objections previously made by him.

In view of all the facts above set forth, it is hereby ordered by the Commissioner of Education that the Respondent, the school auditor as aforesaid, proceed at once to countersign the warrant for $17,500 comprising additional compensation for the school architect, Mr. Donald G. Anderson, in connection with services and expenses incident to the erection of the Junior High School,

and that he proceed to forward such warrant to the Custodian of School Moneys, in accordance with the provisions of the statute.

The appeal is accordingly hereby sustained.

March 17, 1924.

DECISION OF THE STATE BOARD OF EDUCATION

We agree with the conclusions reached by the Commissioner and recommend that his decision be affirmed.

POWERS OF AUDITOR OF SCHOOL DISTRICT

THE BOARD OF EDUCATION OF ATLANTIC CITY,
Petitioner,

vs.

BESSIE M. TOWNSEND, ACTING COMPTROLLER OF ATLANTIC CITY,
Respondent.

James H. Hayes, Jr., for the Petitioner.
Theodore F. Schimpf, for Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The Petitioner, in January, 1909, employed one Edwin Clark to criticise the plans and specifications for a new school building, and said Clark, in May, 1909, rendered a bill for services performed by him under said employment, for the sum of three thousand dollars. Said bill was approved by the Petitioner and forwarded, on April 30, 1910, to the then Comptroller of Atlantic City, who, by virtue of the provisions of Section 62 of the General School Law, is the Auditor of the School District of Atlantic City. Later the bill was returned to the Petitioner, together with a statement of the reasons why the bill should not be paid.

On November 15, 1912, the Petitioner adopted a resolution to pay Clark the sum of two thousand dollars, with interest at the rate of six per cent. from May 5, 1909, to November 15, 1912, in full settlement of his claim.

In accordance with this resolution, a warrant was drawn in favor of said Clark for the sum of $2,424.66, and forwarded to the Auditor, together with the bill of said Clark, duly verified by affidavit. On November 27, 1912, the Auditor returned the warrant and bill, together with a statement of his objections. At a meeting held on November 29, 1912, the Petitioner, after considering the objections of the Auditor, adopted a motion that the bill of Edwin Clark be ordered paid, and on November 30, 1912, the Auditor was notified of the action of the Petitioner.

The Auditor still refuses to countersign the warrant drawn in favor of Edwin Clark, and the Petitioner prays that an order may be issued directing the Auditor to countersign said warrant and deliver the same to said Clark.

Section 62 of the School Law provides that the Comptroller, Auditor or other officer, if there be one, authorized to audit claims against the municipality in which the school district shall be situate, "shall be the auditor of the school district," and that all warrants accompanied by itemized statements of the claims shall be forwarded to said auditor. It further provides that "said auditor shall examine and audit such warrants and statements with a view to ascertaining whether the sum or sums are proper * * * and if said auditor shall have reason to believe that the claim or demand for which such warrant shall have been issued is incorrect, or for any cause should not be paid, he shall return such warrant and statement to the Secretary of the Board of Education with a statement of the reasons why the same should not be paid, and said secretary shall correct said warrant and statement or present them to the Board of Education at its next meeting. If said Board shall find that the claim or demand for which said warrant was issued was correct and just, it shall, by a majority vote of all the members of said Board, order that it shall be paid, and said auditor shall, upon receipt of the warrant and statement thereof, together with a statement of the action of the Board of Education thereon, countersign the warrant and forward it to the Custodian of School Moneys."

The Respondent, in her answer, assigns several reasons for her refusal to countersign the warrant drawn in favor of Edwin Clark.

In order to reach a decision in this case, it is necessary only to consider the eighth objection, which is that the bill is not itemized in accordance with law.

The bill reads as follows:

"For professional services rendered on new Grammar School at Atlantic City and including expenses..... $2.000.00
Interest due from May 5, 1909, to Nov. 15, 1912, as allowed by resolution of the Board of Education..... 424.66

$2,424.66"

The law expressly requires that all bills presented to the auditor shall be itemized. Unless a bill is properly itemized, it is impossible for the auditor to perform the duty cast upon him by the statute. The bill under consideration does not state the nature of the services rendered nor the time given by Clark in performing his duties under his agreement with the Petitioner. Neither does it state the amount of the expenses nor how such expenses were incurred.

The auditor may have been, and probably was, in a general way, cognizant of the nature of the work performed by Clark, but this is not sufficient. He must have clearly stated in the bill he is asked to approve such items as will enable him to act intelligently when he approves or disapproves it.

The bill rendered by Clark and which the Respondent refuses to approve does not comply with the statute.

The appeal is dismissed.

May 11, 1914.

ORDER WITHHOLDING SCHOOL MONEY FROM A DISTRICT

IN THE MATTER OF WALTER G. DAVIS
vs.
THE BOARD OF EDUCATION OF THE TOWNSHIP OF OVERPECK, BERGEN COUNTY.

John Scott Davison, for the Appellant.
William J. Morrison, for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The County Superintendent of Schools of Bergen County has forwarded to this office orders withholding from the school district of the Township of Overpeck all State moneys now in the hands of the Custodian of the School Funds of said district or which may hereafter come into his hands. The reason assigned for the issuing of this order is that "the Board of Education of said school district of Overpeck has neglected or refused to comply with the decision of the State Board of Education in the action of Davis *vs.* The Board of Education of Overpeck Township." Orders issued by the County Superintendent withholding school moneys from the school district do not become effective until approved by the Commissioner of Education.

The question now before me is whether the Board of Education of Overpeck Township has neglected or refused to perform any duty imposed upon it by the school law or by the rules and regulations of the State Board of Education, and, if so, whether such refusal or neglect is sufficient ground for withholding from the school district of the Township of Overpeck the said school moneys.

The State Board of Education decided that the transfer of Mr. Davis from the position of principal to the position of assistant teacher in the schools under its control was illegal and said Davis was under the protection of the Tenure of Service Act as a principal and could not be transferred to another position without his consent. I am of the opinion that the decision of the State Board of Education reinstated Mr. Davis as principal of the High School in the Township of Overpeck without any action whatever by the Board of Education of said school district. The Board, therefore, has not neglected or refused to perform any duty imposed upon it by the statute or by the rules and regulations of the State Board of Education, and for this reason the orders forwarded by the County Superintendent will not be approved.

June 1, 1913.

REFUSAL OF AUDITOR TO COUNTERSIGN WARRANT

JAMES H. HAYES, JR.,
Petitioner,
vs.
BESSIE M. TOWNSEND, COMPTROLLER OF THE CITY OF ATLANTIC CITY,
Defendant.

DECISION OF THE COMMISSIONER OF EDUCATION

The Board of Education of Atlantic City employed the Petitioner to act as its Solicitor and Attorney for one year from August 1, 1913, at a salary of $1,000.

On November 30, 1913, said Board ordered paid a bill for $250, drawn in favor of the Petitioner for salary as Solicitor and Attorney, for the months of August, September and October, 1913. Said bill, together with a warrant for its payment, was forwarded to the Defendant, who, by virtue of the provisions of section 62 of the School Law, is the Auditor of the School District of Atlantic City. Said Auditor returned the bill and warrant to the Board of Education with her reasons for refusing to countersign the warrant. At a meeting of the Board, held December 18, 1913, the bill was again ordered paid, and the bill and warrant were again forwarded to the Auditor, together with a statement of the action of the Board.

On January 29, 1914, the Board of Education ordered paid a bill for $250, drawn in favor of the Petitioner for salary as Solicitor and Attorney for the months of November and December, 1913, and January, 1914. This bill, together with a warrant for its payment, was forwarded to the Petitioner, who returned the bill and warrant to the Board of Education with her reasons for refusing to countersign the warrant. At a meeting held March 19, 1914, the Board again ordered this bill paid, and the bill and warrant were again forwarded to the Defendant, together with a statement of the action of the Board.

The Defendant still refuses to countersign the warrants, alleging, as a reason for her refusal, that there is no appropriation from which the bills drawn in favor of the Petitioner can be paid.

Section 62 of the School Law provides, among other things, that the comptroller, auditor, or other officer, if there be one, authorized by law to audit claims against the muncipality in which such district shall be situate, shall be the auditor of the school district, and that the city treasurer, by virtue of his office, shall be the custodian of the moneys of the school district.

The defendant performs her duties as Auditor of the School District of Atlantic City solely by virtue of the provisions of the School Law, and not by any provision of law relating to her duties as Comptroller of Atlantic City.

The duties of the school auditor are clearly defined in section 62, and

are confined to examining and auditing warrants and statements received from the Board of Education, and, if said warrants and statements are found to be correct, to countersign them and forward them to the Custodian of School Moneys for payment. If the Auditor has reason to believe that the claim for which any warrant is drawn is incorrect, or, for any reason, should not be paid, he must return the warrant to the Board of Education, accompanied by a statement of his reasons for refusing to countersign the warrant. The section further provides that, if, after a warrant is returned by the Auditor, the Board "shall find that the claim or demand for which said warrant was issued is correct and just it shall, by a vote of a majority of all the members of said Board, order that it be paid, and said auditor shall, upon receipt of the warrant and statement thereof, together with a statement of the action of the Board of Education thereon, countersign the warrant and forward it to the Custodian of School Moneys."

The provisions of section 62 have been strictly complied with in the case of the two bills of the Petitioner, except that the Defendant refuses to countersign the warrants for their payment after they have been ordered paid by the Board of Education after consideration of the objections made by her.

The Defendant attempts to excuse her refusal to perform the plain duty cast upon her by the statute by pleading that there is no appropriation from which the claims can be paid.

Whether or not there is an appropriation available for the payment of the claims is no concern of the Defendant. Her responsibility was ended when she returned the warrants to the Board of Education.

It is ordered that the Defendant countersign the warrants drawn in favor of the Petitioner and forward them to the Custodian of School Moneys.

It was not necessary, in order to reach a decision in this case, to pass upon the point raised by the Defendant in her answer, that there was no appropriation from which the bills of the Petitioner could lawfully be paid. The point is, however, of such importance that I think it should be passed upon at this time.

Section 74 of the School Law makes it the duty of the Board of Education in a city school district, annually, to deliver to each member of the Board of School Estimate "an itemized statement of the amount of money estimated to be necessary for the current expenses of and for repairing and furnishing the public schools of the district for the ensuing year," and section 75 makes it the duty of the Board of School Estimate, annually, to "fix and determine the amount of money necessary to be appropriated for the use of the public schools in such district for the ensuing school year."

In the above quotation from section 75, the Board of School Estimate is directed to "fix and determine the *amount of money necessary to be appropriated for the use of the public schools.*"

The language used clearly shows that it was the intent of the Legislature that the annual appropriation should be in bulk and not a separate

appropriation for each purpose specified in the itemized statement received from the Board of Education. Had it been the intent of the Legislature that the appropriation should be itemized, the appropriate language would have been "to fix and determine the several amounts needed for the several purposes specified in the certificate." It should further be noted that, in section 74, the Board of Education is directed to prepare "an itemized statement of the amount of money *estimated* to be necessary." The Legislature, evidently, was aware that it was impossible for the Board of Education to determine the exact amount needed for each purpose, and that all that was intended was that the Board of School Estimate should have before it the information necessary to enable it to act intelligently in determining the amount of the appropriation.

It frequently happens in a large city school district that, owing to an unexpected increase in the number of pupils, additional teachers are required, and that the amount estimated to be necessary for the payment of teachers' salaries is not sufficient. To hold that the Board of Education was prohibited from employing the necessary teachers because the amount estimated for their salaries was too small, while the total appropriation was ample to meet all demands, would prevent the Board from performing the duty cast upon it.

A Board of Education in a City School District may, in its discretion, use for any item of current expense, moneys appropriated by the Board of School Estimate, without regard to the several amounts estimated as necessary for the several purposes specified in its statement to the Board of School Estimate.

In Exhibit "P. 2," annexed to the Petition, the Defendant says that the Board of School Estimate struck out the item for salary of the Attorney of the Board of Education, and that "said action was taken with the view of saving said amount, it being understood that the City Solicitor would act in a like capacity for the Board of Education and Board of Commissioners, at no additional expense to the public."

If that were the reason for reducing the amount of the appropriation, it is evident that the Board of School Estimate did not realize that the City and the School District were separate and distinct municipal corporations, and that the latter was not a department of the city government.

A Board of Education has no right to demand service from an employee of the City Commission, and no such employee could be compelled to serve the school district. It is true that the City Treasurer is the Custodian of School Moneys, and that the City Comptroller is the Auditor of the School District, but this is by virtue of an express provision of the School Law.

There is no incompatibility or inconvenience in these officers holding dual positions, but it would frequently be impossible for the City Solicitor to act as Attorney for the Board of Education.

In a recent case tried before me, in which the Board of Education of Atlantic City was the Complainant and the City Comptroller the Defendant, the City Solicitor appeared for the Defendant. It is impossible "to run with the hare and hunt with the hounds," and it is equally impossible for

one person to appear as Attorney for both the Complainant and Defendant.

The appointment of the Petitioner as Attorney and Solicitor of the Board of Education of Atlantic City was legal, and his salary may be paid from the moneys appropriated by the Board of School Estimate for the current expenses of the schools.

July 24, 1914.

DECISION OF THE STATE BOARD OF EDUCATION

In this case of Hayes *vs.* Townsend it is not denied by the Defendant-appellant that a contract was entered into with the Petitioner-appellee for legal services; that the services were duly performed, and that the Petitioner-appellee earned and is entitled to his money. The defense is that there has been no appropriation of money made for legal services in the budget, and therefore the Defendant, as comptroller of the school funds, has no authority to pay the amount claimed. This is more or less of a legal quibble which the Commissioner has disposed of in his decision. The facts remain that there was a contract made and kept by the Petitioner-appellee; that he rendered legal services, and that he is entitled to payment therefor. This Defendant-appellant countersigned warrants for this same Petitioner-appellee, for the same or similar services, under the same or similar contract, during the year immediately preceding this contract. There was no objection made then to there being no appropriation for the specific purpose of a solicitor. The money was taken out of current expenses. There seems no reason why the precedent could not be continued. The Defendant-appellant should obey the order of the Commissioner and countersign the warrants drawn in favor of the Petitioner-appellee, and forward them to the Custodian of School Moneys.

DECISION OF THE SUPREME COURT

This writ was to test the validity of a determination of the State Board of Education, affirming a decision of the Assistant Commissioner of Education, directing Prosecutrix as Comptroller of the City of Atlantic City, and by virtue of the School Law, ex-officio auditor of the School District of Atlantic City, to countersign certain warrants for the salary of James H. Hayes, Jr., as solicitor and attorney for the Board of Education of Atlantic City. The ground of Miss Townsend's refusal was that there was no appropriation from which the warrants could be paid. The reply of the Assistant Commissioner and the State Board was that the warrants might lawfully be, and should be, paid out of moneys appropriated by the Board of School Estimate for the current expenses of the schools, and was predicated on the provisions of section 62 of the School Law (C. S. 4743; P. L. 1903, second special session, p. 23) of which those pertinent to this case are, that all disbursements of the Board of Education shall be by warrant drawn on the custodian of school moneys; such warrants, accompanied by itemized statements of the claims, shall be forwarded to the Comptroller or auditing office of the municipality, who is made ex-officio auditor of the school district; such auditor shall

examine and audit such warrants and statements, with a view to ascertaining whether the sum or sums are proper, and if he shall find them correct, shall countersign the warrant and forward it to the custodian of school moneys. The auditor may examine witnesses under oath as to the accuracy and good faith of any claim. If the auditor shall have reason to believe a claim for which warrant has been issued is incorrect, or for any cause should not be paid, he shall return the warrant and statement to the secretary of the Board of Education, with a statement of his reasons and the secretary shall correct the warrant or present it to the Board at its next meeting; and if the Board find it correct and just it shall by a majority vote order it paid, and the auditor on again receiving the warrant with a statement of the action of the Board shall countersign it and forward it to the custodian for payment.

If this section be applicable, and be unaffected by other parts of the act, the rulings of the Assistant Commissioner and the State Board should be affirmed; for it is conceded that the warrants were drawn in due form, and after a first refusal by the auditor re-submitted to the Board of Education, and that body by a majority ordered them paid; the auditor on a second presentation with statement of this action, still refused to pay them.

The claim on the part of the Prosecutrix is that section 62 must be read in connection with sections 74 and 75, relative to the estimates and appropriation of moneys required for current expenses and repairing and furnishing the schools for the coming year, and when so read, the refusal of the auditor will appear lawful.

By section 74, C. S. 4746, the Board of Education on or before May 15th is to deliver to the board of school estimate an "itemized statement" of the money estimated necessary for current expenses and for repairing and furnishing the schools for the ensuing school year, and also the amount apportioned to the district by the County Superintendent. With this as a basis (Sec. 75) the board of school estimate fixes and determines the amount necessary to be appropriated for the year, exclusive of the money apportioned by the County Superintendent. This determination, in the form of a certificate, is given to the Board of Education, and also to the municipal council, which appropriates accordingly, subject to certain restrictions not here relevant.

The case shows that pursuant to these sections, the Board of Education made up the itemized statement, totaling $380,320, one of the items of which reads, "Solicitor, $1,000." It is conceded that this was for salary of a solicitor or legal adviser. When this was submitted to the board of school estimate, that body, after discussion, struck out the item, and reduced the total by that amount. Certificate was made accordingly, and it appears plainly from a comparison of the figures of the appropriation and tax ordinance, and the county apportionment, that the city appropriation was made on the basis of the certificate of the board of school estimate, as by law must have been made.

The certificate itself is not part of the return and we are therefore not informed whether it simply called for a lump sum or specified the items, but under section 75 a certificate of a lump sum is plainly sufficient, for all that the board of estimate has to determine is "the amount of money necessary

to be appropriated for the use of the public schools in such district for the ensuing school year, exclusive of the amount which shall have been apportioned to it by the County Superintendent of Schools." In our view it became the duty of the board of estimate to go over the itemized statement of the Board of Education, and using it as a basis, determine the total amount necessary for the use of the schools. It could reach this result by striking out items or reducing them; but the result reached became a total, and it is such total as modified by the county appropriation that the board of estimate is to certify and the city council provide in the tax levy. As was said by the Court of Errors and Appeals in Common Council of Lambertville *vs.* Board of Education, 87 N. J. L. 93, Atl. 596, 597, "the obvious intent was to enable the board of school estimate to act intelligently in fixing and determining the amount necessary for such purpose or purposes;" and while in that case an estimate of the Board of Education combining in one lump sum moneys needed for new schools under section 76 with ordinary repairs to existing schools under section 74 was held invalid, it is important to observe that section 76 authorizes a bond issue for new schools, and the intermixing of the purposes specified in the two sections might result in using the proceeds of bonds for current expenses.

Reading the act as a whole, it would seem that the intent was to substitute for the city council the board of school estimate, a joint body, as the arbiter in fixing the annual appropriation for the schools. This amount when duly certified to the council is mandatory on it. Montclair *vs.* Baxter, 76 N. J. L. 68. That case related to section 76, where the word "may" was used. In section 75 the words are "shall appropriate."

In Newark *vs.* Board of Education, 30 N. J. L. 374, the city charter (P. L. 1857, p. 146, Sec. 60) provided for just such an itemized estimate to be submitted by the Board of Education to the common council, and that body were thereby "empowered to raise by tax such sum or sums of money for the support of public schools as they deem expedient and necessary, and all moneys so raised and appropriated shall be expended by the Board of Education for the support of public schools in the City of Newark, according to the provisions of this act." It was held in the case cited that in that disbursement and distribution of the money the Board of Education were given exclusive management and control, and were in no way subject to the direction or interference of the council except in purchasing real estate.

This decision has never been reversed or overruled, and we thiink it is applicable to the case at bar. The general powers of boards of education under the school act are substantially similar to those in the Newark charter. They may appoint such officers, agents and employees as may be needed, and fix their compensation. Section 50. Whether a permanent solicitor at a fixed salary is needed is a matter primarily for their determination.

We are not unmindful of the damage that might be done by a dishonest school board in estimating moneys for one item and when the appropriation is received, diverting them to other purposes. But we fail to find in the statute that as respects the object specified in Section 74, the legislature intended that the itemized estimate should be more to the board of estimate

than a guide to intelligent action in fixing a total appropriation. The result must be that so long as the total appropriation holds out, the auditor has no option after a rejected claim has come back with the imprimatur of the Board of Education, but to countersign the warrant; and leave the public to its remedies by indictment and otherwise in case of a malfeasance in office by the board.

The order of the State Board of Education is affirmed.

November 17, 1915.

REFUSAL OF CUSTODIAN TO PAY ORDERS

THE BOARD OF EDUCATION OF THE BOROUGH OF HAMPTON,

Appellant,

vs.

JOHN V. MELICK, CUSTODIAN OF SCHOOL MONEYS,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

This appeal is taken by the Board of Education of the Borough of Hampton, Hunterdon County, on the refusal of the custodian of school moneys to pay certain orders regularly drawn on him by authority of the Board of Education.

Article 18 of the School Law, edition of 1914, section 227, provides that school moneys shall be paid out by the custodian only "on orders legally issued and signed by the president and district clerk or secretary of the board of education; any ordinance, by-law or resolution of a township committee, common council or other governing body of any municipality attempting to control such moneys, or which shall in any way prevent the custodian of the school moneys of the school district from paying the orders of the board of education as and when they shall be presented for payment shall be absolutely void and of no effect." The law as quoted is plainly mandatory upon the custodian to pay the orders of a board of education upon being presented to him in a legal form.

The decisions of the courts are also to this effect. In the case of Zimmerman *vs.* Mathe the court in its decision uses the following language: "With the expenditure of money raised for school purposes and the application of the moneys to the purpose for which they were raised the township collector has no official concern."

It has also been held that the custodian of the moneys of a school district in the payment of orders is not responsible for the application the school board has made of the money when such orders come to him drawn according to law.

In this case it is plainly the duty of the custodian of the school moneys, John V. Melick, to pay the orders issued by the Board of Education, and he is hereby commanded so to do.

The appeal is sustained.

February 9, 1916.

DECISION OF THE STATE BOARD OF EDUCATION

The Respondent, Mr. Melick, as custodian of school moneys in the Borough of Hampton, declined to pay certain bills at the request of the Board of Education of the Borough of Hampton, because he did not consider the bills legal. This is a proceeding to compel the custodian to obey the orders of the Board of Education and is, specifically, an appeal from the decision rendered by the Commissioner of Education.

Article 18 of the School Law, section 227, provides that school moneys *shall* be paid out by the custodian "on orders *legally issued and signed* by the president and district clerk, or secretary of the board of education," etc. The word "shall" makes it mandatory upon the custodian to obey the directions of the board. The word "legally" qualifies the words "issued and signed" and indicates that the *issuing* and the *signing* must be legal, but is evidently not meant to qualify in a broad way the word "orders." The reading of "orders, issued and signed legally" gives the right meaning. The custodian has not the powers of an auditor, and cannot make legal quibbles over every dollar paid out. If the statute had any idea of vesting him with any such powers it would have so stated. As it now reads the statute names him a "custodian" and gives him no power but that of a keeper of money to be paid out when duly authorized by the proper authorities.

The note cited on page 388 of the School Law (Edition of 1914) is evidently a continuation from the old forms used before 1911. It is not law nor even a rule of the State Board, but a note of direction written in by some assistant commissioner.

June 3, 1916.

FIXING OF SCHOOL CUSTODIAN'S BONDS AND DESIGNATION OF BANK ACCOUNT

BOARD OF EDUCATION OF THE CITY OF BAYONNE,

Appellant,

vs.

JOHN J. RYAN, CUSTODIAN OF SCHOOL MONEYS,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

On October 21, 1926, the Bayonne Board of Education by resolution duly adopted designated the Mechanics National Bank of Bayonne as the depositary for school funds and ordered the respondent, the Custodian of School Moneys,

to deposit therein all school funds then in his hands. On November 4, 1926, the Board of Education by another resolution directed the respondent to give bonds for the faithful discharge of his duties in the sum of $500,000 with sureties thereon consisting of three separate surety companies. The Custodian of School Moneys refused to comply with either of the directions contained in the above mentioned resolutions and the Board of Education then proceeded to bring this appeal.

The appellant in making these demands of the Custodian of School Moneys as to the giving of bonds and as to the place of deposit of school funds relies upon the following statutory requirements which were added by Chapter 302, P. L. 1915, as an amendment to section 185 of the School Act of 1903 (Sec. 276, School Law):

> "* * * whenever any school district shall contain more than one municipality the Board of Education may appoint a suitable person as custodian of school moneys of said district, and may fix his salary and term of office. Such custodian shall, when requested to do so at any time by the board, render to said board a true and full account of all moneys in his possession, as such custodian, up to such time, and of all payments made by him out of said moneys and for what purpose, and shall also, when required by resolution of said board, deposit in any bank or banking institution designated by said board, all moneys then in his hands or thereafter collected or received by him as such custodian; he shall give bonds for the faithful discharge of his duties in such amount and with such sureties as said board shall direct, but such bonds shall be for a sum not less than the amount apportioned to said district by the County Superintendent of Schools; until the appointment of a custodian of school moneys by the board of education, the collector or other person residing in the municipality situate in such school district having the largest amount of taxable property shall be custodian of the school moneys of such district."

In reaching a determination as to the real intent of the Legislature in the above quoted provisions of Chapter 302, P. L. 1915, it must be noted that no amendment was made as to the place of deposit of school moneys and the giving of bonds by the custodian in that part of section 185 which deals with the custodian's official duties being covered by his bonds as municipal treasurer or collector and with his official duties generally, but that on the contrary such amendment as to the place of deposit of school moneys and the giving of bonds appears only in the latter part of the section after the new provision, "whenever any school district shall contain more than one municipality, etc." This clearly indicates to the Commissioner that it was the intention on the part of the Legislature to allow the Board of Education to impose such requirements upon the school custodian as appellant contends for only in the case of school districts containing more than one municipality. Moreover, since the first part of section 185 definitely provides that the bonds of the municipal treasurer or collector shall be deemed to cover his duties as school custodian, it must necessarily follow that the subsequently added provision in

the same section for the giving of individual bonds by the custodian (while the former provision remains unchanged) can apply only to the Custodian of School Moneys in districts consisting of more than one municipality; and since the latter provision is introduced by the pronoun "he" and refers to the custodian immediately above mentioned who is required to place school moneys in the depositary designated by the Board of Education, it must also follow that both provisions thus connected relate solely to the custodian of school moneys in a district consisting of more than one municipality.

It is therefore the opinion of the Commissioner of Education that since the Board of Education of the City of Bayonne consists of but one municipality, the bonds of the Custodian of School Moneys are controlled by that part of section 185 which provides that the bonds given by the municipal treasurer or collector, as the case may be, shall be deemed to cover his duties as Custodian of School Moneys; and it is further the opinion of the Commissioner that the Custodian of School Moneys in such a district as the City of Bayonne has full discretion as to the place of deposit of school funds, since he is under no further statutory requirement in that respect than that he "shall receive and hold in trust all school moneys belonging to such school district * * * which shall be paid out by him only on orders legally issued and signed by the president and district clerk or secretary of the Board of Education, etc."

The Custodian of School Moneys of Bayonne therefore, who according to section 81 of the School Law holds his office by virtue of being City Treasurer, must be considered to be covered by his official bonds as treasurer and in no way compelled to comply with the direction of the Board of Education as to the place in which he shall deposit school moneys.

The appeal is accordingly hereby dismissed.

April 11, 1927.

SALUTE TO THE FLAG AT THE OPENING EXERCISES OF A SCHOOL

FRED TEMPLE,

Appellant,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF CEDAR GROVE,

Respondent.

Fred Temple, *pro se.*

The Respondent, Mr. Jacobus, President of the Board.

DECISION OF THE COMMISSIONER OF EDUCATION

The only questions before me for decision are the resolutions adopted by the Board of Education of Cedar Grove Township, prescribing the pledge to be used at the morning exercises in a salute to the flag, and the suspension of the son of the Appellant for failure to repeat this pledge.

A Board of Education has the right, under the law, to make rules and regulations for the government of the school, to prescribe the course of study, and, when it deems advisable, the character of the opening exercises. Its action, however, must be reasonable, and must not impose an undue hardship on any pupil.

The Respondent in this case has evidently adopted the rule relating to a salute to the flag in accordance with a suggestion made some time ago by County Superintendent Meredith, which suggestion was in compliance with a rule of the State Board of Education. The rule directed the County Superintendent to see that the law requiring the display of the flag during school hours was observed, and further to recommend to the schools, wherever advisable, that a salute to the flag be made at the opening exercises. The latter part of the rule of the State Board of Education is not mandatory, and, therefore, has no force of law.

I think if a pupil is present at the opening exercises, it is his duty to salute the flag. It is a mark of respect that any decent man or boy would use, no matter what country he was in. But I think that this goes further. It reads:

"I pledge allegiance to my flag, and to the Republic for which it stands. one nation indivisible, with liberty and justice to all."

That is certainly a pledge of allegiance to the United States. The son of the Appellant is not a citizen of the United States. His citizenship must follow the citizenship of his parents until he becomes of age, when he may choose his own; but until that time his citizenship must follow that of his parents. I think, therefore, that if the child salutes the flag, and does not repeat this pledge, that he is doing all that can reasonably be expected of him; and that a Board of Education has no right to ask a child to pledge allegiance to the flag of a country of which he is not a citizen.

The appeal is sustained, and the son of the Appellant must be admitted to the school.

November 8, 1912.

SUPPLIES FURNISHED BY BOARD MEMBERS

FREDERICK W. PARK,
Appellant,
vs.
HUGH HEARON,
Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

This case was submitted on written complaint and answer, and without formal hearing. The complainant, Frederick W. Park, of Cranford, preferred charges against Hugh Hearon, president of the Board of Education

of the school district of Cranford, as having violated article 14, section 183, of the School Law, inasmuch as he had furnished supplies, printing and advertising for the Board of Education, and the bills were paid by the Board, of which he was a member. The appellant demands that the said Hugh Hearon be removed from his office as a member of the Board of Education, pursuant to the law as found in the section above mentioned.

The undisputed facts in the case are that between June 1, 1914, and April 27, 1916, the said Hugh Hearon was the publisher and one of the owners of a newspaper called the Cranford Chronicle and that while part owner of this paper and printing business there were furnished certain printing and advertising to the Board of Education of the district of Cranford, of which Mr. Hearon was a member. Bills for this printing and advertising were paid by the said Board.

The question which is important to consider is the character of the printing, advertising and supplies furnished, in order to determine whether they come under the provisions of article 14, section 183, as the Appellant claims. This article in the School Law was enacted in 1903. Section 181 of this article provides that "textbooks and school supplies shall be furnished free of cost for use by all pupils in the public schools." Section 183 of the same article provides that "it shall be unlawful for any county superintendent of schools, member of a board of education, teacher or any person officially connected with the public schools to be agent for or to be in any way pecuniarily or beneficially interested in the sale of any textbooks, maps, charts, school apparatus or supplies of any kind or to receive compensation or reward of any kind for any such sale or for unlawfully promoting or favoring the same. A violation of the provisions of this section shall be punishable by removal from office or by revocation of certificate to teach." It will be noted that there is a penalty attached to a violation of this law. The question is as to whether the things furnished the Board of Education by the Cranford Chronicle Company were supplies in the meaning of the statute invoked by the Appellant. The supplies mentioned in section 181, article 14, are provided for the use of pupils just as the textbooks and the maps and the charts mentioned are provided for the use of pupils. An examination of the itemized bills that were paid by the Board of Education to the Chronicle Company reveals that only advertising and printing matter made up the items in the bills. The Appellant does not claim that the material furnished by Mr. Hearon was for the use of pupils, but claims they were supplies within the meaning of the section quoted in the law.

Article 7, section 106, of the School Law, in giving a definition of the term "current expenses," states that they shall include among other things textbooks, school supplies, flags, insurance and incidental expenses of the schools. The question to determine, then, is whether the printing furnished in this case would come under the head of incidental expenses or under the head of school supplies. The supplies mentioned in article 14, section 183, are the kind that are intended for the use of pupils, just as the textbooks are intended for the use of pupils, and the printing and advertising the Chronicle Company furnished are not within the meaning of the words "school sup-

plies," but come under the title of incidental expenses for running the schools. It is not shown in the charges made that Mr. Hearon had any interest in the "sale" of textbooks or supplies as comprehended in the meaning of the statute. The things he furnished the Board of Education were not sold to the Board; they were ordered by the Board.

It is common business practice to sell to boards of education through agents of book companies and school supply houses textbooks and school supplies. The law prohibits teachers, county superintendents and school board members from acting as agents for the "sale" of these things, or to receive compensation or reward for promoting the "sale" of them. A violation of this section by a teacher is punishable by revocation of his certificate to teach. A county superintendent or school board member is punished by removal from office.

The Chronicle Company, therefore, not having furnished school supplies for the use of pupils, Mr. Hearon had no pecuniary or beneficial interest in promoting or favoring their "sale." Hence, there was no violation of the provisions of section 183 of the School Law.

Inasmuch as Mr. Hearon in his answer to the charges pleaded justification because of an opinion of the Attorney General that he claims was given to a committee of the Board of Education who visited Trenton to discuss the matter, it is well to consider the case under section 32 of the crimes act as found in section 430 of the School Law. Here the law is as follows: "Any member of any board of education in any school district who shall be directly or indirectly concerned in any agreement or contract, or directly or indirectly interested in furnishing any goods, chattels or supplies or property of any kind whatsoever to the school district, the expense or consideration of which is paid by the board of which such member is a part, shall be guilty of a misdemeanor."

In the case of the State *vs.* Keuhnle it is held that to justify conviction under this section of the crimes act the concern of the member of the body must be corrupt and that there must be proof of corrupt intent to justify conviction. It is held in that case that a member of a board of education may be interested or concerned in a claim against the board of which he is a member even though he may not be criminally liable because of the absence of corrupt intent. Justice Swayze, speaking for the Court of Errors and Appeals, uses the following language: "That the owner of a controlling interest in a corporation may often be as much concerned in its contracts as if they were his own is obvious and that although the interest of a holder of a single share of a great corporation like the United States Steel Corporation or the Pennsylvania Railroad may be slight as to be imperceptible no harm can come from holding that he too is concerned within the meaning of the statute, since he cannot be criminally liable unless there is a corrupt intent. Upon the proof of corrupt intent the said stockholder's interest becomes important and may become controlling." This is evidently the case to which Mr. Hearon refers in justification of his being interested in claims against the Board of which he is a member.

Sworn statements submitted in this case by members of the Board of Education show beyond any question that Mr. Hearon could in no way be accused of any corrupt intent in connection with the business transactions he had with the Board of Education of which he was a member.

Article 7, section 94, of the School Law provides as follows: "He [member of a board of education] shall not be interested directly or indirectly in any contract with nor claim against said board." This clearly sets forth that it is unlawful for any member of a board of education to have any claim against the board of which he is a member.

It has been shown by the Appellant and admitted by the Respondent that there was an interest on the part of Mr. Hearon in claims against the Board of which he was a member. To be interested in any such claim is a plain violation of this section of the school law, even though there is no corrupt intent While there is no penalty attached, yet Mr. Hearon should not permit any claim in which he has a financial interest to come before the Board for payment while he is a member of the Board.

July 8, 1916.

DECISION OF THE STATE BOARD OF EDUCATION

The evidence offered in this case shows:

1. That Hugh Hearon, the Respondent-Appellee, was elected a member of the Board of Education of the school district of Cranford, in April, 1914.

2. That three months thereafter the said Hugh Hearon became the half owner by purchase of a newspaper and printing business known as the Cranford Chronicle, and also became its business manager.

3. That the Cranford Chronicle was one of two papers published in the school district, between which the necessary school advertising and printing were divided.

4. That the said Hugh Hearon upon becoming a member of the School Board, advised with other members of the Board, as to whether the share of school advertising and printing formerly given to the Cranford Chronicle should be continued; that some advice was received by himself and the district clerk from some one in the Attorney General's office at Trenton, to the effect that such action would not be illegal; that he and the School Board acted upon that advice; and that advertising and printing continued to be given to the Cranford Chronicle until May, 1915, when the said Hugh Hearon, hearing of public complaint against such action, refused further orders until March, 1916, when upon direct appeal from the district clerk he inserted a five-dollar advertisement of a pending school meeting. Since then there appears to have been no business of any kind given the Cranford Chronicle.

5. Upon these facts Frederick W. Park, the Complainant-Appellant, avers that the said Hugh Hearon has violated Article XIV, section 183, of the School Law, and insists that in consequence thereof the said Hugh Hearon shall be removed from office.

Section 183 of Article XIV reads as follows:

"It shall be unlawful for any county superintendent of schools, member of a board of education, teacher, or any person officially connected with the public school, to be agent for or to be in any way pecuniarily or beneficially interested in the sale of any textbooks, maps, charts, school apparatus or supplies of any kind, or to receive compensation or reward of any kind for any such sales or for unlawfully promoting or favoring the same. A violation of the provisions of this section shall be punishable by removal from office or by revocation of certificate to teach."

Interpretation of this section—183—must be made by considering its relation to the other sections in Article XIV. Article XIV itself relates to textbooks and school supplies furnished *for the use of pupils in the public schools* as shown by section 181, the first section of the article. We are of the opinion that nothing in this article applies, or can be made to apply to supplies of any kind furnished to school boards. The case does not constitute a dispute or controversy arising under the School Law, and, consequently, neither the Commissioner of Education nor the State Board of Education has jurisdiction in the matter.

The appeal is dismissed.

September 9, 1916.

SUSPENSION OF PUPILS FOR DISOBEDIENCE OUTSIDE OF SCHOOL HOURS

CHARLES LAEHDER AND E. K. EDICK,
Appellants,

vs.

THE BOARD OF EDUCATION OF THE BOROUGH OF MANASQUAN,
Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The son of the Appellant, Laehder, was a pupil in the Manasquan High School, and manager of the High School Baseball Team. The son of the Appellant, Edick, was also a pupil in said school and a member of the ball team.

On Wednesday, May 20th, the baseball team, accompanied by Mr. Satchel, the principal of the High School, went to Trenton to play a game. After the game was over, young Laehder and two other boys returned to Manasquan in the automobile with Mr. Satchel. It was understood that the boys in the other cars would follow immediately, but they failed to do so, and did not reach Manasquan until between two and three o'clock Thursday morning. At the school session on Thursday, Mr. Satchel, who, as Principal of the High School, had charge of the athletics of the school, stated that as a punishment for remaining in Trenton, the team could not play a game

scheduled for Lakewood, on Saturday, May 23d. This action of Mr. Satchel was later confirmed by Mr. Richardson, the Supervising Principal of the schools in the district. Thereupon, young Laehder notified the Lakewood team that the game was cancelled. Upon being urged by the Lakewood team to play the game, the Manasquan High School Team was disbanded, and a team known as "The Independent Baseball Team of Manasquan" was organized. Seven of the members of this team were pupils in the Manasquan School, and members of the High School Team. The pupils were warned that if they went to Lakewood they would be suspended. Notwithstanding this warning, they went to Lakewood on Saturday, May 23d. The following Monday, Mr. Richardson suspended the seven boys who went to Lakewood, and notified the Board of Education that he suspended them "for wilful disobedience of school orders on Wednesday, May 20th and for further disobedience and defying school authority on Saturday, May 23d." Among those suspended were the sons of the Appellants. At a meeting of the Board, held June 3d, the action of the Supervising Principal was ratified and confirmed.

It is from this action that the appeal is taken.

Mr. Laehder claims that, as his son returned from Trenton in the car with Mr. Satchel, he could not be punished for what occurred on that day, and that his son went to Lakewood by his permission, and, further, that the Principal and the Board exceeded their authority in punishing pupils for going to Lakewood on Saturday, a school holiday.

The claim of Mr. Edick is the same as that of Mr. Laehder, except that his son did remain in Trenton, but with his knowledge and consent.

I have been unable to find any decision by the courts in this State as to the right of a Principal of a public school or a Board of Education to punish pupils for acts committed when the school was not in session, but there have been numerous cases in other states.

In the case of Dresser *vs.* Dist. Board, 116 N. W. Rep. 235, the court said: "This court recognizes certain obligations on the part of the pupil which are inherent in any proper school system, and which constitute the common law of the school, and which may be enforced without the adoption in advance of any rules upon the subject. This court, therefore, holds that the school authorities have the power to suspend a pupil for an offence committed outside of school hours, and not in the presence of the teacher, which has a direct and immediate tendency to influence the conduct of other pupils while in the school room, to set at naught the proper discipline of the school, to impair the authority of the teachers and to bring them into ridicule and contempt. Such power is essential to the preservation of order, decency, decorum and good government in the public schools."

35 Cyc. 1137, says: "It has been held that a rule of a school board forbidding pupils to play football games under the auspices of the school is not unreasonable or an excess of the authority of the board, although applied to conduct on holidays and away from the school grounds."

Section 111 of the School Law provides that "a teacher shall hold every pupil accountable in school for disorderly conduct on the way to or from school, or on the play-grounds of the school, or during recess, and shall suspend from school any pupil for good cause; provided, that such suspension shall be reported forthwith to the Board of Education," and section 86, paragraph VIII, gives to a Board of Education power to suspend or expel pupils from school.

The action of the Supervising Principal and the Board of Education was strictly in accordance with the provisions of the statute. The only question, therefore, is: Was the action of the sons of the Appellants good cause for suspension from school?

In the case of Edick, there can be no doubt. He went to Trenton as a member of the High School Team, and was clearly under the control of the Principal. His father had no legal right to give him permission to remain in Trenton. Such permission could only be given by the Principal. Edick was forbidden to go to Lakewood as a punishment, and his going there was an open defiance of the authority of the teacher. Laehder was not under discipline for anything which occurred at Trenton, but his going to Lakewood was in defiance of the authority of the Principal, as defined in the decision quoted above.

The Supervising Principal would have been derelict in his duty had he failed to punish the sons of the Appellants for their disobedience. The discipline of the school would have been injured and the authority of the teachers impaired.

The appeal is dismissed.

Albert Laehder has asked that, notwithstanding his suspension, he be granted a diploma of graduation from the high school course, on the ground that he had practically completed the course at the time of his suspension. While this question was not included in the appeal, with the consent of the Board of Education, testimony was taken. From the testimony of Laehder himself, it is clear that he has not completed the work of the fourth year in the High School. He is not, therefore, entitled to a diploma.

October 26, 1914.

SUSPENSION OF PUPIL INDEFINITELY

EDWARD BOYD,

Appellant,

vs.

THE BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD,

Respondent.

Frederick A. Boyd, for the Appellant.
E. Howard Foster, for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

It is alleged in this case that on November 6, 1916, Edward Boyd, a pupil in the sixth grade of the school in the Borough of Bergenfield, acted disrespectfully to his teacher, Miss Gertrude Morton, whereupon he was requested to apologize for his conduct. He refused and was ordered to report to the principal of the school, Miss Lachmund. The following is a part of Miss Lachmund's testimony in the case: I said: "Were you respectful when you spoke to Miss Morton?" He said he did not know. I asked him "Would you have spoken to your mother in the same manner?" He said "No." "Then you were not respectful?" and he said "No, I was not respectful." I asked him: "Edward, what is the proper thing to do when you have been discourteous to anyone?" He said "Apologize." "Then you will apologize to Miss Morton in the morning," and Edward replied that he would. Edward returned in the morning with a note from his mother and stated to Miss Lachmund: "If I am to apologize I am to go back home."

On November 15, 1916, a special meeting of the Board of Education was held at which Edward was permitted to return to school temporarily until the Board could investigate the matter through its Teachers' Committee. A special meeting of the Board of Education was held on November 21, 1916, with the entire Board present. Edward Boyd and his parents were present. At this meeting the Board passed the following resolution: "That if Edward Boyd does not apologize to-night he be suspended until such time as he does apologize to Miss Morton."

The question to be considered is: Has a Board of Education the right under the law to force an apology by preventing a boy from attending school until he makes such an apology? Section 97, division VIII, of the School Law, edition of 1914, provides that a Board of Education shall have power to suspend or expel pupils from school. Section 125 gives a teacher the right to suspend from school any pupil for good cause, provided that such suspension shall be reported forthwith by the teacher to the Board of Education, and provided further that in any school in which more than one teacher shall be employed the principal alone shall have the power to suspend a pupil. Section 144 states that "continued and willful disobedience, open defiance of the authority of the teacher, the use of habitual profanity or ob-

scene language shall be good cause for suspension or expulsion from school." It thus appears that there is abundant authority in the law for a Board of Education to suspend a pupil from school for good cause.

There is no doubt that it was the intention of the Board of Education to suspend Edward Boyd from school because of open defiance of the authority of the teacher. It however appears in the case that if Edward Boyd apologized to the teacher there would have been no suspension. The apology related to the act of defiance, and thus cannot be the primary reason for a suspension. Teachers or Boards of Education cannot make a rule providing for the enforcement of an apology. The offense on the part of the pupil is the primary thing that must be taken into consideration. A pupil may voluntarily apologize for an offense. He cannot, however, be made to apologize for an offense. The only punishment for disobedience that the law provides is suspension or expulsion from school. It does not provide that a pupil for a certain act can be suspended and at the same time can be forced to make an apology. The Board, therefore, had no right under the law to suspend Edward Boyd from school and at the same time say that he could not return until he apologized to the teacher for his conduct. In other words, there was a double punishment provided: first, suspension, which the law recognizes; second, a forced apology, which the law does not recognize. The error the Board made was in not making the suspension definite in time. If Edward Boyd had voluntarily apologized to the teacher for his misconduct the teacher might or might not have accepted the apology as proper amends for the offense committed in school. She still would have the right to suspend him. It is a very doubtful practice and one that has led to a great deal of trouble to base the suspension of a boy from school on the making of an apology, for it will appear that if he refuses to make an apology then he will have been suspended because of the refusal and not because he has committed an offense against the good order of the schoolroom.

I am therefore of the opinion that the suspension of Edward Boyd was wrong only because it was indefinite in time and because it was based upon the boy's refusal to make an apology. From the circumstances as related, the Board, in my opinion, would be justified in suspending the boy for a definite period of time for his defiant attitude and bad conduct. Being suspended from the 21st of November until the present time is punishment quite sufficient for the offense committed. Hence Edward Boyd should be reinstated in school, and has a right to remain there so long as he is obedient to the rules of the school and respects the authority of the teacher.

January 2, 1917.

SUSPENSION OF PUPIL

SIDNEY HOEY,
Appellant,
vs.

BOARD OF EDUCATION OF
LAKEWOOD,
Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The Appellant in this case, Sidney Hoey, is a resident of the school district of Lakewood, Ocean County, and had been such resident for three years previous to the date of this appeal.

Sidney Hoey, Jr., the son of the Appellant, entered the Lakewood high school, regularly promoted from the grammar school, in September, 1919. He continued to attend the said high school as a student in the first year class until November 24, 1919, upon which date he was suspended by the principal, William M. Austin, until the meeting of the Board of Education. At the meeting of the Board on December 13 the suspension of Sidney Hoey, Jr., was taken up and considered by the said Board.

In the notice furnished the Board of Education by the principal appeared the statement that the boy had been suspended until the meeting of the Board of Education, and a request that the boy be suspended from school by the Board for the remainder of the school year. The reasons given by the principal in the notice for the suspension of the boy were truancy, disobedience, swearing, insubordination, dismissal from algebra, dismissal from physical training, dismissal from chapel, and insolence.

At the meeting of the Board of Education on December 13 the father of the boy, Sidney Hoey, Sr., appeared and protested against the suspension of his son from school and asked that he be reinstated. After considering the case the Board not only approved the suspension by the principal but extended the suspension for the remainder of the school year.

In his petition of appeal to the Commissioner of Education the Appellant prayed that the facts involved in the controversy be reviewed by the Commissioner and that the said Sidney Hoey, Jr., be permitted to resume his attendance at the Lakewood high school. A hearing was granted by the Commissioner of Education and held at Lakewood on April 14, 1920. At this hearing counsel appeared for both Appellant and the Board of Education, and witnesses were examined and testimony taken as to the cause for the suspension of the boy from school. Teachers in whose classes Sidney Hoey, Jr., had been a student were called as witnesses and testified as to his general conduct in their classes. All these witnesses bore testimony to the fact that the boy was a restless, disturbing element in recitation classes and that he frequently left the room without permission. It was also stated that on one occasion he swore at a boy who was standing between him and the blackboard from which he desired to copy some work. It

was shown by the teachers that the boy had been frequently reported to the principal for disturbing the class exercises, but there was no testimony that tended to establish any capital offense in the schooroom, if we except the one instance upon which a teacher testified that the boy used language which might be called "swearing."

The testimony of the teachers also indicated that the conduct in the school of Sidney Hoey, Jr., had been frequently the subject of discussion in faculty meetings. No teacher testified to the fact that the boy was wilfully disobedient, and it was stated by some of the teachers that the trouble with the boy was caused largely by his physically nervous condition. The substance of the testimony, when summed up, was to the effect that the boy was constantly bringing irrelevant things into his conversation in class; that he frequently did things to make the pupils laugh and cause a general disturbance, and that the conclusion of the teachers upon discussing his conduct at faculty meetings was that he should be suspended from school.

The conclusion reached by the Commissioner of Education from the testimony taken at the hearing is that the suspension from school of Sidney Hoey, Jr., by the principal, William M. Austin, was justified. This appeal, however, is not taken from the act of the principal in suspending the boy until the meeting of the Board, but from the action of the Board of Education in suspending him for the remainder of the school year.

The question really involved is whether the suspension of so long a time as to take in the remainder of the school year after December 13, 1919, is excessive in its severity. This is the important question for consideration.

The only punishment the law permits in the public schools of New Jersey is suspension or expulsion from school for offenses against the good government and discipline of a school. The object to be attained by suspension or expulsion is to have some means of maintaining good order and respect for authority in the schoolroom, but the punishment must not be so excessive and unreasonable in its severity as to cause disrespect for the authority that administers the punishment. The following is laid down as a fundamental proposition by Sir William Blackstone in his Commentaries on the Laws of England (Edition by George Chase):

> "Lastly: as a conclusion to the whole, we may observe that punishments of unreasonable severity, especially when indiscriminately inflicted, have less effect in amending the manners of a people, than such as are more merciful in general, yet properly intermixed with due distinctions of severity. It is the sentiment of an ingenious writer, who seems to have well studied the springs of human action, that offenses are more effectually prevented by the *certainty* than by the *severity* of punishment."

It is, therefore, a very grave question whether the manners of this boy could not be amended by less harsh treatment than that which was equivalent to expulsion from school for the greater part of a year. A high school education is of tremendous value to a boy or girl, and no boy or girl should be deprived for such a long period of time of the right to such an education without most serious consideration.

It is, therefore, the opinion of the Commissioner of Education that the suspension from school of the Appellant's son, Sidney Hoey, Jr., was reasonable only to the extent of the time covered by the suspension prescribed by the principal of the school, namely, until the meeting of the Board of Education. This was in itself a sufficient punishment to meet the offenses as they were presented at the hearing, and sufficient in the judgment of the Commissioner to accomplish the proper disciplinary effect as an example to the rest of the school.

It is, therefore, the conclusion if the Commissioner of Education that sufficient and more than sufficient punishment has already been inflicted upon the Appellant's son, Sidney Hoey, Jr., and it is herewith ordered that the said Sidney Hoey, Jr., be reinstated in his classes at the Lakewood high school from the date hereof.

April 28, 1920.

USE OF SCHOOL BUILDINGS FOR OTHER THAN SCHOOL PURPOSES

FRED KLEIN ET AL.,
Appellant,
vs.
BOARD OF EDUCATION OF JERSEY CITY,
Respondent.

John J. Mulvaney, for the Appellant.
Warren Dixon, for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The Appellants charge that the Respondent permitted the use of the auditorium in the high school building under its control for lectures, meetings, and purposes other than those directly connected with the regular school course, and pray that the action of the Respondent be declared illegal, and that the use of said auditorium for other than school purposes be prohibited.

Article VI of the School Law provides for the government of city school districts. Section 50 of said law gives to the Board of Education in a city district "supervision, control and management of the public schools and public school property in its district," and section 51 gives to said board power to "make, amend and repeal rules, regulations and by-laws not inconsistent with this act, or with the rules and regulations of the State Board of Education, for its own government, for the transaction of business, and for the government and management of the public schools and the public school property in said district."

Article VII provides for the government of township, incorporated town and borough school districts, and section 86, paragraph XI, gives to a Board of Education in such district power "to permit a schoolhouse to be used for other than school purposes when the board shall consent thereto."

There is no express provision in Article VI authorizing the use of school buildings for other than school purposes, but an examination of Articles VI and VII discloses that in the latter the powers of the Board of Education are prescribed with considerable detail, while in Article VI they are expressed in general terms. I am unable to discover any reason for permitting the use of a schoolhouse in a borough district for other than school purposes and prohibiting such use in a city district, and I am of the opinion that it was the legislative intent to give to the boards of education in both classes of districts like powers in the control and management of school buildings.

The custom of permitting the use of school buildings for other than school purposes is well established and has existed almost from the time of the erection of the first schoolhouse. I think such use should be permitted unless there is an express statutory prohibition. A Board of Education must use reasonable discretion in the exercise of this power, and must not permit a school building to be used for other than school purposes at any time when such use would interfere with the regular school sessions.

The appeal is dismissed.

November 20, 1912.

EXCLUSION OF PUPILS FROM SCHOOL FOR REFUSAL TO COMPLY WITH VACCINATION REQUIREMENT

JAMES ADAMS, SR., ET AL.,
Appellants,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF BERLIN,
Respondent.

Walter S. Keown, for Appellant.
Edwin G. Scovel, for Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

This appeal is brought by James Adams, Sr., George Ware and Luke Bate from the action of the Berlin Township Board of Education in suspending Appellants' children from the schools of the district under the following resolution passed by the board in January, 1922:

> "On motion of Mr. Parker and seconded by Mr. Egler that the resolution enforcing vaccination as ordered by the Board of Health and adopted by the Board of Education be enforced, and if there are any pupils in Berlin or West Berlin schools that have not done that they be excluded from school."

Upon the advice of the Board of Health it appears that previous to January, 1922, other resolutions requiring vaccination for all teachers and pupils in the township schools had been adopted by the board of education, the

first of which resolutions was passed in October and the other in November, 1921.

The Respondent, the Berlin Township Board of Education, admits the passage of the resolutions and the exclusion of Appellants' children from school for violation of the requirements as to vaccination contained therein, but asserts that according to law such action is entirely justified and legal.

Section 173, Article IX, of the 1921 Edition of the School Law provides upon the subject of vaccination as follows:

> "A board of education may exclude from school any teacher or pupil who shall not have been successfully vaccinated or revaccinated, unless such teacher or pupil shall present a certificate signed by a regularly licensed physician that such teacher or pupil is an unfit subject for vaccination; *provided,* that in any district having a medical inspector appointed by the board of education the certificate hereinbefore provided for shall be furnished by such medical inspector."

From the above provision of law it is very apparent that authority is expressly given to boards of education throughout the State to exclude from school any teacher or pupil who shall not have been successfully vaccinated or revaccinated, unless such teacher or pupil produces a certificate to the effect that he or she is an unfit subject for such vaccination. Such right of exclusion on the part of the board of education is upheld in the decision of the Commissioner of Education and of the State Board of Education in the case of Clarence S. Curtis *vs.* The Board of Education of Newark, N. J., cited on page 656 of the 1921 Edition of the School Law. In this case the action of the board of education in excluding Appellant's son from school was upheld on the ground that the board had merely exercised the authority granted it by statute of excluding from school a child who had not complied with its vaccination requirements.

It cannot in the opinion of the Commissioner of Education be successfully argued that an exclusion from school for failure to comply with a vaccination requirement is in conflict with the provisions of the Compulsory Education Law which requires the attendance at school of every child between the ages of 7 and 16, unless regularly and lawfully employed or unless receiving equivalent instruction elsewhere. A child excluded from school by a board of education under statutory authority for such exclusion is an exception to the Compulsory School Law requirements, or, in other words, is in reality outside the law and remains an exception to or outside the law until he or she has complied with the regulations which the board is legally authorized to make. Neither, in the opinion of the Commissioner, can the statutory authority for such exclusion for failure to be vaccinated be said to be in conflict with the Constitutional provision for the establishment of a system of public schools for all the children of the State between the ages of 5 and 18 years, since the statute authorizing the exclusion for failure to be vaccinated is a justifiable exercise of police power by the Legislature in protecting the health of people.

It is, therefore, the opinion of the Commissioner of Education that the action of the Berlin Township Board of Education in excluding from school

the Appellants' children for an admitted violation of the board's vaccination requirements as set forth in the resolutions above referred to was entirely justified by the statute above cited and was merely a legal exercise of the authority conferred upon it by such statute.

The appeal is accordingly hereby dismissed.

Dated August 22, 1922.

DECISION OF THE STATE BOARD OF EDUCATION

On October 22 and November 9, 1921, and January 7, 1922, the Board of Education of the Township of Berlin, in Camden County, passed resolutions requiring that "in the future all children must be vaccinated before being admitted as pupils" of the schools of the township. Pursuant to this resolution, children of the Appellants who had not been vaccinated were refused admission to the schools by the Board, and thereupon their fathers appealed to the Commissioner, who has held that the Board's action was justified by Section 173 of Article IX of the School Law (1921 Edition, p. 93), which reads in part as follows:

> "A board of education may exclude from school any teacher or pupil who shall not have been successfully vaccinated or revaccinated, unless such teacher or pupil shall present a certificate signed by a regularly licensed physician that such teacher or pupil is an unfit subject for vaccination;"

The language of the statute is so clear that there can be no room for doubt that the Berlin Board of Education had the right to exclude pupils who were not vaccinated. Curtis *vs.* The Board of Education of Newark, New Jersey School Laws (1921 Edition, p. 656).

It is recommended that the decision of the Commissioner of Education be affirmed.

VACCINATION

CLARENCE S. CURTIS ET AL.,
Appellants,
vs.

THE BOARD OF EDUCATION OF THE CITY OF NEWARK,
Respondent.

For the Appellant, Theodore D. Gottlieb.
For the Respondent, Charles M. Myers.

DECISION OF THE COMMISSIONER OF EDUCATION

This appeal is taken by Clarence S. Curtis, whose son was excluded from the Newark schools because he refused to be vaccinated.

The law in this case provides that "a board of education may exclude from school any teacher or pupil who shall not have been successfully vac-

cinated or revaccinated, unless such teacher or pupil shall present a certificate signed by a regularly licensed physician that such teacher or pupil is an unfit subject for vaccination."

Based upon this statute, the Board of Education of the City of Newark enacted a rule whereby all pupils were required to be vaccinated before entering its schools, unless "unfitness for vaccination be claimed, and demonstrated by certificate of a physician."

It was sought to enforce this rule in the case of Laurence Curtis, son of the appellant, Clarence S. Curtis.

Mr. Curtis refused to allow his son to be vaccinated, not on the ground of the physical unfitness of his son, but because he was opposed to the theory and practice of vaccination. The boy was then excluded from school by authority of the Board of Education; whereupon Mr. Curtis demanded of the board a hearing on the merits of the question of vaccination. This request was refused. Mr. Curtis then took an appeal to the Commissioner of Education, desiring "an opportunity to demonstrate the reasonableness of his position to the Newark Board of Education and to that end he desired a ruling remitting the case back to the Newark Board of Education with instructions to grant such hearing."

The whole case was submitted to the Commissioner by mutual agreement on brief of counsel. The counsel for the Appellant ably argued the demerits of vaccination. The counsel for the Respondent answered equally well in reply, giving the law in the matter as quoted from the courts of other States as well as from the Supreme Court of the United States.

The question at issue resolves itself into the meaning of our New Jersey law, as quoted above. Does it give to a Board of Education discretionary power, or is it mandatory? If it gives discretionary power, then a Board of Education becomes the judge of the merits of vaccination as a preventive of smallpox. It follows in such case that the Board of Education should give a hearing to Mr. Clarence S. Curtis, in which he should be allowed to give not only his own opinion, but also whatever of expert medical opinion he could bring to bear in the case. The opposition would bring its expert medical opinion also.

Thus there would be given to the Board of Education a prerogative in the matter of judging the efficacy of vaccination as a preventive of smallpox vouchsafed to no other public body in the world, outside of State Legislatures.

On the other hand, if the statute is mandatory, then the Board of Education has no power to pass on the question of the efficacy of vaccination as a preventive of smallpox. Neither has it power to pass upon the dangers that may follow in case of its performance.

These two views are the only things that it would seem within the legal scope of the Commissioner to consider.

Plainly it is a duty that is imposed on the Board of Education by the statute, in which both public and private persons have a deep interest, namely,

the protection of their bodies from an alarming disease. The clause in the statute "may exclude from school," etc., taking all things into consideration in connection with health legislation, should be construed as conveying a command.

The definition of the auxillary "may," as given in the Century Dictionary, is as follows: "'May' in a statute is usually interpreted to mean 'must,' when used not to confer a favor but to impose a duty in the exercise of which the statute shows that the public or private persons are to be regarded as having an interest."

It is plain that the statute does not confer a favor but it does impose a duty. It is equally plain that a public interest is involved. Besides, to interpret the word "may" as only permissive, would be to render the statute ineffective and would defeat the very object to be attained, namely, the protection of the children and the community at large from the ravages of a loathsome disease.

It is my opinion, therefore, that the statute relating to vaccination is mandatory—hence a Board of Education cannot consider the question raised by the Appellant, namely, the efficacy of vaccination as a preventive of smallpox

Further, the said Laurence Curtis, not seeking exemption from vaccination by reason of physical unfitness, but because of the personal opinions held by his father on the question of the efficacy and dangers of vaccination was lawfully excluded from school.

The appeal is dismissed.

August 2, 1915.

DECISION OF THE STATE BOARD OF EDUCATION

This is an appeal from a decision of the Commissioner which sustained the exclusion of Appellant's son from the schools of Newark because he had not been vaccinated.

The law provides that "a Board of Education may exclude from school any teacher or pupil who shall not have been successfully vaccinated." If the words *may exclude* mean *must exclude,* then clearly the Newark school authorities would have been guilty of a violation of the law if they did not exclude Appellant's son. If the words *may exclude* are to be construed as permissive, then we find that the Newark School Board has availed itself of the permission and has enacted a rule providing that vaccination, except in certain cases, shall be a condition for admission to school.

Whether the words *may exclude* are to be considered as mandatory or as permissive, we cannot hold that the exclusion of Appellant's son was unlawful.

Neither are we prepared to hold if such words are permissive that a hearing on the general subject of vaccination must be granted to every parent who, like appellant, contends that compulsory vaccination is an infringement of personal liberty and is unsanitary, not in the particular case, but generally

The decision of the Commissioner is affirmed.

September 11, 1915.

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