## School Districts—Trustees—Elections—Classifications.

A school district retains its classification until the Legislature prescribes the manner of changing it.

Under the facts stated in the opinion, Trustees should be elected for regular terms and also to fill out the unexpired terms of those holding by appointment.

Robert E. Purcell, Esq.,
County Attorney,
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My dear Mr. Purcell:

You have requested my opinion as to the number of Trustees which should be elected in a district showing a population of less than 1,000 according to the last federal census where the district is functioning as one of the second class and there has been no action on the part of the School Board changing this classification.

It appears that there are four vacancies on the Board at present by reason of two terms regularly expiring and two terms expiring by reason of appointments to fill vacancies.

The only provision of the statute relating to classification of school districts is Section 1021, Revised Codes of 1921, which provides:

> "All districts having a population of eight thousand or more are, and hereafter shall be, districts of the first class. All districts having a population of one thousand or more, and less than eight thousand, are, and hereafter shall be, districts of the second class, and all districts having a population of less than one thousand are, and hereafter shall be, districts of the third class. In districts of the first class the number of Trustees shall be seven; in districts of the second class the number of Trustees shall be five, and in districts of the third class the number of Trustees shall be three."

This statute declares that districts having a certain population are, and hereafter shall be, districts of a certain class, depending upon the population. Did the Legislature intend by this declaration that all school districts existing at the time of the approval of this Act should take and thereafter retain the class that their population would give them? The statutory declaration would seem to justify this construction, but such construction would leave without classification all school districts organized after the date of approval of the Act. There is an entire absence from the statute of any machinery with which to give effect to the provisions of Section 1021. No method of determining the population by a census, or otherwise, is made, nor is there anything to authorize the adoption of any census taken by the federal, state, county or other municipal government, nor is any officer or board authorized to declare the class of school district.

The classification of cities and towns in this state is based upon population. Both the method of determining the population, as well as of declaring the result, is provided for by Sections 4959, 4960, 4969, 4970 and 4973 of the Revised Codes of 1921.

In the case of In re Assessment for Construction of Sewer in City of Passaic, N. J., 23 Atl. 517, the court had under consideration the classification of cities and towns according to population, where there was no provision as to how the population was to be ascertained. The court, in discussing this question, used the following language:

> "The act for the classification of cities, above cited, fixes the grade of cities of the first, second, and third class, by 'population.' How the population of any city is to be ascertained, is not expressly declared. The contention is that population may be determined, like any other fact, by evidence, and that, when it thus appears that a city of the third class has acquired a population exceeding 12,000, it must be judicially declared to be no longer a city of the third class, but one of the second class. If the question thus presented was limited to the construction of the original classification act, I think its solution not difficult. Neither parties litigant nor municipalities nor courts have been empowered to make enumeration of inhabitants for the determination of population. Any attempted enumeration not accompanied with power to inquire and to compel answers would be a mere farce. The fact determined in one case in one way might be determined otherwise in another case. It is inconceivable that the Legislature intended to make classification depend on such uncertainties. It is apparent that 'population,' in this act, bears the meaning of enumeration of inhabitants, and refers to such enumeration as the law provides to be made. Two such enumerations are provided for by law in each decade,—one under United States authority, and the other under the laws of this state. At what period will 'population,' as used

> in the original classification act, be fixed and determined? The contention is that, when the bureau or officer charged with the duty of enumerating states the result, the population of the district is established and proven. But this is equally inadmissible. Such statements may be varied and altered, and manifestly the enumeration intended is not complete until it is officially promulgated."

The School Board is not authorized to take a census, except the census of children of school age.

It was held in Vol. 8, Opinions of Attorney General, p. 519, that the county does not automatically change its classification, but that action must be taken by the Board of County Commissioners before the classification is changed, and this under statutes making it the duty of the Board of County Commissioners to determine the class of county at stated intervals. The statute does not make it the duty of the School Board, or any other officer, to either determine the population or change the classification of a school district.

It is, therefore, my opinion that it would retain its classification until the Legislature prescribed the manner of changing it, and, unless changed by common consent, the district must continue to function under the classification it had adopted.

This office has held in opinions dated February 27, 1914; March 15, 1915, and March 22, 1917, (the latter opinion being reported in Vol. 7, Opinions of Attorney General, p. 59), that the provisions of Section 1001, Revised Codes of 1921, do not apply to elections to fill vacancies, but apply only at the close of a regular term, and, in that case, Trustees should be elected for regular terms and also to fill out the unexpired terms of those holding by appointment.

Very truly yours,

WELLINGTON D. RANKIN,
Attorney General.