Teachers, Payment of Salary of—Schools Closed by Epidemic.

In case agreement between trustees and teacher is silent upon matters of payment of salary in case schools are closed on account of an epidemic disease, and schools are closed by order of the Health Officer because of an epidemic of influenza, and a teacher holds himself in readiness at all times during which the schools are so closed to resume his duties at any time, such teacher is entitled to be paid the salary provided by his contract during all of the times the schools are so closed.

Nov. 6th, 1918.

Miss May Trumper,
Supt. Public Instruction,
Helena, Montana.

Dear Miss Trumper:

It appears that a very great many of the schools in this state have been closed upon the orders of the local and county health offices on account of an epidemic of Spanish influenza. You have

submitted to me the usual blank agreement between school trustees and teachers. This agreement is in part as follows:

"THIS AGREEMENT, Made and entered into this..... day of....., A. D. 191...., between....., party of the first part, and the Board of Trustees of School District No....., of.....County, Montana, parties of the second part.

"WITNESSETH, That the said....., who holds a legal certificate as teacher for said county, hereby agrees for the consideration hereinafter stated, to teach the school in said district for the period of.....months, commencing on the.....day of....., 191.....

"AND THE PARTIES OF THE SECOND PART hereby agree to pay the said.....Dollars for each and every month of twenty school days (including all holidays), in the manner following, to-wit: By drawing their order upon the County Treasurer of said County, to be paid out of any school moneys in the County Treasury standing to the credit of said district.

"IT IS MUTUALLY UNDERSTOOD AND AGREED, that whenever the school shall be closed by order of the trustees on account of the prevalence of contagious or epidemic disease, or from any cause, the salary of said first party as teacher shall....."

The last paragraph of this agreement is to be completed by adding the words "be paid the same as when school is in session" or "cease for such time as school is closed," according to the agreement in such case between the school trustees and the teachers. You have requested my opinion upon the question of whether or not a teacher is entitled to be paid for the time the school is closed on account of the epidemic of the Spanish influenza in case the agreement between the school trustees and such teacher is silent upon such question.

Section 1477 of the Revised Codes provides in part as follows:

"The State Board of Health shall have power to promulgate and enforce such rules and regulations for the better preservation of the public health in contagious and epidemic diseases as it shall deem necessary, and also regarding the causes and prevention of diseases, and their development and spread."

Section 1510 provides as follows:

"In case of imminent danger from infectious or contagious disease, where the health of the people would be endangered from the delay of action necessary to call a meeting of the State Board of Health, the Secretary of the State Board of Health shall have the full power of the State Board of Health to act in such matter until such time as a meeting of the State Board of Health may be duly called."

Pursuant to the above authority the Secretary of the State Board of Health on Oct. 7, 1918, promulgated the following order:

"Believing that an emergency exists and not being able to quickly get a meeting of the State Board of Health, the Secretary has promulgated the following regulations for the control of Spanish influenza.

"129. Spanish influenza is hereby declared to be infectious, contagious and communicable and dangerous to public health.

"131. When Spanish influenza appears in epidemic form in any community the health officer having jurisdiction shall close the schools and prohibit all public gatherings."

Section 1484 of the Revised Codes provides in part as follows:

"Each incorporated city or town in the state shall have a local board of health, the same being designated in this act as the 'Local Board.' Said local board shall consist of three members to be appointed by the municipal authorities of the town or city, and removable at their pleasure, one of whom shall be a physician, legally qualified to practice medicine and surgery in the state; the Board shall elect one of its members as Secretary; provided, that any incorporated town of less than five thousand inhabitants, may, by written notice to the State Board of Health, and to the county board of health of the county in which said town is located, place itself under the care of the county board of health, in which case the county health officer, as hereinafter provided for, shall have the same authority within the incorporate limits of such town as he has in the county outside of corporate limits."

By Section 1487 the local health officer shall, as Secretary of the local board of health, "order all public buildings, such as schoolhouses, churches, theaters, or other places where people congregate in considerable numbers to be closed in time of epidemic or in the face of serious or unusual sickness, which in his judgment, and approval in writing by the Secretary of the State Board of Health and Safety may require the same, and may forbid and prevent the assembling of the people in any place when the public health and safety demands the same."

Section 1492 of the Revised Codes provides in part as follows:

"There is hereby established in each county a board of health which is designated in this Act as the 'County Board of Health,' which shall consist of the Board of County Commissioners, and one physician legally authorized to practice medicine and surgery in this state, who must be appointed by the Board of County Commissioners. Said physician, when so appointed, shall be ex-officio secretary of the county board of health and the county health officer, and shall hold office at the pleasure of the board. The county health officer shall have the same powers and perform the same duties in the county of his appointment, outside of the limits of incor-

porated towns or cities, as are hereinabove provided for a local health officer within the corporate limits of a town or city, and his salary shall be fixed by the Board of County Commissioners * * *."

In view of the foregoing sections of our Codes I think there can be no question as to the authority of local health officers to order schools closed because of the presence of an epidemic of Spanish influenza.

In Goodyear vs. School District, 17 Ore. 517, 21 Pac. 664, it was held that where under a contract between the directors of a school district, there was a clause to teach a definite period, unless the school was discontinued by order of the directors, and the directors in consequence of the prevalence of diphtheria stopped the schools but opened them when the danger had passed and before the expiration of such contract, that the discontinuance of the school was for a good cause and authorized under the contract but that it did not operate to annul such contract and discharge the teacher, but that it did relieve the district from liability during such period, but not from liability for the unexpired portion of such contract after the schools were reopened. But, it will be noticed that in this case there was an expressed provision in the contract for a discontinuance in the event that it should become necessary for any proper cause to discontinue the schools during some period of the contract.

In Sherman County School District vs. Howard, 5 Neb. Unof., 340, 98 N. W. 666, the court said:

"It is clearly settled by innumerable authorities that whenever a contract which was possible and legal at the time it was made becomes impossible by act of God, or illegal by an ordinance of the state, the obligation to perform it is discharged. Baylies v. Fettyplace, 7 Mass. 325; Vol. 9, Cyc. Law & Pro. 629. No contract can be carried into effect which was originally made contrary to the provisions of law, or which, being made consistently with the rule of law at the time, has become illegal by virtue of some subsequent law. This is so well settled and so thoroughly understood by the profession that a citation of authorities is unnecessary. It is not claimed that the board of health did not have authority to close the school, or that the order was illegal in any respect. This being so, that order, so long as it remained in force, was a valid legal prohibition against the continuance of the school, and the district, by force of law, was unable to complete its contract. Had the board of health failed to act, and had the school been closed by the district on its own motion, then the rule contended for by the defendant in error, and followed in the case of Dewey v. Union School District (Mich.) 5 N. W. 646, 38 Am. Rep. 206, and Libby v. Inhabitants of Douglas (Mass.) 55 N. E. 808, might be invoked. But the action of the district in closing the school was not voluntary. It was the act of the law, which the district and all others were compelled to obey. In Baylies v. Fettyplace,

supra, it was held that, where the law interposes to prevent the performance of a contract, but such prohibition is temporary only, the parties are not excused from its performance after the law has ceased to operate."

In Dewey vs. Alpina School District, 43 Mich. 480, 5 N. W. 646, 38 Am. St. R. 206, it was held that smallpox is not an act of God in such a sense as to excuse a school district from liability on a contract with a teacher, the performance of which the district has prevented by closing the school, and that the act of God which will release one from the obligation of a contract is one which renders its performance impossible. In this case the court said on page 483:

"Admitting that the circumstances justified the officers, and yet there is no rule of justice which will entitle the district to visit its own misfortune upon the plaintiff. He was not at fault. He had no agency in bringing about the state of things which rendered it eminently prudent to dismiss the schools. It was the misfortune of the district, and the district and not the plaintiff ought to bear it."

This case was cited and quoted in School Town of Carthage vs. Gray, 10 Ind. App. 428, 37 N. E. 1059, in which it was held that where a school town contracts with a teacher for a certain number of weeks of service, and, before the expiration of the term, closes the school upon order of the county board of health because of the prevalence of diphtheria, it is liable for the teacher's salary for the time the school is closed, the non-performance of the contract not being due to an act of God. This case was also cited and followed in Libby vs. Douglas, 175 Mass. 128, 55 N. E. 808, where it was held that it was no defense to an action against a town for salary as a teacher for a certain period, that during that time the school was closed by the school committee because of the prevalence of a contagious disease in the town, if the plaintiff, who was employed to teach during the school year for a certain sum payable in monthly installments, kept himself in readiness to resume work, at the request of the committee. In Randolph vs. Sanders, 22 Tex. Civ. App. 331, 55 S. W. 621, the Michigan and Indiana cases above were cited and followed and the court held that where, on account of smallpox, the public schools of a city were temporarily suspended and a teacher was notified to hold herself in readiness to resume work, which might occur any day, she was entitled to her salary for the lost time. The same two cases were also cited in McKay vs. Barnette, 21 Utah 239, 60 Pac. 1100, 50 L. R. A. 371, in which case it was held that a contract between the plaintiff and the board of education of Salt Lake City, wherein, among other things, plaintiff bound herself "to give her entire time and best efforts in any of the schools of said city to which she might be assigned" for four weeks of five days each in each month from September 11, 1899, until June 1, 1900, or until the termination of the contract by the board of education for misconduct, etc., or for any other reason than those specially mentioned, on four weeks' notice, carries with it by implication that the board of education shall, in case it failed to furnish plaintiff

with employment as teacher, pay her the stipulated wages during the time mentioned, or until said board terminated the contract as therein provided, and the arbitrary closing of the schools by the board of education during an epidemic of smallpox, although it may have been a wise precaution, did not release the plaintiff under the contract, or change the obligation of the board. A stipulation, in a contract of employment, to pay plaintiff a certain wage "for the time actually occupied in school," must be construed simply as an intention to prohibit plaintiff from drawing her salary during vacation, or during the time she might be excusably absent or temporarily unable to discharge her duties, and not to apply to such time as the defendant might arbitrarily prevent plaintiff from performing her duties without discharging her under the contract. The following quotations are from the opinion of the court in this case:

> "In the case of Jones v. U. S., 96 U. S. 29, 24 L. Ed. 646, the court said: 'Impossible conditions cannot be performed, and, if a person contracts to do what at the time is absolutely impossible, the contract will not bind him, because no man can be obliged to perform an impossibility; but where the contract is to do a thing which is possible in itself the performance is not excused by the occurrence of an inevitable accident or other contingency, although it was not foreseen by the party, nor was it within his control. Chit. Cont. 663; Jervis v. Tomkinson, 1 Hurl. & N. 208.' Where the contract is to do acts which can be performed, nothing but the act of God or of a public enemy or the interdiction of the law as a direct and sole cause of the failure will excuse the performance. This principle is elementary. The schools were not closed for any such cause by the board of education. While the closing of the schools may have been wise and prudent, the closing was not due to any cause which made it impossible for the school to keep open. The board of education might have stipulated that the plaintiff should have no compensation during the time the school should be closed on account of the prevalence of contagious diseases, but, not having done so, it cannot deny the compensation during such time on account of the prevalence of smallpox. Libby v. Inhabitants of Douglass (Mass.) 55 N. E. 808; Gear v. Gray (Ind. App.) 37 N. E. 1059; Dewey v. School District (Mich.) 5 N. W. 646."
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> "If the local board of health had possessed, at the time said contract was entered into, lawful authority to order the schools closed whenever smallpox should become prevalent, and continued to possess such authority up to the time when it acted in the premises, and also had lawful authority to enforce such an order, then the defendant, in that event, might, with much better show of reason, insist that the parties contracted in view of such authority, and contemplated, if a smallpox epidemic should occur during the life of the contract, the board of education might be legally com-

pelled, against its will, and without fault on its part, to close the schools, and that during the time the schools were so closed under such authority, no salary should be paid to the plaintiff. But the local board of health had no such authority at the time the contract was made, and has not since had any such authority."

It will be noticed that the other two justices of the Supreme Court of Utah concurred in the result of this case, and that one justice did not assent to that part of the opinion having reference to the power of the board to close the schools during the smallpox epidemic. The last quotation above, therefore, from the opinion of the court in this case, cannot be urged as an authority for the proposition that the contract between a teacher and school board contemplates that if an epidemic should occur during the life of the contract, the board of trustees might be legally compelled, against its will, to close the schools and thereby be relieved from its liability to the teacher under the contract.

The above cases were cited and followed in Smith vs. School District, 89 Kan. 225, 131 Pac. 557, in which it was held that since there was no express stipulation for a deduction from the compensation agreed upon by reason of the closing of the school during the prevalence of a contagious disease in the community the teacher was entitled to his salary for that month. In this case the court quoted from Libby vs. Douglas, supra, and expressly followed the decision of the Supreme Court of Michigan in Dewey vs. School District, supra.

The latest case which I have been able to find upon this proposition is that of Board of Education vs. Couch (Okla.) 162 Pac. 485. In this case it appeared that the teacher was employed by the Board of Education as principal to teach for the school year 1912-13, a period of nine months, commencing on the 9th day of September and continuing to the 16th day of May, at a salary of $90 per month; that he entered upon the performance of his duties and continued therein until an epidemic of smallpox broke out. Thereupon the Board of Health, acting under authority conferred upon it by statute, issued an order closing said schools during the prevalence of said disease; thereupon the Superintendent of Schools instructed the teachers to hold themselves in readiness to resume their duties as soon as the schools were permitted to be reopened; and, that said schools were reopened and plaintiff resumed his duties at the end of one month and continud to carry out his contract to the end of the term. The defendant contended that, the schools being closed by the Board of Health, acting under legal authority, such action rendered further performance of the contract illegal for both plaintiff and defendant and therefore no recovery could be had by the plaintiff for the month of suspension from duty. The court in this case, in holding that the plaintiff was entitled to recover the full compensation agreed upon, said:

"The case of Randolph v. Sanders, 22 Tex. Civ. App. 331, 54 S. W. 621, seems to us to be directly in point. In that case the schools were closed on account of the prevalence of

an epidemic disease, and the reopening thereof was temporarily postponed by authority of the city authorities and health officers of the state and city and county during the period of three months. Discussing the effects of this suspension upon the right of one of the school teachers to recover his salary for the time the school was closed, Mr. Chief Justice James, who delivered the opinion for the court, says:

"'* * * Plaintiff was not consulted as to the closing of the schools as aforesaid, but was informed and required by the executive school board that she should hold herself ready to resume her duties under said contract as soon as the health authorities would permit the schools to be opened, and the executive council should so direct; that plaintiff accordingly held herself ready at all times up to May 15, 1899, to resume her duties, * * * and the requirement of her that she remain in readiness to resume work at any time she might be called upon, and that she remained ready. In view of this, we are of opinion that it cannot be said that the schools were closed, or the term shortened, in the sense of the contract. * * * Had the act of closing of the schools been intended as permanent on January 6, 1899, or at any date afterwards, plaintiff's right to compensation after such time would probably not have existed. But the schools were never discontinued, only suspended temporarily, and were liable to open at any time. Plaintiff was notified that she was to be ready to work when the schools resumed, and this might have occurred any day. There was no dereliction or fault on her part in any respect. Had the schools been closed permanently, she would have been able to seek other employment; but, as it was, she was held as a teacher under her contract, and the city cannot, in justice, claim that her time so spent was not in the actual service of the schools. Under the circumstances we think the warrant was in conformity with the ordinance requiring that the services be rendered, and the salary due, for which it should issue.'"

A great many cases were cited in support of its decision, including all of the above cases. The case of Sherman County School District vs. Howard, 98 N. W. 666, was referred to but it was distinguished upon the ground that it did not appear in the Howard case whether the teacher was instructed by a superior to hold himself ready to resume his duties as soon as the schools were permitted to open, but it did appear that after the closing of the schools they did not open again for the school year.

The rule is stated in 35 Cyc. 1099-1100, as follows:

"While a school district may be relieved from liability for compensation to a teacher during the time the schoolhouse is closed by an act of God or of the public enemy, which renders performance of the contract impossible, as a general rule it is held that a contagious disease or the de-

struction of a school building is not such an act within the meaning of the school law, and that where a teacher is ready and offers to continue his duties under his contract of employment, no deduction can be made from his salary for the time that the school is closed by reason of a contagious disease, or by reason of the destruction of the school building, or by its becoming in a condition unfit for school purposes, unless there is a stipulation in the contract of employment covering such a possible occurrence, or unless it is closed by authority of the law."

It is stated in Vol. 3 of Elliott on Contracts, Section 1892:

"Where one employed to teach in a public school for a certain time is able and willing to teach during that time, the fact that the school was necessarily closed part of the time by order of the board of health, because of the prevalence of a contagious disease among the pupils, does not deprive the teacher of the right to compensation for the entire time, since such closing of the schools is not caused by the act of God."

Section 65 of The Law of Public Schools by Voorhees is also to the same effect.

I am therefore of the opinion, in view of the foregoing authorities, that in case the agreement between the school trustees and teachers is silent upon the matter of the payment of the salary of the teacher in case of the closing of the schools on account of the prevalence of a contagious or epidemic disease, and the schools are closed by order of the local or county health offices, because of an epidemic of Spanish influenza, and a teacher holds himself in readiness at all times during which the schools are so closed to resume his duties at any time, such teacher is entitled to be paid the salary provided by his contract during all of the time the schools are so closed.

Respectfully,

S. C. FORD,

Attorney General.