Trustees—School District — Pupils — Conveyance — Injuries.

The Trustees of a school district are not liable for injuries to pupils enroute to school in conveyances provided by the school district, unless the Board, while convened as such, had notice of a defect in the mode of conveyance which should have been remedied in the exercise of reasonable care and diligence.

Howard A. Johnson, Esq.,
County Attorney,
Boulder, Montana.

My dear Mr. Johnson:

You have requested my opinion as to the liability of Trustees and their employees when engaged in transporting pupils to and from school.

You have not given any statement of facts upon which it is contended that liability has, or has not, attached. Hence, it is impossible for this office to give an opinion as to the general liability of officers of school districts for tort or negligence.

The rule as to liability of school officers for negligence or tort is stated in 24 R. C. L. at page 606, as follows:

> "As a general rule, school officers whose duty it is to keep in repair the school premises are not personally liable for injuries resulting from defects in the premises caused by the negligence of the persons employed by the officers to look after the premises. The doctrine of respondeat superior does not apply to a school board and it is not liable for the negligent acts of any of its subordinate officers or servants. But a Board of Education having the management and control of the schools of a city, although not liable under the doctrine of respondeat superior for the torts of its subordinates, is liable for its own participation in the wrongful appropriation of the property of another and they may render themselves personally liable by negligence in the performance of duties to be performed by themselves. So where a Board of Education, knowing a school building to be unfit for use, permits it to be used as a school, the Board is liable for injuries caused to a child, not because of its failure to repair, but because of its negligence in permitting the building to be used, knowing its defective condition. But in regard to other matters, all liability ceases when they employ proper persons to perform the work."

The supreme court of this state in the case of Smith v. Zimmer, 45 Mont. 282, had under consideration the question of the liability of County Commissioners for injuries sustained by reason of a de-

fective highway which had existed for about five months. In the first opinion the court held the Commissioners liable but on rehearing the court, through Mr. Justice Smith, at page 305, used the following language:

"But the court has also held that they as individuals may be charged with constructive notice of a defect in a highway. I have no pride of opinion in this matter, and, since listening to the reargument, I have arrived at the conclusion that the court was in error in so holding. I am impressed with the soundness of the doctrine that in order to charge the individual Commissioners, or any of them, with a neglect of duty, it must appear that the Board, as such, had actual notice of the defective condition of the highway. I have no doubt that when an office is held by a single individual, notice to him personally is, ordinarily, notice to him officially. But when a duty devolves upon a Board which has sole power to act, and not upon its individual members, in order to put the Board or its members in error or default, notice must be served upon the Board; that is, actual notice must come to its members while convened officially. As was well said by Mr. Justice Start of the supreme court of Vermont in Daniels vs. Hathaway, supra, one member cannot act alone; he can neither order repairs nor remove a supervisor for neglect of duty. Two might act if legally convened as a Board, but unless so acting they would be as powerless as one. Mr. Commissioner Callaway, for this court, in Williams v. Commissioners, 28 Mont. 360, 72 Pac. 755, said: 'To bind the county * * *(the Board) must act as an entity and within the scope of its authority. Its members may not discharge its important governmental functions by casual sittings on drygoods boxes or by accidental meetings on the public streets; the statutes do not vest the power of the county in three Commissioners acting individually, but in them as a single Board; and the Board can act only when legally convened.' If, after the Board has been officially notified, any two or more of the individual members thereof negligently refuse to act as a Board, I know of no reason why those so refusing should not be held personally responsible in damages for any resulting injury to a traveler on the highway.

"Meetings of the Boards of County Commissioners are limited and regulated by law. When not in session as a Board, although the individual members are still County Commissioners, they are powerless to perform any official function. I am of opinion, therefore, (1) that before the individual members of a Board of County Commissioners can be held personally liable for negligent conduct in refusing to repair a public highway, the Board of which they are members must have actual notice of such defective condition; (2) that if after such actual notice to the Board any two or

more members thereof negligently or willfully refuse to cause the defect to be repaired, either directly or through the agency of the supervisor, the members so guilty of negligent conduct are liable to one who, without contributory negligence, is injured thereby. I use the words 'neglect' and 'negligently' advisedly. They are the crucial words in what I have written. Without negligence or willful misconduct there can be no liability."

It is, therefore, my opinion that the rule as laid down in this case applies equally to the liability of Trustees in managing the affairs of a school district.

Very truly yours,

WELLINGTON D. RANKIN,
Attorney General.