5147.

BOARD OF EDUCATION—LEGALLY LIABLE FOR PAYMENT OF WATER RENTALS CHARGED BY MUNICIPALITY, WHEN.

SYLLABUS:

Boards of education are legally liable for the payment of water rentals charged against them by municipalities which own and operate waterworks, for water furnished from said municipal waterworks and consumed by said boards of education for school purposes. Board of Education v. Village of Willard, 130 O. S., 311.

COLUMBUS, OHIO, February 6, 1936.

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

GENTLEMEN: This will acknowledge receipt of your request for my opinion concerning the liability of boards of education for the payment of water rentals charged against them by municipalities which own and operate municipal waterworks, for water furnished to the board for school purposes.

This question has been the subject of considerable controversy and has received the attention of this office in a number of opinions as well as of the courts in a number of decisions. In my opinion, the decision of the Supreme Court, in the case of Board of Education of Willard Village School District v. Village of Willard, 130 O. S., 311, decided December 4, 1936, settles the matter beyond controversy, and for the entire state.

The confusion heretofore existing with reference to this matter was the outgrowth of different opinions held by individual judges both of the Supreme Court and of the Appellate Courts, as to the constitutionality of that provision of Section 3963, General Code, which reads: "No charge shall be made by a city or village, or by the waterworks department thereof, for supplying water * * * for the use of the public school buildings in such city or village", and the unique provision of the Ohio Constitution found in Section 2 of Article IV thereof, to the effect that no law may be held unconstitutional and void by the Supreme Court without the concurrence of at least all but one of the judges, except in the affirmance of a judgment of the Court of Appeals declaring a law unconstitutional and void.

In the case of City of East Cleveland v. Board of Education, 112 O. S., 607, a case was presented where the Court of Appeals of the Eighth Appellate District held the provision of Section 3963, General Code,

quoted above, to be constitutional. Although five members of the Supreme Court were of the opinion that it was not constitutional, the judgment of the Appellate Court was not reversed because of the constitutional inhibition referred to.

Later, in the case of Board of Education v. Columbus, 118 O. S., 295, the same question was presented. In this case, however, the Court of Appeals of the Second Appellate District had held that the provision of Section 3963, General Code, with reference to furnishing water to the schools without charge, was unconstitutional, and the court being composed of the same members as when the East Cleveland case was decided, and these members being of the same mind apparently as before, affirmed the judgment of the Court of Appeals, by the concurrence of five members of the court. In the course of the opinion in the Columbus case Chief Justice Marshall, after referring to the East Cleveland case and a decision of the Court of Appeals of the ninth Appellate District, which had held the statute to be unconstitutional, and the provision of the Constitution which prohibited the Supreme Court from reversing a decision of the Court of Appeals which had held the law constitutional in the absence of the affirmative assent of all but one of the members of the Supreme Court, said:

> "In the Second Appellate District, Section 3963 is unconstitutional and void, and must be so treated by all the municipalities of that district. In the Eighth and Ninth Appellate Districts the statute is valid, and must be so administered. In the other six appellate districts, municipalities may not know whether that section is valid and applicable to municipalities within their jurisdictions until the question has been submitted to the various Courts of Appeals of those districts, but all municipalities in those districts, may be assured that whatever judgments are rendered by their respective Courts of Appeals will be affirmed by this court until such time as either the constitutional provision is abrogated or changes occur in the personnel of this court."

In view of the decision of the Supreme Court in the Columbus case, and the remarks of Judge Marshall quoted above, this office held in an opinion which will be found in the published opinions of the Attorney General for 1929, at page 1084, as follows:

> "1. In the Second Appellate District, Section 3963, General Code, in so far as it provides that water shall be furnished for school purposes by municipally owned waterworks free of charge, is unconstitutional and void, and must be so treated by all the

municipalities of that district. In the Eighth and Ninth Appellate Districts, the statute is valid and must be so administered.

2. In view of the language used by Chief Justice Marshall in his opinion in the case of the Board of Education of the Columbus School District v. City of Columbus, 118 O. S., 285, municipal administrative officials in the First, Third, Fourth, Fifth, Sixth and Seventh Appellate Districts should consider Section 3963, General Code, as being valid until such time as it is held to be otherwise by a court of competent jurisdiction."

Since that time the former decision of the Appellate Court in the Eighth Appellate District was overruled by that court on April 3, 1933. The Appellate Courts in the Third, Fourth, Fifth, Sixth and Seventh Districts, and the Common Pleas Court in Hamilton County have each held the provision of the statute here involved, to be unconstitutional.

The result was that up to the time of the decision of the Supreme Court in the Willard case, supra, the statute was held to be unconstitutional by reason of the holdings of the several courts mentioned, in all the territory of the state except in Butler, Clermont, Clinton and Warren counties of the first Appellate District, and in the four counties comprising the Ninth Appellate District, namely, Lorain, Medina, Summit and Wayne.

The personnel of the Supreme Court has changed since the decision of the Columbus case, and apparently all but one of the members of that court at the time of the decision of the Willard case were of the opinion that the statutory provision mentioned is unconstitutional, as six members of the court concurred in the affirmance of the judgment of the Court of Appeals, which had held the statute to be unconstitutional. No opinion other than that which is contained in the journal entry was rendered. The journal entry reads:

"It is ordered and adjudged by this court that the judgment of the said Court of Appeals be and the same is hereby affirmed on authority of Board of Education of the City School District of Columbus v. City of Columbus, 118 O. S., 295."

Prior to the decision of the Willard case, some appellate courts had felt that they were bound to follow the judgment of the Supreme Court in cases of this kind, regardless of the number of judges that had concurred in that judgment. Others had not. In the case of Board of Education v. City of Wellston, 43 O. A., 552, decided after the Columbus case was passed upon by the Supreme Court, and in which it was held that the statute was unconstitutional, Judge Mauck said:

"The duty of the Court of Appeals is to follow the last word of the Supreme Court."

On the other hand, the Court of Appeals of the second Appellate District, in deciding the Columbus controversy, after referring to the holding of the Supreme Court in the East Cleveland case, said:

"We are of the opinion that where the judgment of the Supreme Court rests upon the concurrence of less than a majority, that such judgment is binding only in the particular case as an adjudication, but is not binding in other cases under the rule of stare decisis."

The Court of Appeals in the Columbus case then proceeded to hold the statute unconstitutional, thus giving to the Supreme Court the opportunity of affirming the judgment of the Court of Appeals, which necessarily meant that the statute was regarded as being unconstitutional.

Whatever may be the status of the controversy as to the duty of a Court of Appeals in such situations it cannot be denied that since all but one of the judges of the Supreme Court have now concurred in holding the statutory provision in question to be unconstitutional in the Willard case, that decision is now binding on all courts and administrative officers throughout the state under the rule of stare decisis, and that holding should be followed and acted upon accordingly.

I am therefore of the opinion that boards of education are legally liable for the payment of water rentals charged against them by municipalities which own and operate waterworks, for water furnished from said municipal waterworks and consumed by said boards of education for school purposes.

Respectfully,
JOHN W. BRICKER,
Attorney General.

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APPROVAL—BONDS OF CITY OF CLEVELAND, CUYAHOGA COUNTY, OHIO, $27,000.00.

COLUMBUS, OHIO, February 6, 1936.

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