

Opinion No. 266.**Schools and School Districts—Joint
Districts—Division of Districts.**

HELD: There is no provision in the law of Montana for division of joint school districts, lying partly in one county and partly in another.

April 8, 1938.

Mr. L. D. French
County Attorney
Polson, Montana

My Dear Mr. French:

You request my opinion as to the validity of certain proceedings relating to the proposed division of School District No. 28, the same being a joint school district, the greater portion being in Lake County and the smaller portion in Missoula County.

From your letter it appears that at a joint meeting of the county school superintendents of Missoula and Lake Counties a joint order by the two superintendents was made granting said petition and purporting to create a new joint school district lying partly in Lake and partly in Missoula Counties.

Later an appeal was taken from said order of said superintendents to the boards of county commissioners of both counties, and thereafter a joint hearing was held in the City of Missoula by both of said boards. At said meeting the board of county commissioners of Missoula County voted to sustain the order of the county superintendents, and the board of county commissioners of Lake County voted to reverse the decision of said superintendents. In other words, a tie vote was cast.

In your letter you advise us that all of the proceedings were to be pursuant to the authority found in Sections 1035 and 1024, Revised Codes of Montana, 1935. Section 1035 provides:

“Joint districts — formation, control, discontinuance. Joint districts (districts lying partly in one county and partly in another) may be formed in the same manner as other new districts are formed, except that the petition herein provided for must be made to the county superintendent of each county affected; but in the case of joint districts, all of the provisions herein enumerated for the formation of a new district must be by concurrent action of the superintendent of each county affected.”

We are of the opinion that the section last above quoted, by its express language, which appears to us to be definite and certain, cannot be made to apply to, nor to provide the machinery for, dividing a joint school district, which in this case would result in the creation of yet another joint school district. Section 1035 only provides for the formation of a joint district. The county superintendent's authority in school matters is only co-extensive with his county, and to adopt the theory that Section 1035 has application to a joint school district, as in your case, would be to give the county superintendent of schools in one county joint and interrelated jurisdiction with the superintendent of another county.

In the event that Section 1035, by any stretch of the imagination, could apply to your situation and create the machinery to divide the district, then it is obvious that said section is incomplete, and in that event, or in any event, recourse for authority to make a division of this joint district would have to be found in Section 1024 of the 1935 Revised Codes of Montana.

School District No. 28, prior to the creation of Lake County in the year 1923, was not a joint district, but was a single district situated entirely within the boundaries of Missoula County, and by the creation of the new county became a joint district, and the proposed new district resulting from the proposed division of District No. 28 will also continue to be a joint district, and will lie partly in Lake County and partly in Missoula County.

In the year 1926 a similar proceeding was instituted to divide District No. 28. The petition filed in said matter at that time was predicated upon, and endeavored to be drawn up in accordance with, the provisions found in Section 1024 of the 1921 Revised Codes of Montana. In March, 1927, the legislature amended Section 1024, Revised Codes of Montana, 1921, by Chapter 138 of the 1927 Session Laws, and thereafter said Chapter 138 was amended by Section 1, Chapter 175 of the 1933 Session Laws, which is now set forth as Section 1024 of the 1935 Revised Codes of Montana.

Pursuant to the authority found in Section 1024 of the 1921 Revised Codes of Montana (prior to its amendment) our supreme court in the case of School District No. 28 v. Larson, 80 Mont. 364, was of the opinion that no adequate machinery existed in the law which would enable District No. 28, a joint school district, to be divided. And the court expressed the view that Section 1024 of the 1921 Revised Codes of Montana had no application to the division of a joint school district. The court said: “Evidently, the section refers to the creation of a new district when all the territory involved lies in one county.” The court further said in said case:

“As to the merits of this appeal, we have said all that is necessary but we feel impelled to add that, as to the correct procedure in an undertaking to create a new joint school district, to be taken wholly from the territory of one existing district, such as in this instance, the statutes are in a conflicting and unsatisfactory state; indeed, there appears room for much doubt if the confusing provisions, as they now are, can be made workable at all, without judicial legislation. This court is not now prepared to say what is the correct procedure, if there be any; at least its members are not in accord in their views, so far as they may have any. The situation calls for legislative attention. The legislature, at its next session, should clarify the situation and make plain and simple the procedure, from beginning to end.”

In the determination of the question submitted to this office, the question involved is, whether or not the two

amendments to Section 1024 of the 1921 Revised Codes of Montana have provided the necessary machinery, which was lacking in the law at the time of the decision in the Larson case, to divide a joint school district. While the Larson case, supra, was not predicated upon the 1927 amendment, because the petition was filed prior to its passage, yet such amendment was written into the statutory laws at the date of the submission and rendition of the Larson decision. Yet, notwithstanding such fact, the supreme court evidently did not consider that the amendment had cured the objections found therein, or had provided the necessary machinery to legally divide a joint district, or that it was possible under any conditions to divide District No. 28. If the amendment had supplied the needed, but lacking, legislation, certainly the court would not have recommended new legislation, when the amendment had already been passed and was in force and effect. The question then must be determined as to whether or not Section 1024 of the 1935 Codes, the same incorporating the 1933 amendment, made the necessary changes either in Section 1024 of the 1921 Codes or the 1927 amendment. As no material change affecting the matter of the division of a joint school district was made by Chapter 138 of the 1927 Laws to Section 1024 of the 1921 Revised Codes of Montana, no comparison of the amendment to the old law is necessary, and in order to determine this matter all that is necessary is to devote ourselves to a comparison of Chapter 138 of the 1927 Session Laws to Section 1024 of the 1935 Revised Codes of Montana. Chapter 138 of the 1927 Session Laws is as follows:

“A new school district may be created out of portions of one or more existing school districts where the assessed valuation of property remaining in each district from which territory is taken is not reduced below Seventy-five Thousand Dollars (\$75,000.00) and where the number of census children between the ages of six and sixteen years is not reduced below ten. For the purpose of organizing a new school district out of one or more existing districts, a petition in writing shall be made to the county superintendent of schools

signed by parents or guardians of at least ten census children between the ages of six and sixteen years, residing within the boundaries of the proposed new district, and residing at a greater distance than two miles from any schoolhouse owned by any one of such school districts in which a school is maintained. The petition shall describe the boundaries of the proposed new district and give the names of all children of school age residing therein at the date of the presenting of said petition. The petition shall also show the assessed valuation of the property within the proposed new district which must not be less than Forty Thousand Dollars (\$40,000.00) as shown by the last completed assessment roll. The county superintendent shall within five days from the receipt of such petition give notice of the hearing of said petition by posting or causing to be posted, a notice thereof at least ten days prior to the time appointed by him for consideration of said petition, in at least three of the most public places in the proposed new district and one on each schoolhouse door of each district affected by the proposed change, or if there be no schoolhouse, then in one of the most public places in each of said old districts; and shall on the day fixed in the notice proceed to hear said petition at the place designated in said notice, which must be either at the schoolhouse in one of the school districts affected, unless a protest in writing signed by at least a majority of the school electors residing within such proposed school district shall be filed with the County Superintendent of Schools before or at the time fixed in the notice for the hearing of said petition, in which event the proposed school district shall not be created. If no such protest be filed, then the county superintendent, upon hearing the petition, shall within ten days from the date of such hearing, make an order establishing the new district and describe the boundaries thereof, or make an order denying such petition. An appeal may be taken to the Board of County Commissioners of the county, from either order made as aforesaid by three resident taxpayers of either the old or the new district who are dissatisfied with said order. Such appeal shall be taken

within thirty days of the date of the order and upon the hearing of said matter by the Board of County Commissioners, a decision shall be rendered which shall be final. The appeals mentioned in this section shall be in writing, subscribed by the parties taking the appeal and shall recite sufficient facts to show their rights to appeal hereunder and that it is an appeal from the decision rendered, and such an appeal shall be filed with the County Superintendent within thirty days from the date of the order establishing such new district or denying such petition. The County Superintendent shall, within twenty days from the filing of such notice of appeal, transmit to the Board of County Commissioners and file in the office of the County Clerk, the notice of appeal and all petitions, plats and papers in his possession pertaining to the petition for the creation of such new school district. The County Clerk shall, forthwith, upon receipt of such notice of appeal and other papers, give notice to all parties interested by causing to be posted at least ten days prior to the date of the next regular meeting of the Board of County Commissioners, in at least three of the most public places in the proposed new district, and one on each schoolhouse door of each district affected by the proposed change, or if there be no schoolhouse then in one of the most public places in each of said old districts, notices to the effect that the Board of County Commissioners will at its office in the courthouse upon a certain date, specifying the same in such notices, which date shall be during the next regular session of the Board, finally hear and determine said appeal and said petition for the creation of such new district."

The changes made by the 1933 amendment, as codified in Section 1024 of the 1935 Revised Codes of Montana, are substantially as follows: The age of the census of school children has been altered; the valuation of the property in the proposed district has been changed; and some other slight procedural changes in reference to the details have been made; and in addition to those changes an entire new amendment has been added to Chapter 138, which is as follows:

" * * * A majority of the resident freeholders residing in territory which is a part of any organized school district may present a petition in writing to the county superintendent of schools, asking that such territory be transferred to, or included in, any other organized district to which said territory is contiguous, provided however, that no territory within three (3) miles of an established school in such district shall be so transferred and provided further that the taxable valuation (the percentage valuation upon which levies are made and taxes computed) of property in the district from which territory is taken shall not be reduced to less than seventy-five thousand dollars (\$75,000).

"The petition shall describe the territory which it is proposed to transfer or include, and shall also state the reason for desiring such change, and the number of children of school age, if any, residing in the territory to be transferred or included.

"The county superintendent shall file said petition in his office immediately on receipt thereof, and shall give notice to the parties interested by posting notices at least ten (10) days prior to the time appointed for considering said petition, one (1) of which shall be in a public place in the territory which is proposed to be transferred or included, and one (1) on the door of each schoolhouse in each district affected by the change, or if there be no schoolhouse in such district, then in some public place in such district or districts, and at the time stated in said notice for the consideration of such petition, which shall not be less than ten (10) days nor more than thirty (30) days after the date of filing such petition, he shall proceed to hear such petition, and if he deem it advisable and for the best interest of the territory proposed to be transferred or included, he shall grant said petition and make an order fixing the boundaries of the district so changed, which order shall be final, unless an appeal be taken to the board of county commissioners of the county wherein such districts are located within thirty (30) days thereafter, and upon hearing thereof the decision of said board shall be final. All the papers, documents, and records in the case shall be certified by the county superintendent to the

county commissioners for their determination of the matter on appeal; provided, that lands lying contiguous to a district and not attached to any district shall be attached to an adjacent district by the county superintendent of his own motion, and provided further, that all districts shall consist of contiguous territory."

The above quoted amendment can have no application herein to the division of a joint district, because it refers to the transfer or inclusion of territory in one district to that of another district, whereas, the division of District No. 28 is a clear separation of one existing district, and not the transferring of that separated territory to another district. Furthermore, the amendment provides that no territory within three miles of an established school shall be so transferred, and from said language it is very obvious that said amendment can have no application to, nor provide any machinery for, the division of District No. 28. In other words, the legislature has not remedied that situation found in the law when the Larson case was decided, and there is no authority in law for the division of District No. 28, and a division of said district cannot be made until the legislature has passed additional legislation for that purpose.

The express language found in Section 1024, Revised Codes of Montana, 1935, substantiates the theory that the section only applies to districts entirely within one county. For instance, the language found therein specifies that the hearing before the county superintendent must be either at the courthouse or the schoolhouse in one of the school districts affected. There is no provision for two hearings before each of the superintendents in his respective county, and there is no provision enlarging the jurisdiction of one superintendent to preside at a joint meeting in another county and retain official authority. The statute further provides that the county superintendent shall transmit, upon appeal, all of the papers to the board of county commissioners and file them in the office of the county clerk. Which county would such papers be filed in? There is no provision for filing the papers in both counties, or filing the original in one and duplicates in the other. The statute further provides that at the

hearing before the board of county commissioners, the board will, at its office in the courthouse, upon certain date during the next regular session of the board, hear said appeal. There is no authority or provision in law for a joint meeting of the board of county commissioners. Your board of county commissioners has no official authority nor right to sit as a board of county commissioners and perform any official duties in Missoula County. Its jurisdiction, like the county superintendent's, is co-extensive with its county, and when it appears in another county it is divested of its official character.

There is no provision in the law to determine the procedure in the event of a tie vote, by either the county superintendents, or the county commissioners, and it certainly was never the intent of the law that a stalemate would result. Therefore, it is apparent to us that it was never intended by Section 1024 to provide the machinery to divide a joint district, and in the light of the court decisions upon said matter, it is our opinion that until further and additional legislation is had, it will be impossible to divide District No. 28.

Therefore, it is my opinion that the county superintendents were without authority to entertain the petition for the division of School District No. 28, and that the order made by them was a nullity, and, of course, it follows that any acts attempted by the boards of county commissioners of both of said counties were of no force and effect, and that your county superintendent should not proceed further in the attempt to organize the proposed new district, or make any division of property thereto, and should treat District No. 28 as an undivided district.