

OPINION
46-235

December 26, 1946 (OPINION)

TEACHERS CONTRACT

RE: School Board Not Liable for Damage Upon Destruction of School by Fire

This office is in receipt of your letter of December 23 in which you ask the opinion of this office on the following situation.

Zenith School District entered into a contract with qualified teachers for the school year of 1946 and 1947. On about December twentieth the school building burned to the ground. There are no other buildings in said district suitable for school purposes. There are now 17 children in said district. The equipment, maps and desks were all destroyed in the fire. Most of these items are unavailable during the remainder of the school year. The board has proposed to send the children to other schools in other districts.

The question is whether under the circumstances the school board is liable for damages to the teachers for breach of contract. You enclose a form of the contract between the teachers and the district.

Section 9-1104 of the Revised Code of North Dakota for 1943 provides that, "The want of performance of an obligation or of an offer of performance, in whole or in part, or any delay therein, is excused by the following causes to the extent to which they operate:," and among the causes enumerated are the following: "When it is prevented or delayed by an irresistible superhuman cause or by the act of public enemies of this state or of the United States, unless the parties have agreed expressly to the contrary."

Ordinarily impossibility arising subsequent to the making of a contract does not excuse non-performance thereof. However, an exception to the general rule is recognized where the event creating the impossibility is one which cannot be reasonably supposed to be within the contemplation of the parties at the time of execution of the contract. 17 C.J.S. Sec. 463(b). Also in the absence of a statute to the contrary, the general rule is that an absolute undertaking is not discharged by a subsequent act of God rendering performance onerous or even impossible. 17 C.J.S. Sec. 463(d).

However, I believe the statute quoted would apply to the circumstances which you present since the destruction of the school building by fire would probably be held by the courts to be an irresistible superhuman cause and further under the decisions in such cases the destruction of the school building by fire was not in the contemplation of the parties thereto at the time of its execution.

It is the opinion of this office, therefore, that upon the facts stated, the school board would not be under obligation to fulfill the contracts with the teachers after the destruction of the school building by fire.

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Attorney General