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Rights of a Teacher in the Public Schools when School is Closed

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RIGHTS OF A TEACHER IN THE PUBLIC SCHOOLS
WHEN SCHOOL IS CLOSED

This problem presents a nice question in contract law and one upon which very little has been written. Without doubt this phase of contract law is highly practical from the lawyer's standpoint, and may come up at any time, since thousands of contracts are executed between school authorities and school teachers every year. The writer will attempt to detail the rights of a teacher under his contract in the following instances: (1) When school is closed by order of the school authorities themselves because of an epidemic or inclement weather; (2) When school is closed by order of the health authorities because of the prevalence of disease or bad weather; (3) When school is closed because of destruction of the school building. These situations will be discussed in the order given.

Before beginning the discussion proper perhaps it would be well to indulge in a few assumptions. First let us assume that the teacher is qualified to teach under the law, and that he is working under a valid contract of employment. In addition to certainty and definiteness required by general contract law, to be valid a teacher's contract with a board of education must comply with certain statutory requisites. For instance, such contract must not be for a duration longer than one year. Moreover, although not coming within the Statute of Frauds such contracts by statute and decision must be in writing in Kentucky. Along with the above assumptions as to validity, let us further assume that there is no provision in the teacher's contract for a cessation of his salary upon the happening of any contingencies whatsoever.

1. Now, let us suppose that the school authorities themselves find it necessary or expedient to temporarily close the school because of an epidemic, or inclement weather. What rights has the teacher to his salary for the period during which the school is thus closed?

1 Caroll's Kentucky Statutes, Section 4399-34 (1934 Supp.).
2 Caroll's Kentucky Statutes, Section 4396-2 (1930 Ed.); Gover v. Stovall 273 Ky. 172, 35 S. W. (2d) 34 (1931); Caroll's Kentucky Statutes, Section 4384-30 (1934 Supp.).

K. L. J.—5
According to elementary principles of contract law, certain classes of impossibility excuse performance of a given contract. Impossibility, according to a noted writer on contract law, excuses performance when the impossibility is due (1) to an act of God;\(^3\) (2) to a change in the law which renders performance of a contract illegal;\(^4\) (3) to the death of one of the parties when the contract was for personal services;\(^5\) (4) to the destruction of the subject matter, where the contract calls for a specific thing, or specific goods, as distinguished from a general subject matter, the promisor not having assumed the risk of the continuance \(\text{in esse}\) of the subject matter.\(^6\) But it is well settled that mere impossibility, inconvenience in performing, or hardship does not release the contracting parties from contractual obligations.\(^7\)

Applying the rule as enunciated in the preceding paragraph, the Courts have uniformly held that where schools are closed by the school authorities because of an epidemic, the teachers are entitled to their salaries for the time school is thus closed unless it is specifically provided otherwise in the contract.\(^8\) The courts go upon the basis that as one contracts, so is he bound, and that the teachers did not bring on this misfortune, that is if the school authorities had desired to be relieved of the obligation of paying teachers while school was closed because of the prevalence of disease, they could have, and should have, inserted in the contract a stipulation to that effect. Moreover, the Courts go further, and hold that closing the schools in such cases does not constitute impossibility of performance within the contemplation of the law, but results from mere necessity or expediency. \textit{McKay v. Barnett,}\(^9\) a Utah case decided in 1900, illustrates the reasoning of the Courts. In that

\(^{3}\text{Williston on Contracts, Impossibility, Section 1936 and cases cited.}\)
\(^{4}\text{Ibid., Section 1938 and cases cited.}\)
\(^{5}\text{Ibid., Section 1940 and cases cited.}\)
\(^{6}\text{Ibid., Section 1946 and cases cited.}\)
\(^{7}\text{Williston on Contracts, Impossibility, Section 1963}\)
\(^{8}\text{Dewey v. Union School District of the City of Alpena, 43 Mich. 480, 5 N. W. 646 (1880); Libby v. Inhabitants of Douglas, 175 Mass. 123, 55 N. E. 808 (1900); McKay v. Barnett, 21 Utah 239, 60 Pac. 1100 (1900); Smith v. School District No. 64 of Marion County, 89 Kan. 225, 131 Pac. 557 (1913); Holter, Appellant v. School District of Patton, 73 Pa. Superior Court 14 (1919).}\)
\(^{9}\text{Supra, note 8.}\)
case the schools were closed for sixteen days by the school board because of smallpox. In holding that the teacher could recover for that time, the court used this emphatic language: “Where the contract is to do acts which can be performed, nothing but the act of God, or of the public enemy, or the interdiction of the law as a direct and sole cause of the failure will excuse performance. This principle is elementary. The schools were not closed for any such reason 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 schools to keep open. The board of education might have stipulated that the plaintiff should have no compensation during the time the school 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.” The court in the Libby case\textsuperscript{10} enunciated that “the prevalence of disease made the keeping open of school unwise, but not impossible”. The other cases cited, based upon facts eiusdem generis, hold that teachers can recover. No cases have been found contra.

No Kentucky cases have been reported involving this phase of contract law. But the writer submits that Kentucky would follow the other states, and would allow the teachers to recover their salaries for the time school was closed. When the school board closes school because of contagion in the school district this does not create an impossibility of performance on the part of the school board. True, the welfare of the community dictates that school should be closed. But this is expediency rather than impossibility, and is not sufficient to exonerate the school authorities from liability on their contract. Besides, the teacher is not to blame. The school board could have relieved itself of liability had it thought fit by providing against liability in case of such contingencies. No fraud or sharp practice was used by the teacher in securing his contract. The contract calls for a definite term at a stated salary. If a misfortune befalls the district so that school must be closed, it would seem that the district should bear the burden. It assumed the risk that school should be kept open during the entire term by implication. To hold the district or school board liable in such instance would

\textsuperscript{10} Libby v. Inhabitants of Douglas, supra, note 8.
be in accord with sound principles of contract law. The same rule should be applied if the school board closed the school because of extreme weather in the winter months, such as was witnessed in Kentucky during the winter of 1935.

2. Suppose the schools were closed by order of the health authorities because of an epidemic, rather than by order of the school authorities. What rights has the teacher to his salary in this case?

The Courts are divided upon this point. One line of decisions holds that where school is closed by the health authorities acting under statutory authority the teacher cannot recover salary for the time school is closed. The Courts upholding this view reason that here is a case of real impossibility within the contemplation of the law, since the school authorities are prevented from carrying out their part of the contract by operation of law.\textsuperscript{11} The Court in the \textit{Howard} case,\textsuperscript{12} in holding that the teacher could not recover, had this to say: ‘‘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 the 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 (that the district was not relieved from liability on its contract) 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.’’ The \textit{Hinshaw} case\textsuperscript{13} contains language of like import. In the course of the opinion this significant expression fell from the Court: ‘‘It was in the exercise of the police power which had been delegated to it by statute that the health officials closed the school here involved, and such act was independent of the authority of the township trustee, and entirely beyond his control. The law delegating this authority to the board of health was in force when the contract here involved was entered into. . . . The law

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of the land is a part of every contract. It is the rule that when
the performance of a contract becomes impossible, non-perform-
ance is excused, and no damages can be recovered. After the
contract was entered into, and when the exigency arose, the
health board in the exercise of the police power delegated to it,
closed the school, and the contract for the time that the order
was in force was impossible of performance, and hence unen-
forceable, and there can be no recovery for such time." Thus we
see that these jurisdictions have determined in no uncertain
terms that when school is closed by the health officers acting in
pursuance of law in the exercise of the police power delegated
to them, because of an epidemic, the teacher cannot recover for
such time because of impossibility of performance on the part of
the school boards. Performance of the contract with the teacher
in contravention to the order of the board of health would be
a violation of the law by the school authorities and when such
is the case performance of contract is excused pro tanto.

On the other hand, however, there is an array of authority
which holds that the teacher is entitled to recover for the time
school is closed, even though it may have been closed by order of
the health officers, or pursuant to such order.14 But upon analysis
and mature reflection it will be seen that most of these decisions
resulted from peculiar circumstances in the factual set-up. For
example, in the Sanders and Couch cases, although school was
closed by order of the board of health, in each instance the teach-
ers were instructed by the school authorities to hold them-
selves in readiness to resume work when the schools could be
opened, which might occur at any time. The Courts correctly
decided the cases in allowing the teachers to recover for the
time while school was closed. To the same effect is a recent
Ohio case,15 wherein the plaintiff had been employed by the
school board to transport pupils to and from school. The health

of Education of City of Hugo, Choctaw County v. Couch, 63 Okla. 65, 162 Pac. 555 (1917); Montgomery v. Board of Education of Liberty
T. P., Union County, 102 Ohio State 189, 131 N. E. 497 (1921); Phelps
v. School District No. 109, Wayne County, 302 Ill. 193, 134 N. E. 313
(1922); Crane v. School District No. 14 of Tillamook County, 188 Pac.
712 (1920).

15Montgomery v. Board of Education of Liberty Township, 102
Ohio State 189, 131 N. E. 497 (1921).
board closed the schools, but at the same time the plaintiff was instructed by the school officials to continue ready to begin work again when the school could be opened. Although the plaintiff was not a teacher, the Court applied the same rule and allowed the plaintiff to recover.

It is not difficult to follow the Courts in the cases just alluded to. Certainly when the school officials ordered the teachers to hold themselves in readiness to resume work, and to hold themselves thus even while school was closed, this signified that they treated the contracts with the teachers as still being in force; and if the teachers remained ready to resume work when called upon, at the instance of the school boards such school boards in justice ought to be required to pay the teachers' salaries while school was closed. Now can it be doubted after reading the cases just referred to that the mandate of the school authorities requiring the plaintiffs to hold themselves in readiness to resume work as soon as the schools could be opened, which might have been any day, had considerable weight with the court in allowing recovery in favor of the teachers? In the Crane case, where the schools were closed in pursuance of an order by the health officers, the court allowed recovery in favor of the teacher for the time school was closed, but specifically held that quarantine laws applied only to individuals and not to the public at large, and that the health authorities had no right under the law to close the schools. This decision then is easy to comprehend. If the school board stopped performance of its contract in obedience to an order of the health officers who had no authority to close the schools, certainly the school board could not plead impossibility of performance because of the operation of the law. This was the position taken by the court.

The Gear case is also capable of explanation. There the health board temporarily closed the schools because of contagion. The court allowed recovery for such time in favor of the teacher. But nowhere did the school board interpose the defense that it was prevented from carrying out its contract by operation of the law. Its sole defense was that its contract was impossible of performance during the time in question because of an act of God. And the court was right in determining that closing the

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10 Supra, note 14.
11 Id.
schools was not the result of an act of God within the contemplation of the law, and that it was only a misfortune which the district must bear, since it did not provide against such contingency in the contract. This view is in exact accord with the cases cited in footnote 8, supra, where the schools were closed by the school boards themselves, and which allowed the teachers to recover since no provision was inserted in the contract against recovery in case such contingencies as epidemics arose. The Court in the Gear case under discussion was not required to go beyond the pleadings and decide the case upon another ground not relied upon by the defendant. Moreover, the Court placed emphasis upon the fact that the plaintiff teacher was able and willing to teach during all the time specified in the contract and said that there was nothing to show in the evidence that the teacher was not bound to hold herself in readiness to teach whenever called upon to resume her duties. Doubtless these aspects of the pleadings and evidence influenced the court in its decision. But it is quite reasonable to surmise that the court would have disallowed recovery if the defense had been impossibility because of the operation of the law through the order of the board of health, rather than the defense of an act of God which was quite ill-conceived.

The Phelps case, however, is a little unusual. The health board ordered school closed because of an epidemic of influenza. While in the course of the opinion the court says, that the performance of the contract, valid when made, was rendered impossible by the happening of a contingency which could not be foreseen or, known when the contract was made, yet it held in favor of the teacher simply because the school board did not expressly provide against such contingency in the contract. Moreover, throughout the opinion the court discussed cases wherein the schools had been closed by the school authorities themselves, and continuing, made this statement: "whether the school authorities took the initiative in closing the school, or whether it was done by action of the board of health does not alter the rights of the parties to the contract." The reasoning of the court in this case seems fallacious. The court says that performance of the contract by the school board became impossible. Yet the court held the board liable simply because it did not provide

18 Id.
against such impossibility in the contract. In this the court was in error. It is well settled that where a contract becomes impossible of performance by operation of the law, the contracting parties are discharged from liability unless there is an express stipulation in the contract whereby the promisor absolutely assumes the risk of impossibility. In the absence of such stipulation impossibility relieves the parties of their obligations under the contract. This is different from the cases of hardship or inconvenience. To be relieved of liability in these cases there must be a provision in the contract to that effect. Not so where there is real impossibility created by operation of the law. The law will not enforce a contract which the law itself has made impossible of performance; and there is such impossibility when to perform would be to violate the law. This principle is so elementary that we need not cite authorities to sustain it. Moreover, the court is clearly wrong when it says that the same result should be reached regardless of whether the schools were closed by the school authorities or by the board of health. When the school officials close the schools of their own accord we cannot say that the contract is impossible of performance because of the commands of the law. But when the health board, clothed with full authority under the police power, orders the schools closed, there is nothing left for the school officials to do but comply with the order. All the other courts before whom this question has been have drawn this distinction, and have allowed recovery when the schools were closed by the school authorities themselves, and other courts have disallowed recovery in favor of the teachers when the schools were closed by the board of health, saying that the contract was impossible of performance temporarily, because of the operation of the law. The court in the Phelps case under consideration erred in failing to make this distinction.

Notwithstanding the Phelps case the writer submits that it does not represent the law. If school is closed because of contagious disease by order of the board of health acting with full authority under the law, and if the school officials do not create a continuing liability by instructing the teacher to hold himself in readiness to resume work when school can be re-opened there

\[^{19}\text{Cases cited in footnote 8 supra.}\]
\[^{20}\text{Cases cited in footnote 9 supra.}\]
should be no recovery in favor of the teacher for the time school is thus closed. There is such impossibility as the law requires to discharge the school board from liability, since to perform would be to violate the law. It matters not that the school board failed to provide against an impossibility created by the law itself in the contract.

3. Suppose the school house is burned or otherwise destroyed before the term ends and the school board refuses or fails to provide another building. Can the teacher recover for the remaining part of the term?

By the preponderant weight of authority the teachers in such case can recover, unless the board of education has protected itself from liability by the terms of the contract.21 The courts supporting this view go upon the idea that burning the building is not tantamount to an act of God, and that destruction of the building, while it may create an inconvenience to the district, or work a hardship upon it, yet it does not render the contract impossible of complete performance. It is always possible for the school board to re-build the school house or procure a suitable building in the community so that it may fulfill the obligations of the contract with the teacher. School Directors v. Crews22 aptly expressed the majority view. There the court said, ‘The statute made it the duty of the school Directors to maintain a school of at least five months in the year, and the destruction of the school house does not exonerate them from the performance of this duty, as they can, in that event, rent a suitable room for school purposes, and the fulfillment of the contract not being made impossible by the act of God, they must be held bound by its terms, as mere hardship or difficulty will not suffice to excuse them.’ Judgment was rightly rendered for the teacher’s salary for nearly four months, which part of the school year remained when the school house was destroyed by fire.

The only case which has been found denying recovery in favor of the teacher upon destruction of the school building


22 Supra, note 21.
comes from Missouri. The teacher there had a contract to teach four months. When he had taught two months and fifteen days the school house burned. The statute authorized the payment of teachers' salaries only upon the filing of monthly reports. No reports were made by the teacher after the school house was destroyed. In holding that the teacher could not recover the court partially based its decision upon the failure of the teacher to file monthly reports after the burning of the school building; but the principal reason for disallowing recovery by the teacher is best detailed in the court's own language. Said the court: "The plaintiff in the present case was employed to teach the school of the defendant school district for a period of four months. That is to say, he was employed to teach for such period a school in the school house then owned by the defendant. . . . We are satisfied that in the contract the condition 'if the school house should continue to exist for such period of time' should be implied. . . . The burning of the school house during the school term stopped the defendant's liability pro tanto.'"

The above decision from Missouri appears to be unsound. The court partly decided the case because no monthly reports were filed by the teacher after the school house burned. But could not the court have just as well determined that the reports required by the statute were reports of attendance under normal circumstances when there were pupils in attendance? The school officials knew that the school house had been destroyed, and to require the teacher thereafter to file mere blank monthly reports would have been to require a vain and futile thing. Doubtless when the Legislature framed the Statute requiring reports to be filed by teachers, such conditions as existed in the case at bar were not within its contemplation. The court's reasoning on this point lacks profundity. Continuing, the Missouri court goes off on a tangent when it says that the parties contracted that school should be taught in a particular house for the entire term. And the court deviated further when it inserted of its own motion the condition "if the school house should continue to exist for so long a term." Here, the court in actuality remade the contract for the parties. Nothing was said in the contract as made by the contracting parties that any particular house should be used. The plaintiff was hired to teach in a par-

ticsular district, not in a particular house. Moreover, it is doubt-
ful whether the parties contemplated when the contract was made
the continued existence of the school house then standing, as the
court intimates. On the other hand it could have been within
their contemplation that if this school house were destroyed an-
other would be built or furnished by the school authorities so
the teacher could teach a full term for the benefit of the taxa-
pliers’ children. Throughout the opinion the court indulges in
technicalities, and implied conditions in the contract which are
unwarranted. It is remarkable that no other state has adopted
the rule enunciated by the Missouri court. Perhaps this deci-
sion is just another anomaly in the law.

Three Kentucky cases have been found involving our prob-
lem. While these decisions disallowed recovery in favor of the
teacher peculiar circumstances in the factual set-up were re-
sponsible for the results reached. And the import of these Ken-
tyucky decisions is that Kentucky follows the majority view, and
would allow the teacher to recover his salary if the school board
failed to furnish another building after the original school house
burned. In the first Kentucky case, while there is dictum to
the effect that school funds can be paid out only when the school
is legally taught, yet the basis of the decision was that the teacher
sued the wrong party in suing the Superintendent rather than
the school board. The court specifically declared that it was the
County board’s duty to provide another school building, and
that if the teacher had a cause of action it was against the board,
and not against the Superintendent. The court rightly held
that the teacher had no cause of action as to the Superintendent,
inasmuch as the teacher’s contract was with the board of
education.

The dictum in the Vaughn case just cited to the effect that
school funds can be paid out to teachers only when school is
legally taught is completely negativiated by a later Kentucky case
decided in 1912. In this case the school building burned and
the teacher rented another of her own accord. She was not re-
quested to do this by the school authorities, nor did she consult

21Vaughn v. Hindman, Superintendent of School, 145 Ky. 507, 140
S. W. 641 (1911).
22Noble, et al. v. Williams, et al., 150 Ky. 439, 150 S. W. 507
(1912).
them about doing so. She paid the rent herself, and later sued to recover the money so expended. The court was right in holding that the school board was not liable since the teacher acted the part of a volunteer in paying the rent in the first instance. But as bearing upon whether the teacher could have recovered her salary in case no other building had been furnished by the school board this significant expression fell from the court: "The teachers had their teaching contracts; and if the board made it impossible to teach by failing to furnish a place for conducting the school, they had their right of action on their contracts, subject to customary principles involved in such cases."

The direct tenor of this language is that the teacher was under no duty to provide a building in which to teach after the first one burned, and that if the school board whose duty it was to furnish such building had been derelict in that respect, the teacher could have sued the board on her contract for the salary for the remainder of the term.

Another Kentucky case,\textsuperscript{26} decided in 1929, supports the majority view. In this case the school house burned. The school board upon consideration determined that another suitable building could not be procured in the community, and that it was too late to build a new one. Thereupon the board discontinued the school service in that district for the rest of the term. The teacher did not try to find other employment as a teacher of similar rank, in the county, with a view to mitigating the damages, and when she sued the school board for her salary, the court held that she could not recover. The Court in this case applied an elementary principle of contract law, and recovery was properly disallowed; for it is well settled that when an employer wrongfully terminates a contract for personal service it is the imperative duty of the employee to minimize the damages by finding, or at least seeking to find another position of similar rank in the locality. This the teacher here failed to do; and in thus failing to comply with the demands of contract law she lost a perfectly good cause of action. In the course of the opinion the court said: "'But if such be the result, without his fault, and in spite of reasonable effort to find work, he may recover the whole

\textsuperscript{26} Abrams v. Jackson County Board of Education, 230 Ky. 151, 18 S. W. (2d) 1000 (1929).
contract price, provided he alleges and proves that state of

's case.' Thus we see that the court denied recovery in this case not because the teacher had no cause of action but because she failed to follow the customary principles of contract law in regard to mitigation of damages. In fact the court plainly says that if the teacher had done her part toward minimizing the damages after the breach of contract by the board recovery of her salary for the remainder of the term would have been decreed.

Thus Kentucky follows the other states, save Missouri alone, and would allow a teacher to recover salary under her contract for the time school is closed because of destruction of the school building, provided that the contract contains no stipulation against such recovery, and provided also that the teacher does her duty in trying to find other similar employment in the county in mitigation of damages.

This position is in accord with sound principles of contract law. Such contingency as destruction of the school building is not provided against in the contract. The contract is not impossible to perform, nor was destruction of the building, such an act of God as will excuse performance within the eyes of the law. It is the statutory duty of a school board to furnish school buildings so that it may be possible for teachers to carry out their part of the contract. Burning of the school house is merely a misfortune which must be borne by one of the parties to the contract. If the teacher continues ready to perform, and in the meantime has tried to mitigate the damages of the district by seeking after employment the school board should be held liable for the teacher's salary under its unconditional contract, since it could have relieved itself of liability by replacing the school building, or by stipulation in the contract with the teacher against recovery in case the school house should be destroyed. Without doubt this is the law, Missouri being the only exception.

Town Hall.