

Opinion No. 42.

**Schools—Text Books—Basal Text-
Books—Supplementary Textbooks.**

HELD: The Textbook Commission may not contract with one company to supply basal penmanship textbooks and with another company to supply supplementary penmanship textbooks and leave it to the discretion of the myriad of school officials throughout the state as to which system shall be taught pupils under their jurisdiction.

February 13, 1935.

Miss Elizabeth Ireland
Secretary, State Textbook Commission
The Capitol

You have submitted to this office Bond No. 955990-D, for \$2,000, executed by The A. N. Palmer Company, as principal, and the American Surety Company of New York, and a proposed contract, executed in duplicate, by which The A. N. Palmer Company agrees to supply to the State of Montana certain basal textbooks known as "Grades 1 and 2, Writing Lessons for Primary Grades; Grades 3 and 4, Palmer Method Handwriting; Grades 5 and 6, Palmer Method Handwriting; Grades 7 and 8, Palmer Method of Business Writing; Teachers' Manuals, Teachers' Correspondence Course, and Supervision" at prices fixed in the contract for a period of six years from and after the first day of September, 1935.

On page 2 of this contract and made a part thereof is a copy of a letter dated December 11, 1934, to the Montana State Textbook Commis-

sion and signed A. N. Palmer Company, by Alice Carlberg, Montana Representative. This letter is as follows:

"In the event that the A. N. Palmer System of handwriting is now adopted as the basal system for the schools of Montana and the Zaner-Blosser system of handwriting is placed upon the supplementary list, it is agreed that the A. N. Palmer Company or a representative of the A. N. Palmer Company will not in any of the state or Federal courts attempt to prohibit the use of the Zaner-Blosser system of handwriting in those schools adopting the said Zaner-Blosser system of handwriting instruction."

You have advised us verbally that the textbook commission has also authorized its proper officers to execute a contract with the Zaner-Blosser Company by the terms of which that company will supply certain penmanship textbooks to be used as supplementary texts.

Under the uniform textbook law of this State (Section 1187-1200, R. C. M. 1921, as amended by Chapter 25, Laws of Montana, 1925), the Commission must adopt a basic penmanship textbook that must be used in all public schools of this State. It may also adopt a supplementary penmanship textbook but such supplementary textbook must in fact be used as a supplementary and not as a substitute or co-basal text. (See opinion rendered by this office to you on December 7, 1934.)

At 56 C. J. 849 it is said: "Where a uniform series of textbooks has been adopted by the board or commission having statutory authority to make the selection and adoption, local districts and boards are compelled by law to use the books officially adopted, and are not permitted to use other books selected independently by themselves as substitutes therefor; nor can the law be evaded, or noncompliance be excused, by local boards calling the books selected independently by them 'supplemental' to the officially authorized series, * * * ."

Accordingly, it is our view that if the contract submitted to us is exe-

cuted by the Commission, the adopting of the Palmer system of penmanship will become mandatory in all public schools throughout the State and any other textbook must be used in connection with and supplementary to the Palmer system. In other words, under the law as it now stands, the Textbook Commission may not contract with one company to supply basal penmanship textbooks and with another company to supply supplementary penmanship textbooks and leave it to the discretion of the myriad of school officials throughout the State as to which system shall be taught pupils under their jurisdiction. (Chapter 25, Laws of Montana, 1925; 56 C. J. 845-852.)

Under Section 1196, R. C. M. 1921, it is the duty of all school officers and teachers to use the books prescribed by the Commission. Indeed, under that section it is a criminal offense for them to do otherwise.

There has been some question raised as to the possibility of the textbooks of one system of penmanship being supplemental to another. As a practical matter, it is said, it is as physically impossible to have one system of penmanship supplemental to another as it is to teach two systems of shorthand at the same time, one supplementing the other.

This argument was well considered in an opinion rendered by Attorney General Foot, to Mr. W. A. Campbell, member of the State Textbook Commission, dated March 17, 1932 (not published in the official opinions of the Attorney General), from which we quote with approval the following language:

"The question is not a question so much of law as it is of fact. The question being whether two given systems can be used together, one being used as supplemental to the other. The answer to this question must come from the teaching profession. It is not a question for a lawyer or a layman or even a court to answer as a proposition of law until it is first determined by experiment and practice by the teaching profession. It would appear to be clear that a **totally different** system would not be supplementary to the basal system."

We understand the conclusion of Mr. Foot to be: (1) that it is physically impossible for a **totally different** system of penmanship to be used as a supplement to another; (2) that whether or not two systems of penmanship are **totally different** to each other is a question of fact which must be decided in each given case; (3) that whether or not two systems of penmanship that are **not totally different** may be used one supplementary to the other is also a question of fact which must be proved by competent evidence. With these conclusions we fully agree.

Having all of the above general observations in mind, we now proceed to consider the contract referred to at the outset of this opinion and, particularly, the letter incorporated therein, which we have quoted above in full. For the purpose of this opinion we will presume that the Palmer and Zaner-Blosser systems of penmanship are not totally different and that it can be proved that it is possible for the Zaner-Blosser system to be used as a supplement to the Palmer system.

What does this letter mean?

Does it mean: (1) that if in a particular school the Palmer Company's book is used as a basic text and the Zaner-Blosser system's book is used as a **supplementary text**, the Palmer Company or its representative "will not in any of the state or Federal courts attempt to prohibit the use of the Zaner-Blosser system of handwriting in those schools adopting the said Zaner-Blosser system (as a **supplementary text**) of handwriting instruction?"

Or does it mean: (2) that if in a particular school the Zaner-Blosser Company's book is used as a **basic text** or to the exclusion of the Palmer Company's book, the Palmer Company or its representative "will not in any of the state or Federal courts attempt to prohibit the use of the Zaner-Blosser system of handwriting in those schools adopting the Zaner-Blosser system (as a **basal text**) of handwriting instruction?"

Clearly, if the letter referred to has only the meaning first suggested, its incorporation in the contract is unimportant.

As pointed out above, the Textbook Commission may select and the schools may use both a basal and supplementary textbook; and a company that has been awarded a contract to furnish basal textbooks may not complain if another company has been awarded a contract to furnish supplementary textbooks **which are used in addition and supplementary to the basic textbooks**. Consequently, a provision in a contract, such as the letter referred to, under which one party to the contract agrees to give up a right it does not have, is without legal effect since such an agreement is completely lacking in consideration. (13 C. J. 311, et seq.)

If, however, the letter carries the second meaning suggested, a very serious question is presented.

Section 7558, R. C. M. 1921, provides: "Every stipulation or condition in a contract by which any party thereto is restricted from enforcing his rights under the contract, by the usual proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void."

Since the enforcement of the use in the schools of an adopted textbook may be had on petition of its publisher to the proper court (Section 9848, R. C. M. 1921, *Eaton v. Royal*, 36 Wash. 435, 78 Pac. 1093; *Rand v. Royal*, 36 Wash. 420, 78 Pac. 1103; *Westland Publishing Company v. Royal*, 36 Wash. 399, 78 Pac. 1096; *Rand v. Hartranft*, 32 Wash. 378, 73 Pac. 401; 38 C. J. 736; 56 C. J. 849), if the second meaning is given to the letter, the Palmer Company would be "restricted from enforcing its rights under the contract," and the provisions of the letter would be void because they are clearly contrary to the provision of Section 7558, *supra*, which section is nothing more than the statutory enactment of the common law. (*Wortman v. Montana Central Railway Company*, 22 Mont. 267, 56 Pac. 316.)

We have given a great deal of thought to the terms of the letter under discussion and the more we study it the more we are at a loss to determine which of the two suggested meanings should be given to it. We have nothing but the cold writing be-

fore us. Many reasons may be advanced why one meaning or the other should be given to it. We do not have before us any of the facts and circumstances which surrounded the awarding of the contract, which facts and circumstances could be shown in the event that the validity of this contract were challenged in the courts.

For these reasons, then, we respectfully decline to pass upon the validity of the terms of so much of the contract as is embodied in the letter from the A. N. Palmer Company to the State Textbook Commission.

It is our opinion, however, that even if the courts should hold that the provisions of the letter are void, such invalidity would not affect the validity of the other provisions of the contract. (13 C. J. 512.)

Subject to the above observation we find the contract and bond referred to above to be in proper form.