1590.

ANNEXATION OF RURAL SCHOOL DISTRICT TO CITY—ISSUE OF REFUNDING BONDS BY RURAL SCHOOL DISTRICT—ASSUMPTION OF BONDED INDEBTEDNESS OF RURAL DISTRICT BY CITY SCHOOL DISTRICT.

SYLLABUS:

When a portion of the territory of a rural school district is annexed to a contiguous city and the city school district receiving such territory thereby assumes a portion of the bonded indebtedness of the rural school district represented by a certain issue of bonds, by force of section 4690, *General Code, and it later becomes necessary to issue refunding bonds to meet the maturities of the bond issue in question, the said refunding bonds should be issued by the rural school district.*

COLUMBUS, OHIO, September 18, 1933.

HON. WILLIAM E. KERSHNER, *Secretary, Ohio State Teachers Retirement System, Columbus, Ohio.*

DEAR MR. KERSHNER:—I am in receipt of your request for my opinion which reads as follows:

> "If a portion of a Rural School District should be annexed to a City School District and a certain percentage of the bonded indebtedness of the Rural District be assumed by the City District for a certain bond issue; and if a part of this bond issue should have to be refunded should the original district issue the refunding bonds, or should each district issue its portion of the refunding bonds?
>
> Will you kindly give us the necessary procedure."

Pertinent to your inquiry is section 4690, General Code, which reads as follows:

> "When territory is annexed to a city or village, such territory thereby becomes a part of the city or village school district, and the legal title to school property in such territory for school purposes shall be vested in the board of education of the city or village school district. Provided, however, if there be any indebtedness on the school property in the territory annexed, the board of education of the city or village school district, shall assume such indebtedness and shall levy a tax annually sufficient to pay such indebtedness and shall pay to the board of education of the school district or districts from which such territory was detached, the amount of money collected from such levy as it becomes due."

From the plain terms of the above statute, it seems evident that the legislature did not intend to discharge a school district from which territory had been annexed to a city or village, from any portion of its indebtedness and substitute the city or village school district receiving the territory, as the debtor, even if it should be held that it was within the power of the legislature to do so. The legislature apparently recognized that the subdivision which had originally incurred the indebtedness was the primary obligor so far as the creditor was concerned, and did not assume to disturb that relation, but provided that the city

or village school district receiving the territory should assume a portion of the indebtedness of the district from which the territory was detached and levy a tax sufficient to meet the portion of indebtedness so assumed and pay the same to the district upon which the indebtedness rested. The duty and obligation to pay the indebtedness rested with the public corporation that incurred it. Such a corporation is not dissolved when territory is taken from it, and its obligation to pay its debts continues. The creditor looks to the original debtor for the fulfillment of the obligation of its contract, and to require the creditor to accept the substitution of some other debtor would doubtless be held to be an unwarranted impairment of his contract, in violation of constitutional guarantees.

The common law applicable when a portion of the territory and property of a public corporation is transferred to another public corporation, leaves the property where it is found and the debt on the original debtor. *Commissioners of Loraine County* vs. *Commissioners of Albany County,* 93 U. S. 307; *Town of Mt. Pleasant* vs. *Beckwith,* 100 U. S. 535; *Johnson* vs. *San Diego,* 109 Calif. 477, 30 L. R. A. 178; *Board of School Directors* vs. *Ashland,* 87 Wis. 533.

It is only when this common law rule has been modified by statute that a political subdivision receiving territory from another can be held for any of the indebtedness of the subdivision from which the territory is detached. The statute in question, section 4690, supra, wherein it provides that the city or village school district receiving territory from an adjoining district shall assume a portion of the indebtedness of the latter district, provides further with respect to the manner of such assumption that it levy a tax, annually, sufficient to pay the portion assumed and, when collected, pay it to the district from which the territory was detached, thus enabling that district to pay the debt. This clearly imports that the obligation of the debt remains where it was in the first instance.

Should it become necessary to renew or refund this debt, it should be done by the debtor, the corporation which is the obligor with respect to the debt which is being renewed. The refunding of a debt is not the creation of a new debt but simply the continuation of the old debt. The contention that by the issuance of refunding bonds a new debt is created has been repeatedly held by the courts to be not well taken for the reason that the proceeds of such bonds are not used for the purpose of adding to the indebtedness or the obligations of the corporation but for paying outstanding ones. *Marsh* vs. *Territory of Arizona,* 164 U. S. 599; *Gorman* vs. *Sinking Fund Commissioners,* 25 Fed. 647; *Brown* vs. *Millikan,* 42 Kansas, 769; *City of Poughkeepsie* vs. *Quintard,* 136 N. Y. 275. In the case of *Board of Commissioners* vs. *Aetna Life Insurance Company,* 90 Fed. 222, it is held:

> "The refunding of indebtedness by the issue of bonds is not a creation of a new debt but a matter of fiscal administration."

In the opinion of the Justices, 82 Me. 602, it is said:

> "Bonds issued to fund a valid indebtedness neither creates any debt nor increases the debt but merely changes the form of indebtedness."

The purpose of the issue of refunding bonds is to pay with their proceeds outstanding and floating corporate indebtedness, the intention being to effect this through either the sale of the refunding securities and with the money so derived pay the outstanding obligations, or by exchange of the old securities for the new, thereby effecting their payment and cancellation. Inasmuch as the debt referred to in your inquiry, which it is proposed to refund by the issuance of

bonds, is a debt of the rural school district in question, even through a portion thereof has been by force of law assumed by the city school district to which a portion of the rural school district has been attached, I am of the opinion that bonds to fund this debt should be issued by the rural school district. This would be true, in my opinion, even though the statute did not by its terms clearly import that a city or village school district receiving territory in the manner prescribed does not become obligated directly to a bondholder or a creditor of the district from which it receives such territory for any part of the obligations of that district. The terms of the statute clearly precludes the conclusion that any part of the original debt is at any time the debt of the city school disrict so far as the creditor is concerned. The liability of the city school district is to the rural school district. It is not that liability or duty that it is proposed to refund by the issuance of bonds, but the debt or liability flowing to the holders of the original bonds, which debt or liability is the debt of the rural school district.

Respectfully,
JOHN W. BRICKER,
Attorney General.

1591.

TENANT IN COMMON—MAY NOT PAY PROPORTIONATE SHARE OF TAXES ON REAL ESTATE UNLESS REMAINING TAX WHICH HAS NOT BEEN ENJOINED, IS PAID.

SYLLABUS:

By reason of the provisions of Section 2655 *of the General Code, a tenant in common, of real estate in Ohio, may not pay his proportionate share of the taxes charged against such real estate unless at the time of such payment, the remaining tax which has not been specifically enjoined, is paid.*

COLUMBUS, OHIO, September 18, 1933.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your request for my opinion, which reads as follows:

> "Can a tenant in common, of real estate in Ohio, pay his proportionate share of the taxes charged against said real estate without paying the full amount charged thereon?"

Section 5690, General Code, referred to in your inquiry, reads as follows:

> "When a tract of land is owned by two or more persons, as joint tenants, co-partners, or tenants in common, and one or more of them has paid the tax, or tax and penalty charged or chargeable on his or their proportion of such tract, and one or more of those remaining has failed to pay his or their proportion of the tax, or tax and penalty, charged or chargeable on said land, and partition of the land is made between them, the tax, or tax and penalty, so paid, shall be deemed to have been paid on the proportion of such tract, set off to the person or persons, who paid his or their proportion of the tax, or tax and penalty."