Section 4692. "The county board of education may transfer a part or all of a school district of the county school district to an adjoining district or districts of the county school district. * * *"

Section 4736. "* * * The county board of education is hereby authorized to create a school district from one or more school districts or parts thereof. * * *"

By virtue of the authority vested in county boards of education by either Section 4692 or 4736, several transfers may be made or new districts created by the county board of education in such a manner as to effect the accomplishment of the ends sought by the petitioners residing in New Bazetta Rural School District without an election.

The county board of education of Trumbull County School District may, if it feels that it would be for the best interest of the schools, transfer the territory of the New Bazetta Township Rural School District as requested by signers of the petition you speak of, but they cannot be compelled to do so.

In the light of the foregoing discussion, it is my opinion, in answer to your question, that the electors residing within the territory which now constitutes Bazetta Rural School District are not empowered, by virtue of Section 4735-1, General Code, to dissolve said district and join parts thereof to Howland Rural School District, Warren Rural School District and Cortland Village School District; and that there is no authority for calling an election and submitting to the voters of said school district the proposition of dissolving said district and joining portions thereof to contiguous districts as mentioned above. This may be done, however, by action of the county board of education by authority of Section 4692, General Code, and the same result might be obtained by the creation of new districts, as authorized by Section 4736, General Code.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2365.

PUBLICATION OF ADVERTISEMENTS UNDER SECTION 6251, GENERAL CODE—WHEN PROOF OF PUBLICATION MUST BE PAID FOR.

SYLLABUS:

1. *Publishers of newspapers in which are published the advertisements, notices and proclamations described in Section 6251 of the General Code, may not charge in excess of the maximum rate prescribed in such section for such publication.*

2. *Where the statute specifically provides that proof of publication be furnished by the publisher, such proof constitutes an essential part of the publication and must be furnished and no additional payment may be demanded therefor.*

3. *Where the statute makes no provision as to proof of publication, no liability is imposed upon the subdivision in the event that proof is furnished by the publisher, but, where in such case proof is demanded by any public authority and the publisher furnishes the same, a contractual relationship arises separate and apart from that incident to the publication itself and the publisher may refuse to furnish such proof unless he be reimbursed for the expense incident to the execution of such affidavit.*

COLUMBUS, OHIO, July 17, 1928.

HON. CHARLES P. TAFT, 2ND., *Prosecuting Attorney, Cincinnati, Ohio.*

DEAR SIR:—This will acknowledge your letter dated February 20, 1928, which reads as follows:

"At the request of the attorneys for the Cincinnati Enquirer, we are very glad to present for your reconsideration the question passed upon by you in your former term as Attorney General, of April 7, 1915, (Op. Atty. Gen. 1915, Volume I, page 405).

This involves the conclusion of Section 6251, G. C., and Section 6254, G. C., and raises the question as to whether the publishers of newspapers may charge and receive a notary fee for the affidavits of publication of advertisements.

I enclose a copy of the opinion of Frost and Jacobs given to the Enquirer on the subject, for your consideration."

The syllabus of the opinion to which you refer reads as follows:

"A notary fee on an affidavit in proof of publication is not a public charge unless made so by statute, and the expense thereof is to be borne by the publisher."

The question that you present involves consideration of Sections 6251 et seq., General Code.

On March 25, 1876 (73 O. L. 75), the Legislature passed an act entitled:

"An Act—To fix the price of legal advertising." (Advertising).

Section 1 thereof (now Section 6251, General Code) reads as follows:

"That publishers of newspapers shall be allowed to charge and entitled (entitled) to receive for the publication of all advertisements, the price or rate for which is not now fixed by law, which by law are required to be published by any public officer or officers of counties, cities, villages, townships, schools, benevolent or other public institutions and all notices and publications known as official advertisements, notices relating to the estates of deceased persons, and all notices and publications generally known as legal advertisements, and all advertisements, appertaining to any public interest and required by law to be printed in any newspaper in this state, the follows (following) sums, to-wit: For the first insertion, one dollar for each square; and for each additional insertion authorized by law, or by the officer or person so ordering, fifty cents for each square, fractional squares to be estimated at the same rate for space occupied; and in advertisements containing tabular or rule work an additional sum of fifty per cent. may be charged in addition to the before mentioned rates."

This was the wording of the section at the time my previous opinion was rendered. In 1919 the section was amended and, finally, in 1921, the section was enacted in the present form, as follows:

"Publishers of newspapers may charge and receive for the publication of advertisements, notices and proclamations required to be published by a public officer of the state, county, city, village, township, school, benevolent or other public institution, or by a trustee, assignee, executor or administrator, the following sums, except where the rate is otherwise fixed by law, to-wit: For the first insertion, one dollar for each square, and for each additional insertion authorized by law or the person ordering the insertion, fifty cents for each square. Fractional squares shall be estimated at a like rate for space

occupied. In advertisements containing tabular or rule work fifty per cent. may be charged in addition to the foregoing rates. Providing, however, newspapers having a circulation of over twenty-five thousand shall charge and receive for such advertisements, notices and proclamations, rates charged on annual contracts by them for like amount of space to other advertisers who advertise in its general display advertising columns; and the publisher shall make and file with his bill before its payment, an affidavit, that the newspaper had a bona fide circulation of more than twenty-five thousand at the time the advertisement, notice or proclamation was published, and that the price charged in the bill for same did not exceed the rates herein provided for such advertisement, notice or proclamation."

In determining the effect of my prior opinion the syllabus of which has been heretofore quoted, it is necessary to examine the reasoning upon which that opinion was based. The specific request then before me was as to the legality of charging for notary services on an affidavit of proof of publication in connection with advertising in proceedings for the sale of forfeited lands. The opinion is short and the reason for the conclusion reached is stated in the next to the last paragraph as follows:

"If the law requires him to furnish proof of the publication thereof, the charge for the same should be paid for by the publisher and not charged as costs in the case; nor is the same to be paid by the officer receiving the affidavit and proof of publication. The affidavit and proof of publication is the substantiation of the publisher under oath that the publication has been properly made, and that is and should be a prerequisite to his receiving compensation therefor."

You will observe that my previous conclusion was based upon the fact that the law required the publisher to furnish proof of publication of the advertisement, and, accordingly, the charge should be paid by him and not become a public charge. This is, in my opinion, the proper rule.

It is to be noted that Section 6251 of the General Code, supra, states the maximum fee to be allowed to publishers of the advertisements, notices and proclamations therein described. The proviso permits the charging of an additional rate under certain circumstances, and makes the affidavit of the publisher as to circulation and price a condition precedent to the payment of his bill at such additional rate. Quite obviously this affidavit, being a condition to payment, must be furnished by the publisher, and the cost of the notary services in connection therewith must be borne by him. The section does not require an affidavit as to proof of publication. It does, however, prescribe the maximum rate to be obtained for publication in accordance with law. It becomes necessary, therefore, to have recourse to the various sections of the General Code pertaining to publication of advertisements, notices and proclamations, in order to determine just what publication means.

So numerous are the provisions in the Code for publications of various character that it would be impossible within the confines of this opinion to give separate consideration to each. In many, the method of publication is described without any reference whatsoever to any proof with relation thereto. Others provide that proof of publication in accordance with law shall be made by the public officer in whose behalf the publication is made. An example of this is Section 6456 where, in the course of ditch proceedings, notice of the assessment must be given and provision is made for notice by publication to non-residents. The section provides that the auditor shall file a certificate showing the service of such notice as therein provided, which apparently also includes service by publication.

Again in Section 8572-15 of the Code, proof of service in connection with proceedings had under the so-called Torrens Act is made by a certificate of the clerk of courts, and likewise in Section 11045 of the Code, in relation to the proceedings in Probate Court, the publication of notices is proved by affidavit of any person having knowledge thereof.

These illustrations indicate that in many instances no affidavit as to publication need be furnished, and that, if one is desired, the party asking it of the publisher must bear the expense thereof. That is to say, ordinarily, where the statute is silent on the subject, proof by way of affidavit of the performance of the publisher's contract constitutes no part of the terms of the contract itself. I accordingly am of the opinion that in the classes of statutes described, namely, where no provision as to proof is found in the statute, and where the statute provides a method of proof other than by the affidavit of the publisher, the furnishing of such an affidavit constitutes no part of the obligation of the publisher, and, if one be required by any public officer in connection with such class of publication, the expense thereof need not be borne by the publisher, but must be assumed by the officer requesting the proof.

Reference should perhaps be made to Section 4228 of the General Code, where provision is made with relation to the publication of municipal ordinances, resolutions, etc., in the following language:

> "Unless otherwise specifically directed by statute, all municipal ordinances, resolutions, statements, orders, proclamations, notices and reports, required by law or ordinance to be published, shall be published as follows: In two English newspapers of opposite politics printed and of general circulation in such municipality, if there be such newspapers; if two English newspapers of opposite politics are not printed and of general circulation in such municipality, then in one such political newspaper and one other English newspaper printed and of general circulation therein; if no English newspaper is printed and of general circulation in such municipality, then in any English newspaper of general circulation therein or by posting as provided in Section 4232 of the General Code; at the option of council. Proof of the place of printing and required circulation of any newspaper used as a medium of publication hereunder shall be made by affidavit of the proprietor of either of such newspapers, and shall be filed with the clerk of council."

The last sentence of this section makes the furnishing of proof of place of printing and required circulation by affidavit of the publisher, an essential part of the publication, and requires that the affidavit be filed with the clerk of council. In so providing, the Legislature has deemed such proof to be essential to the completion of the publication, and consequently any publisher who fails to provide such an affidavit with respect to the publication of matters covered by the section has failed fully to perform his contract. It necessarily follows that the expense of furnishing the affidavit must be borne by the publisher. This does not, however, require the affidavit to state the number of publications and their dates.

Your attention is directed to Section 2427-2 of the General Code, contained in the group of sections with relation to appropriation proceedings incident to the location of a bridge or road. The particular section provides for notice with respect to claims for compensation and damages, and further makes provision for publication of notice for non-residents. It finally makes it mandatory that service of notice shall be proven by affidavit of the person making the same. Accordingly, if publication is made, an affidavit of the publisher would apparently be required as a part of the publication, since the publisher is the one who makes the service by publication.

I deem further illustration of the distinction which I make unnecessary. The reasoning upon which the prior opinion is based is in my opinion, sound. That is to say, if the law requires the publisher to furnish proof of publication by affidavit, then he has not fulfilled all the terms of his contract with relation to such publication until such affidavit is furnished. On the other hand, where the statute is silent as to proof of publication, or makes other provision therefor than the affidavit of the publisher, I am of the opinion that such proof is not so necessarily incident to the publication itself as to require the publisher to furnish such proof by affidavit and assume the expense incident thereto.

In view of my conclusion, I feel that the syllabus of the prior opinion is too broad and that it should be modified in accordance with the views herein expressed.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2366.

ASSIGNMENT—PARTITION FENCES—TOWNSHIP TRUSTEES—JURISDICTION ONLY AFTER WRITTEN NOTICE TO ALL ADJOINING LAND OWNERS UNDER SECTION 5910, GENERAL CODE.

SYLLABUS:

By the terms of Section 5910, General Code, in order to vest jurisdiction in a board of township trustees to make the assignment therein provided, written notice must be given to all adjoining land owners.

COLUMBUS, OHIO, July 18, 1928.

HON. J. R. POLLOCK, *Prosecuting Attorney, Defiance, Ohio.*

DEAR SIR:—This will acknowledge your letter of recent date which reads as follows:

> "I would like to have your opinion upon the following proposition concerning partition fences:
>
> F. L. B. and A. S. B. are the owners of 160 acres, known as the Northeast quarter of Section 30, Tiffin Township, Defiance County, and H. C. R. and L. C. R. are the owners of 160 acres located in the Southeast quarter of Section 19 of said township and county. The length of the line between these premises is 160 rods.
>
> Several weeks ago H. C. R. addressed a letter to F. L. B. requesting him to build a line fence. B. agreed to this proposition and two disinterested parties were called in to apportion the fence between them. A written agreement was drawn up, assigning to B. the first forty rods, to R. the second forty, to B. the third forty rods and to R. the last forty rods. The agreement was fixed in this manner by reason of certain hills and valleys along the line fence so that the apportionment would be substantially the same.
>
> Accordingly B. commenced to build his portion of said fence but R. refused to abide by the agreement and neglected to build his portion of the fence. Thereupon B. filed an application with the trustees according to law requesting them to view the premises and the line and to assign to each party his portion of the fence to be built and maintained.