to be advised if the village becomes a part of the county library district and is subsequently annexed to the adjoining city of C. is there any means by which the village of G. can be separated from the county library district, or must the village be compelled to levy taxes for both the support of the county district library service and the municipal library service at the same time. Relative to this question you quote section 3574 G. C. as saying that "The annexation shall not affect any rights of libraries existing at the time of annexation either in favor of or against the corporation, except such as are affected by such terms and conditions of annexation." A careful examination of section 3574 G. C. as amended in House Bill No. 2 appearing on page 266 of 109 O. L. fails to show any reference therein to "libraries," but on the other hand the closing sentence of section 3574 G. C. uses the word "liabilities" and not "libraries." Thus it reads:

> "The annexation shall not affect any rights or liabilities existing at the time of annexation, either in favor of or against the corporation, except such as are affected by such terms and conditions of annexation and suits founded on such rights and privileges may be commenced, and pending suits prosecuted to final judgment and execution, as though the annexation had not taken place."

In reply to your ninth query, you are advised that nowhere in the act creating county library districts (Amended Senate Bill No. 209) is there any provision for a township, school district or municipality joining in the creation of such proposed district thereafter leaving such established county library district. For this department to say that the village in question could leave the county library district in the absence of law upon the subject would be legislation and a matter that should come within the power and authority of the General Assembly.

The attention of the State Librarian is invited to the fact that if this county library district law does not at this time dovetail into the many other sections of the General Code bearing upon libraries of various kinds, the opportunity is now close at hand in the coming session of the Eighty-Fifth General Assembly to have the sections of the county library district law amended so that they will harmonize with other existing library statutes and thus care for just such cases as those mentioned in the inquiries herein discussed.

Respectfully,
JOHN G. PRICE,
Attorney-General.

3848.

BOARD OF EDUCATION—HAS NO AUTHORITY TO REFUSE TO ADMIT TO HIGH SCHOOL PUPIL WHO HAS DIPLOMA SHOWING COMPLETION OF ELEMENTARY SCHOOL WORK—WHERE TUITION PAID OR WILL BE PAID—REMEDY FOR REFUSAL TO PAY TUITION—HOW PAID.

1. *Under existing law there is no authority for a board of education conducting a high school to refuse to admit to the high school conducted by it any pupil holding a diploma showing completion of the elementary school work, where such pupil's tuition is paid or will be paid.*

2. *Where boards of education refuse to pay tuition already past due, the remedy of the creditor board of education is in an action in the courts for the amount accrued. Final judgment against the school district shall be paid from a separate fund to be known as the "Judgment Fund" to be created as set forth in section 2295 G. C.*

COLUMBUS, OHIO, December 30, 1922.

HON. JOHN G. EVANS, *Prosecuting Attorney, Jackson, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your request for the opinion of this department upon the following:

"(1) Can the Jackson City Board of Education, or any other board of education, refuse to admit qualified high school students because there is some doubt about the ability of the township in which the child resides to pay his tuition?

(2) Can any high school refuse to admit any qualified student that lives more than four miles from a high school for any reason whatsoever?

The townships of Jackson, Liberty and Lick from which these pupils come have each voted down the three mill levy, and therefore do not participate in the state aid fund. The total levy in each of these townships is 15 mills. Lick township owes the Jackson City board for last year's tuitions over $600.00. If your answer to the question propounded is in the negative, and the Jackson City board is compelled to receive pupils from these townships, how then can said board secure its tuition already past due when said township boards refuse to pay?"

Pertinent sections of the General Code upon the question of admission of pupils by a board of education are as follows:

Section 7682. "Each board of education may admit other persons upon such terms or upon the payment of such tuition within the limitations of other sections of law as it prescribes. * * * *" 109 O. L. 375.

Section 7734. "The board of any district may contract with the board of another district for the admission of pupils into any school in such other district, on terms agreed upon by such boards. * * * *" (73 O. L. 243).

Section 7747. "The tuition of pupils who are eligible for admission to high school and who reside in districts in which no high school is maintained, shall be paid by the board of education of the school district in which they have legal school residence, such tuition to be computed by the school month.

* * * * * * *

The district superintendent shall certify to the county superintendent each year the names of all pupils in his supervision district who have completed the elementary school work and are eligible for admission to high school. The county superintendent shall thereupon issue to each pupil so certified a certificate of promotion which shall *entitle the holder to admission to any high school.* * * * *"

Section 7750. "A board of education not having a high school may enter into an agreement with one or more boards of education maintaining such school for the schooling of all its high school pupils. When such agreement is made the board making it shall be exempt from the payment of tuition of other high schools of pupils living within three miles of the school designated in the agreement if the school or schools selected by the board are located in the same civil township, as that of the board making it, or some adjoining township. In case no agreement is entered into, the school to be attended can be selected by the pupil holding the diploma, if due notice in writing is given to the clerk of the board of education of the name of the school to be attended and the date the attendance is to begin, such notice to be filed not less than five days previous to the beginning of attendance." 100 O. L., 74.

Referring to section 7747 G. C. wherein reference is made to the action to be performed by the "district superintendent" the act in which this appears (Senate Bill 100) was passed by the General Assembly prior to the time of the passage of the Kumler law (Senate Bill 200) abolishing district superintendents, so that in order to make this paragraph of the section workable the words "district superintendent" should be construed to mean until later corrected as it should be, "the executive head of the school." Bearing upon the question of the assignment of a pupil outside of the district in which the pupil resides attention is invited to section 7764 G. C. (a part of the Bing compulsory education law as enacted in 109 O. L. 380) which reads as follows:

"The child in his attendance at school *shall be subject to assignment* by the principal of the private school or superintendent of schools as the case may be, to the class in elementary school, high school or other school, suited to his age and state of advancement and vocational interest, within the school district; or, if the schooling is not available within the district, *without the school district, provided the child's tuition is paid* and provided further that transportation is furnished in case he lives more than two miles from the school, if elementary, or four miles from the school, if a high school. * * *"

Section 7764 G. C. is the latest expression of the General Assembly upon the question of assigning a child to a school outside of the school district where the child lives. It is significant to note that while the power of assignment by the school authorities in the district where the child lives appears in section 7764 G. C., nothing is said as to the rights of the school district to which assigned to refuse to take the pupil so assigned. Nor does any provision appear in other sections of the school code which give any direct authority to a board of education to refuse to receive pupils from other districts.

Much might be said upon the right of a board of education to conduct its own schools as it sees fit, receiving only those whom it cares to receive from territory outside its own school district; the school space of the board of education might already be taken up fully by its own pupils for whom of course it would seem that the board would have its first concern; the desire of the board having control and management of the schools of the district (7690 G. C.) to allot to each teacher a certain number of pupils and no more might not be consummated. If the board had to receive all the pupils assigned to it from other districts without any right

on its part to say how many it should receive or could take care of, its schools might become overcrowded to the extent that it would require new school rooms or possibly an addition to its teaching personnel with the attendant expense.

Whatever may be the merit of this side of the question, under existing laws nowhere does anything appear which would give the board of education in an outside district to which pupils are assigned, the right to refuse to receive pupils assigned from other districts. On the contrary the tendency seems to be the other way when one reads the language appearing in sections 7747 and 7750 G. C. supra. Thus, in section 7747 (a very late expression of the General Assembly) the language is that the pupil promoted receives a certificate furnished by the superintendent of public instruction and issued by the county superintendent of schools, which certificate "shall entitle the holder to admission to any high school."

Again, in section 7750, enacted in 1909 and not changed since that time, there is a clear provision that if no agreement is entered into between boards of education as to high school tuition matters, then in that case "the school to be attended *can be selected by the pupil* holding a diploma." Here is a clear inference that the pupil has a right to go to a high school and that he can select the high school which he desires to attend and if the board of education in the district where he resides has no high school tuition contract with another school district, his tuition must be paid, the sole requirement being that he should file with the clerk of the board of education "the date the attendance is to begin."

It cannot be denied that in a school district where the school and class room space was limited and a large number of pupils were received from other districts, that sooner or later the board of education in the district would be operating its school and class rooms in conflict with certain sections of the state building code, one of which is 12600-50 G. C. reading in part as follows:

> "*Dimensions of School and Class Rooms.* Floor space. The minimum floor space to be allowed per person, in school and class rooms, shall not be less than the following, viz.:
>
> Primary grades sixteen (16) square feet per person.
>
> Grammar grades eighteen (18) square feet per person.
>
> High schools twenty (20) square feet per person.
>
> All other schools and class rooms twenty-four (24) square feet per person.
>
> Cubical Contents. The gross cubical contents of each school and class room, shall be of such a size as to provide for each pupil or person not less than the following cubic feet of air space, viz.: Primary grades 200 cubic feet, grammar grades 225 cubic feet, high schools 250 cubic feet and in grade B buildings 300 cubic feet.
>
> * * * * * * *
>
> CAPACITY OF ROOMS. The plans shall be clearly marked showing the maximum number of pupils or persons to be accommodated in each room."

Should violation of the state building code occur in a given instance, this might lead later to orders from the department of industrial relations forbidding the use of the school and class rooms for more than a certain number of persons. The board of education then would be confronted with supplying additional space for the pupils attending in the district and in certain instances this might work a hardship upon the receiving district requiring it to issue bonds and levy taxes in

order to either add to its present buildings or erect a new one. However, it must be remembered that when these pupils are being received into the school district there is also flowing into the treasury of the receiving school district the tuition fees of all of the non-resident pupils. Where the pupils came from a school district in which no high school was maintained, the amount of these tuition fees in any individual case would be computed in the manner set forth in section 7747 G. C. Where the pupils came from a district in which a high school was maintained, and exercised their right of attendance under 7750 G. C., the provisions of section 7682 G. C. would govern authorizing boards of education to admit pupils not residents of the district "upon such terms or upon the payment of such tuition * * * as it prescribes."

Bearing upon this question and upon the sections of law above cited, attention is invited to a very carefully prepared opinion issued by the Ohio Supreme Court in the case of state ex rel. Nimberger et al., vs. Bushnell et al., Board of Education, et al., 95 O. S., 203. This was a case in which a writ of mandamus was sought ordering the board of education of the city school district of the city of Cleveland to permit a certain pupil to attend one of the high schools of the city school district, the relators contending among other things that they were the owners of property situated in the city of Cleveland and the school tax upon such property should be credited on the tuition, and also that the board of education of the village of East View should pay the tuition of the pupil which was demanded by the Cleveland city board of education. In considering these questions the court in a long opinion of eleven printed pages went into all of these sections cited very carefully, giving their history and commenting upon their use and effect. The first and fourth branches of the syllabus of this court decision read as follows:

> "1. The re-enactment of a statute in a code or revision does not change its meaning, construction or effect unless the language of the statute as revised clearly manifests the intent of the legislature to make such change.
>
> 4. When the meaning of the language employed in a statute is clear, the fact that its application works an inconvenience or accomplishes a result not anticipated or desired should be taken cognizance of by the legislative body, for such consequence can be avoided only by a change of the law itself, which must be made by legislative enactment and not by judicial construction."

Bearing upon the right and privilege of pupils to attend high school in districts other than those wherein they reside, this very significant language is used by the court:

> "It is to be borne in mind that *the right and privilege of pupils to attend high school in districts other than those wherein they reside* was conferred long prior to the passage of any law requiring boards of education to pay tuition for such attendance. It is therefore manifest that the right to take the examination and, if successful, the *privilege of attending a high school in another district,* did not imply any obligation whatever upon the local board of education to pay tuition. *The right of the pupil to attend a high school elsewhere* and the obligation of the board to pay tuition have at all times been treated in legislation as two entirely separate and

distinct matters, *the privilege of the pupil being broader than the obligation of the board.*"

Bearing upon tuition rates which might be charged, the court held on pages 212-213 that "we cannot look to the provisions of Section 7747 to ascertain the rate of tuition to be charged" in those cases which fall under 7750 and are not the districts described in section 7747 G. C. The court held that neither 7750 nor any other section of the statute prescribes any method of determining the amount of tuition to be paid by districts in which a high school was maintained but from which district certain pupils by preference attended another high school, located in another district; that unless the boards of education were in those districts described in 7747 G. C. the boards "must meet the terms prescribed by the board of education of the district maintaining the high school attended" and that the provisions of section 7682 G. C., supra would govern.

After considering all of the sections of the statutes having to do with matters of this kind, the court pointed out that the conflict which might exist in the existing statutes was a matter for legislative correction rather than judicial interpretation, the court speaking as follows:

> "The condition of the provisions we have been considering serves to illustrate the usual results of the scissors-and-paste method of legislation too frequently employed. Whatever the cause of the present condition of the statute, if a correction is to be made it should not be accomplished by a forced construction of the provisions of the school code by the courts. That is purely a matter of legislation, and is solely within the province of the legislature."

In reply to your inquiry you are therefore advised that it is the opinion of this department:

(1) That under existing law there is no authority for a board of education conducting a high school to refuse to admit to the high school conducted by it any pupil holding a diploma showing completion of the elementary school work, where such pupil's tuition is paid or will be paid.

(2) Where boards of education refuse to pay tuition already past due, the remedy of the creditor board of education is in an action in the courts for the amount accrued. Final judgment against the school district shall be paid from a separate fund to be known as the "Judgment Fund" to be created as set forth in 2295 G. C.

Respectfully,
JOHN G. PRICE,
Attorney-General.

3849.

APPROVAL, BONDS OF VILLAGE OF OAKWOOD, MONTGOMERY COUNTY, $4,600, STREET IMPROVEMENTS.

COLUMBUS, OHIO, December 30, 1922.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.