of bonds unless all of it should so apply. The provision of the schedule of the act referred to in the first of the enclosed opinions is indicative of such an intention. This presumption applied to the present question would force the conclusion that the paramount legislative idea for the purpose of determining the manner in which the act shall take effect is found in section 2295-9 of the General Code rather than in section 2295-10. If this presumption be ignored, however, it is arguable that inasmuch as section 2295-9 can only be procedurally applied or enforced by means of the machinery provided for in sections 2295-10, and inasmuch as that procedure must take place "before any resolution, ordinance or other measure providing for the issuance of bonds or incurring of indebtedness * * * is passed or adopted", therefore, where such resolution, ordinance or other measure was passed or adopted prior to January 1, 1922, these sections can have no application.

Yet even this argument would not be conclusive in the absence of the presumption referred to, for if there were no other law to apply excepting sections 2295-9 and 2295-10 of the General Code, we would still have to determine whether the legislature intended that all bonds issued after these sections became effective should be limited in their maturities by the application of these sections, or whether the policy of the legislature extended only to limiting the maturities of bonds authorized after the sections went into effect. This question is at least doubtful, and in the opinion of this department, the presumption above referred to is sufficient to determine the doubt. It follows that where the bonds had not yet been issued on January 1, 1922, they could not be issued without complying with these two sections.

Accordingly, it is the opinion of this department that the maturities of the bonds referred to in your letter must be limited to twenty-five years for the building and thirty years for the site, and that if these bonds are issued, the legislation providing for their issuance must be reformed and section 2295-10 complied with. It is, of course, regrettable, if true, that this conclusion may make it impracticable to proceed with the project in view.

Respectfully,
JOHN G. PRICE,
Attorney-General.

3138.

COUNTY BOARD OF EDUCATION—COUNTY SUPERINTENDENT—COMPENSATION FIXED AT TIME OF EMPLOYMENT—CANNOT BE CHANGED DURING TERM FOR WHICH APPOINTED—EMPLOYED FOR TWO YEARS—FIX CERTAIN AMOUNT FOR FIRST YEAR—AT END OF FIRST YEAR FIX GREATER AMOUNT FOR SECOND YEAR—ILLEGAL.

The county board of education should fix the compensation of the county superintendent at the time of employment and such compensation cannot thereafter be changed during the term for which appointed, and a county board of education may not employ a county superintendent for a period of two years and fix his compensation at a certain amount for the first year, and at the end of the first year fix a greater amount as compensation for the second year.

COLUMBUS, OHIO, May 25, 1922.

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

GENTLEMEN:—Acknowledgement is made of the receipt of your request for the opinion of this department upon the following:

"May a county board of education employ a county superintendent for a period of two years and fix his compensation at a certain amount for the first year and at the end of the first year fix a greater amount as compensation for the second year?

We are enclosing herewith a transcript of the proceedings of a board of education in a case which has been brought to our attention."

The transcript to which you refer reads in full as follows:

"Record No. 1, p. 42, Record of Board of Education of ———— County, Ohio, pertaining to the employment of a county superintendent.

————, Ohio, June 7, 1919.

This being the date for the election of county superintendent, it was moved by W. E. J., seconded by L. C. F., that applications be read and roll called for election. There were two applicants, M. A. H. and J. F. D. On motion J. H. voted for M. A. H., W. E. J. voted for J. F. D., M. A. H. voted for J. F. D., L. C. F. voted for J. F. D. Mr. D. was declared elected.

Moved by M. A. H., seconded by W. E. J., that *J. F. J.'s term of election be for two years* and that the salary be fixed for one year, the first year at $1,800.00 with expenses not to exceed $300.00 for the year. On this motion J. H. voted yes. W. E. J. voted yes. M. A. H. voted yes. L. C. F. voted yes. Motion carried.

On motion the board adjourned.

(Signed) M. A. H., Secy.
J. H., Pres.

Record No. 1, page 58 and 59. Record of Board of Education of J. County, O., pertaining to the salary of the county superintendent.

————, Ohio, May 15, 1920.

The salary of the county superintendent for the ensuing year was next discussed. It was moved by B. and seconded by H. that the salary of the county superintendent for the ensuing year be set at $2,800 a year. Upon roll call the vote stood, as follows: H. yea; J. yea; H. yea; B. yea; F. yea.

There being no further business the board adjourned.

(Signed) J. F. D., Co. Supt.
J. H., Pres."

Bearing upon the powers of a county board of education, your attention is invited to the decision of the Cuyahoga county court of appeals, in the case of Mathews vs. Board of Education, reported at page 305, 30 O. C. A., the first branch of the syllabus reading as follows:

"1. A county board of education is a creature of statute, and the exercise of the powers granted to it is limited to those expressly given and those contained by reasonable intendment in the act creating it."

A more recent decision and by the highest court in the state, the powers of a county board of education also being under consideration in this case, is that of Clark vs. Cook, decided November 22, 1921, 103 O. S.—, the second branch of the syllabus reading:

"2. Boards of education, and other similar governmental bodies, are limited in the exercise of their powers to such as are clearly and distinctly

granted. (State ex rel Locher, Prosecuting Attorney, vs. Menning, 95 O. S., 97, approved and followed)."

It is noted in the transcript furnished that the contract as appearing in the minutes of the board of education was made on June 7, 1919, for a period of two years, and that on May 15, 1920, the minutes show that the salary of the county superintendent of schools for the county in question was increased "for the ensuing year" from $1,800 to $2,800. From June 7, 1919, to May 15, 1920, was almost a year and during this period the laws passed by the 83d General Assembly (108 O. L.) became effective. That is to say, certain sections of the law pertinent to this case were different in more or less degree on June 7, 1919, than they were on May 15, 1920. In the case at hand it is therefore necessary to analyze the sections governing, as they may have appeared at the time of the June 7th meeting of the county board of education in 1919, and the meeting of the same board which occurred May 15, 1920. The power to appoint a county superintendent appears in section 4744 (104 O. L., 133), which section has not been changed since it was enacted, and reads in part as follows:

"The county board of education at a regular meeting held not later than July 20th, shall appoint a county superintendent for a term not longer than three years commencing on the first day of August * * *. He shall be in all respects the executive officer of the county board of education, and shall attend all meetings with the privilege of discussion but not of voting."

The section fixing the salary of the county superintendent of schools is section 4744-1 G. C., which was first enacted in 1914 as a part of the Ohio school code of that year (104 O. L., 133) and this section was amended twice thereafter, first in 107 O. L., 622 (1917) and again in 108 O. L., Part I, p. 707, the latter amendment effective as of September 22, 1919. As enacted in 104 O. L., 133, (1914) 4744-1 G. C. read as follows:

"The salary of the county superintendent *shall be fixed* by the county board of education, to be not less than twelve hundred dollars per year, and shall be paid out of the county board of education fund on vouchers signed by the president of the county board. Half of such salary shall be paid by the state and the balance by the county school district. In no case shall the amount paid by the state be more than one thousand dollars. The county board may also allow the county superintendent a sum not to exceed three hundred dollars per annum for traveling expenses and clerical help. The half paid by the county school district shall be prorated among the village and rural school districts in the county in proportion to the number of teachers employed in each district."

As amended in 107 O. L., 622, section 4744-1 G. C. read as follows:

"The salary of the county superintendent *shall be fixed* by the county board of education, to be not less than twelve hundred dollars per year, and shall be paid out of the county board of education fund on vouchers signed by the president of the county board. Half of such salary up to two thousand dollars shall be paid by the state and the balance by the county school district. In no case shall the amount paid by the state be more than one thousand dollars. The county board may also allow the county superintendent a sum not to exceed three hundred dollars per

annum for traveling expenses and clerical help. The half paid by the county school district shall be prorated among the village and rural school districts in the county in proportion to the number of teachers employed in each district.

The above section as to the salary of the county superintendent of schools and the fixing of the same by the county board of education was the law on June 7, 1919, the date of the employment of the county superintendent for two years, because the amendment of 4744-1, appearing in 108 O. L., Part 1, 707, did not become effective until September 22, 1919. But the amendment to section 4744-1 G. C., 108 O. L., Part 1, p. 707, becoming effective as of September 22, 1919, was the law thereafter and on May 15, 1920, the date on which the county board of education increased the salary of the county superintendent of schools in the sum of one thousand dollars. Section 4744-1 G. C., as amended in 108 O. L., 707 (in effect on May 15, 1920) reads as follows:

"The salary of the county superintendent shall be fixed by the county board of education to be not less than twelve hundred dollars per year, and shall be paid out of the county board of education fund on vouchers signed by the president of the county board. Half of such salary up to the amount of two thousand dollars shall be paid by the state and the balance by the county school district. In no case shall the amount paid by the state be more than one thousand dollars. The county board may also allow the the county superintendent a sum not to exceed three hundred dollars per annum for traveling expenses and may employ an efficient stenographer or clerk for such superintendent. The part of all salaries and expenses paid by the county school district shall be prorated among the village and rural school districts in the county in proportion to the number of teachers employed in each district, but the county board of education must take into consideration and use any funds secured from the county dog and kennel fund or from any other source and which is not already appropriated before the amount is prorated to the various rural and village districts."

Following this amendment to 4744-1, providing for the use of a part of the dog and kennel fund by the board of education in order to save prorating the county school expenses to the various rural and village districts, there was issued by this department on April 1, 1920 (just prior to the meeting of this county board of education on May 15, 1920) Opinion 1117, appearing at page 366, Vol. I, Opinions of the Attorney-General for 1920, the third and fourth branches of the syllabus of such opinion reading as follows:

"The county board of education fund can be expended only by the county board of education and for those purposes mentioned in the statutes, but the county board of education must take into consideration and use any funds secured from the county dog and kennel fund or from any other source and which is not already appropriated, before the amount due from the rural and village school districts is prorated to any of such districts.

A county board of education is a creature of statute and the exercise of the powers granted to it is limited to those expressly given and those contained by reasonable intendment in the act creating it, * * * ."

In the body of such opinion of this department, in discussing section 4744-1

G. C., the section fixing the salary of the county superintendent of schools, the following language appears on pages 369 and 370:

> "The meaning of the above section (4744-1) is that before the county board of education can prorate any of its expenses to the rural and village districts composing the county school district, it must take into consideration and use the county dog and kennel fund; therefore in the county in question, if the county dog and kennel fund were used to pay the county superintendent and other expenses of the county board of education, it is entirely likely that there would be no prorating of such county board of education expenses among the various rural and village school districts of the county, which was the contemplation of the General Assembly when it amended section 4744-1. * * * * Similarly, too, the other expenses of the county board of education, which might be a number of things as treated in a former opinion of this department, are to be paid, if possible, from the dog and kennel allotment made to the county board of education by the county board of commissioners. So the statement that the county board of education in this particular county would have no use for a very large portion of its allotment of the dog and kennel fund, is not true when the General Assembly contemplates that such dog and kennel fund shall be used in the first instance to pay the expenses of the county board of education before any prorating shall be done to the districts in the county."

For a case holding that it is the mandatory duty of the county commissioners to transfer the surplus in the sheep (dog and kennel) fund in excess of one thousand dollars to the county board of education fund, see State ex rel Mitman vs. Board of County Commissioners of Greene County, 94 O. S., 296. The statistics furnished by the various county superintendents of schools throughout the state on file in the department of education, and appearing in the Annual Reports of the Superintendent of Public Instruction, show that following the issuing of Opinion 1117 on April 1, 1920, the various county boards of education funds throughout the state were considerably increased in amount because the county board of education fund began to receive the allotment from the county commissioners which the General Assembly intended it should receive. In the case at hand it appears that in anticipation of a considerable amount being received from the dog and kennel fund in this particular county, a large fraction of the amount received was used to increase the salary of the county superintendent of schools during the term of his contract rather than use such dog and kennel allotment towards the payment of the superintendent's salary and all the expenses of the county board of education and thus lessen the prorating upon the various village and rural school districts in the county. A report of the superintendent of public instruction shows that in this county, following the issuance of Opinion 1117, the amount of the allotment from the dog and kennel fund received by the county board of education in this county for the school year beginning September 1, 1920, and ending on August 31, 1921, was $1,757.94. Of this $1,757.94 allotted to the county board of education fund, in order to lessen the prorating to the various school districts throughout the county, more than half was apparently taken and used to increase the salary of the county superintendent of schools during his term of contract from $1,800 to $2,800 for the ensuing year, that is, September 1, 1920, to August 31, 1921, following May 15, 1920, the date of the meeting of the county board of education, when this increase to $2,800 was voted.

It is unnecessary to discuss the question as to whether the General Assembly

created this allotment from the dog and kennel fund in order to increase the salary of the county superintendent, because it must be apparent from the language of 4744-1, as effective on September 22, 1919, that the intention of the General Assembly was to reduce, if not do away with, in some instances, the prorating of county school expense on the rural and village school districts in the county school district.

It is well to remember that under the provision of the law the salary of the county superintendent of schools in each instance is paid by both the county and the state. Thus when this salary was set at $1,800, section 4744-1 G. C. (107 O. L.) provided that "half of such salary up to $2,000 shall be paid by the state and the balance by the county school district." Half the salary of $1,800 would be $900, which was paid by the state, and the remaining $900 would be paid by the county school district. The limit that can be paid on the state's portion by the state is $1,000 and the balance, whatever it may be, must be paid by the county school district. So that when the salary of the county superintendent was increased to $2,800 for the second year of the contract, $1,000 of this $2,800 came from the state and $1,800 was furnished by the county school district. The county school district had previously paid but $900 of the county superintendent's salary, and with its increase to $1,800 as the county's portion to pay, the burden upon the county school district and its component parts was doubled, that is, increased one hundred per cent, because only $100.00 more of state aid could be received in addition to the $900.00 already received at the time of the beginning of the contract.

Attention is also invited to section 4744-2, first enacted in 1914 as a part of the Ohio school code (104 v. 133), this being the section which provides that the county board of education shall certify its budget of expense to the county auditor. This section was amended twice later, first in 108 O. L. by the 83d General Assembly, and again by the 84th General Assembly in 109 O. L.

Upon the question immediately under consideration, section 4744-2, as first enacted in 104 O. L., read in part as follows:

> "On or before the first day of August of each year the county board of education shall certify to the county auditor * * * the compensation of the county superintendent; and such board of education shall also certify to the county auditor the amounts to be apportioned to each district for the payment of its share of the salaries (salary) of the county * * * * superintendent."

As amended in 108 O. L., p. 233, section 4744-2 G. C. provided in part:

> "On or before the first day of August of each year the county board of education shall certify to the county auditor * * * the compensation of the county superintendent; and such board of education shall also certify to the county auditor the amounts to be apportioned to each district for the payment of its share of the salaries (salary) of the county * * * superintendent and of the local expense of the normal school in the county."

It is significant to note, as illustrating the intention of the General Assembly to clarify section 4744-2, that the section was amended to read (in S. B. 200—Kumler Law) in part as follows:

> **"On or before the first day of August of each year the county board of education shall certify to the county auditor * * * *the compensation***

of the county superintendent for the time appointed; and such board of education shall also certify to the county auditor the amounts to be apportioned to each district for the payment of its share", etc.

Section 4744-3 provides that the county auditor, when making his semi-annual apportionment of the school funds to the various village and rural school districts, shall retain the amounts necessary to pay the district's share of the expense of the county board of education, and such moneys shall be placed in a separate fund to be known as the "county board of education fund". From the discussion heretofore given, it would appear that if the dog and kennel fund had been properly conserved and used to lessen the prorating upon the taxing districts instead of increasing salaries simply because the fund was available, there might be instances in which the county auditor would not retain anything from the school districts and the county district, or, in possible other cases, a very small amount.

Bearing upon the question of the "fixing" of a salary of a superintendent of schools, your attention is invited to the syllabus of Opinion 371, issued on April 30, 1912, appearing at page 491, Vol. I, Annual Report of the Attorney-General for 1912, and reading in part as follows:

> "A board of education may not provide that the superintendent of schools shall receive, in addition to a stated salary, all funds received for tuition of non-resident pupils, for the reason that such payment would not be a 'fixed' salary as intended by Section 7690, General Code."

Upon the question of the increasing of salary of a county superintendent of schools during his term, this department on December 24, 1919, issued Opinion 895, appearing at page 1604, Vol. II, Opinions of the Attorney General for 1919, the first branch of the syllabus reading as follows:

> "In effect there is no material distinction in the authority or power granted to appoint and fix the salary or compensation of a county and a district superintendent of schools. It is the duty of the board of education to fix the salary of a county superintendent before August 1, and when said salary is fixed, the said board can not legally increase the same during the term for which he was appointed."

Following the issuing of this opinion the same case upon which the opinion was issued to the bureau of inspection and supervision of public offices was carried to the supreme court of the state and a decision was rendered by the highest court on November 22, 1921, sustaining the opinion of this department in the case of Clark vs. Cook, (103 O. S., p.—). Reference to this court decision was briefly made in the beginning of this opinion, a portion of the syllabus being quoted.

The question is of so much import, however, that it is believed a portion of the decision of the court, in arriving at its conclusion, should be reproduced here. Thus the court say:

> "That boards of education are purely the creatures of statute is an old and uniformly accepted doctrine. Section 3, Article VI of the constitution adopted in 1912 provides in part that, 'provision shall be made by law for the organization, administration and control of the public school system of the state, supported by public funds.'
>
> As administrative boards created by statute, their powers are necessarily limited to such powers as are clearly and expressly granted by the statute. This same doctrine as to inferior boards or commissions, was

recently laid down in 95 Ohio St., 97, *State ex rel. Locher vs. Menning.*

'The legal principle is settled in this state, that county commissioners, in their financial transactions, are invested only with limited powers, and that they represent the county only in such transactions as they may be expressly authorized so to do by statute. The authority to act in financial transactions must be clear and distinctly granted, and, if such authority is of doubtful import, the doubt is resolved against its exercise in all cases where a financial obligation is sought to be imposed upon the county.'

This appears in a per curiam opinion concurred in by all the members of the court. This doctrine as applied to a board of county commissioners in their financial transactions, must in principle be equally obligatory upon the boards of education in their financial transactions.

Now, what are the powers conferred by the statute in question, particularly section 4744 G. C. 'The county board of education shall, not later than July 20th, appoint a county superintendent, for a term not longer than three years, commencing on the 1st day of August.'

Section 4744-1 G. C. says: 'The salary of the county superintendent shall be fixed by the county board of education, to be not less than $1,200 per year. This statute invests the board of education with power to appoint a county superintendent, for a term not longer than three years. They did appoint the relator as county superintendent for three years, on the 13th day of March, 1918, and on the same date, agreeable to the statute, the same board of education 'fixed the salary for said county superintendent, for said term'.

The county board of education, having exercised that power at the proper time, in the proper manner, and the county superintendent having accepted the appointment and entered thereon, the question is, whether or not such exercise of power is or is not an exhaustion of the power of the county board of education in respect to fixing the salary of such county superintendent for said maximum period of three years.

Both parties to this cause, in argument and brief, concede that the relator is a public officer, as county superintendent of schools of Ashtabula county. The statute itself, providing for the appointment of such county superintendent, expressly designates him as 'in all respects the executive officer of the county board of education.' For the purposes of this case, it is assumed that he is such officer.

It is further assumed that the General Assembly of Ohio in the enactment of section 4744 et seq., had in mind section 20, Article II, of the constitution, which reads:

'The General Assembly in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished.'

The legislature in this statute uses the word 'fix' the term of office and the compensation of all officers, and this is substantially the language of the constitution. The people of Ohio wisely provided in this delegation of power to the General Assembly, that, 'no change therein shall affect the salary of any officer during his existing term, unless the office be abolished'.

Now, it is argued that the legislature, not having put this language in the statute, it may be presumed that they did not intend to deny the board of education the right to subsequently change any salary fixed by said board of education.

It could not be seriously doubted, however, that what the constitution

reads into every statute, it is quite unnecessary that the legislature should expressly write into the statute. Upon the contrary, the presence of such constitutional provision is as necessarily implied in the statute, unless the language of the statute is clearly inconsistent therewith as if the same were expressly written in the statute.

The obligation of the legislature to support the constitution, imposes upon them their primary and paramount duty and the language of the statute is entirely consistent with this sound and wholesome public policy.

The express power to fix a salary does not grant by implication the power to unfix said salary. The exercise of the power agreeable to the statute exhausts that power agreeable to the statute. The power to change after once fixed, from the language of the *Locher* case, supra, shows that such power is not 'clear and distinctly granted'. The power not being so granted to the board of education, cannot be exercised by the board of education, and its attempted exercise thereof is ultra vires. *The action of the board of education in attempting to change the salary of the county superintendent, after once fixed, is illegal and void under the statute."*

Following the reasoning of former opinions of this department on questions somewhat similar to the one presented, and directing attention to the recent decision of the supreme court, quoted herein, you are advised that it is the opinion of this department that the county board of education should fix the compensation of the county superintendent at the time of employment and such compensation cannot thereafter be changed during the term for which appointed, and a county board of education may not employ a county superintendent for a period of two years and fix his compensation at a certain amount for the first year, and at the end of the first year fix a greater amount as compensation for the second year.

Respectfully,
JOHN G. PRICE,
Attorney-General.

3139.

BOARD OF PARK COMMISSIONERS—WITHOUT AUTHORITY TO APPOINT MUNICIPAL POLICE OFFICERS OR TO EMPOWER EMPLOYES TO ACT IN CAPACITY OF CITY POLICEMEN.

The office and duties of city policemen are created and prescribed by the provisions of sections 3617, 4368 *and* 4370 *of the General Code, and section* 4061 *G. C. confers no authority upon a board of park commissioners to appoint municipal police officers or to empower employes to act in the capacity of city policemen.*

COLUMBUS, OHIO, May 25, 1922.

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

GENTLEMEN:—Receipt is acknowledged of your recent communication which reads as follows:

"On January 26th, 1903, the Attorney-General held that police for park purposes should be under the control of the board of public safety the same as other police. Section 4061 G. C., provides that a board of park commissioners 'may employ a secretary, general superintendent, engineer, clerks