day noted my approval thereon, and return the same herewith to you, together with all other data submitted in this connection.

Respectfully,

JOHN W. BRICKER,

Attorney General.

5908.

TRANSFER OF SCHOOL TERRITORY—SCHOOL DISTRICT CREATED WITHIN COUNTY FROM TWO FORMER DISTRICTS—EFFECT UPON TAXING RATE OF NEW DISTRICT—WHEN TRANSFER REQUIRED TO BE MADE BY COUNTY BOARD OF EDUCATION.

SYLLABUS:

1. Where a new school district is created from two or more districts under Section 4736, General Code, and one or more, but not all, of said districts, have voted tax levies for any purpose outside of the limitations of Section 2 of Article XII of the Constitution, such new district may not levy such taxes outside of limitations for such purpose until the proposition to make such levy has been submitted to and approved by the electors of the new district, provided that no contractual obligations incurred by such old district or districts are thereby impaired.

2. The creation of such new district cannot affect the rights of the holders of bonds issued by any of the absorbed districts to compel the levy of the rate of taxation upon the property of such old district or districts which they were authorized to levy when the bonds were issued, if such levy be necessary to pay such bonds.

3. Where a new district is created from two old districts, one of which had issued bonds and prior to their issuance had voted a levy therefor outside of the limitations of Section 2 of Article XII of the Constitution, and sufficient taxes to pay said bonds cannot be levied inside such limitations, it is the duty of the taxing authority of the new district to levy outside such limitations a sufficient rate of taxation upon the property of such old district to make up the deficiency so that said bonds and interest can be paid at maturity.

4. When a petition is filed with a county board of education asking for the transfer to another county school district of certain school territory described in the petition and lying within a district of the county school district within which said county board of education functions, signed by 75% or more of the electors residing within the territory so described, it becomes the mandatory duty of the county board of education to make the transfer so requested, unless the territory described is a part of a dis-

trict in which the schools have been centralized by vote of the people as provided by Section 4726, General Code, or unless a re-transfer as described in the last paragraph of Section 4696, General Code, is involved and the consent to the proposed transfer is not given by the Director of Education, or unless such proposed transfer does not conform to a "plan of organization" for a county school district adopted and approved under and by authority of Section 7600-1, et seq., of the General Code of Ohio, regardless of the size of the territory described or the number of electors residing within such territory .

COLUMBUS, OHIO, July 28, 1936.

HON. FRANK A. ROBERTS, *Prosecuting Attorney, Batavia, Ohio.*

DEAR SIR: You have submitted for my consideration two questions, as follows:

> "1. Can a county board of education acting under the provisions of Section 4736, create a new district from two old districts within the county, one of the districts having a levy for bonds and a voted operating levy outside the ten mill limitation, and the other district having neither of these two levies? If so, how are the rates for the new district determined?
>
> "2. A man having a farm in one county school district petitions a county board of education to have it transferred to another county school district. Will the law as given in Section 4696 compel the county board of education to make such transfer?"

With respect to your first question, there can be no doubt that a county board of education may, in pursuance of Section 4736, General Code, create a new school district by consolidation of the whole or parts of then existing school districts of its county school district, regardless of the status of authorized tax levies in the districts or parts of districts so consolidated, in all cases at least except where such consolidation might have such an effect on authorized tax levies as to impair the obligation of existing contracts of the districts involved in the consolidation, or where its action constitutes an abuse of discretion. In the comparatively recent case of State, ex rel. v. Preston, 126 O. S. 1, said Section 4736 was held to be constitutional.

School districts are mere agencies of the state for governmental purposes in the carrying out of the constitutional mandate enjoining the General Assembly to secure by taxation or otherwise a thorough system of common schools throughout the state. Subject to constitutional limitations, the state legislature has plenary power to create and dissolve or

abolish school districts and to provide for the transfer of a part or all of their territory to another district or other districts, or to create new districts by the consolidation of existing districts or parts of districts. This may be done for any reason saisfactory to the legislature and even without the consent of the districts or the people residing or owning property therein, provided, of course, contracts of the districts are not impaired. Corpus Juris, Vol. 56, page 263. The legislature may exercise this power directly, subject, of course, to constitutional limitations, or it may delegate the power to subordinate boards or agencies. State v. Powers, 38 O. S. 54; Cline v. Martin, 5 O. App. 94; Washington School Dist. v. Eureka, 173 Calif. 154; People v. Cowan, 283 Ill. 308; and Rawson v. Spencer, 113 Mass. 40.

Where new school districts are created by authority of Section 4736, General Code, the question of the status of voted tax levies outside the ten mill limitation as fixed by Section 2 of Article XII of the Constitution of Ohio, which may have been authorized in any of the districts involved prior to consolidation, with respect to the territory involved in the consolidation, is one of considerable difficulty, and one upon which there are no helpful decisions in this state and very few in other jurisdictions. A leading case on this question is the case of Crabbe v. Celeste Independent School District, 105 Tex. 194, 146 S. W. 528, 39 L. R. A. (N. S.) 601. It was held in that case:

> "A tax voted by the taxpayers of the school district in the manner provided by the Constitution cannot be extended over territory added to the district after the vote was taken, without giving the taxpayers of such addition an opportunity to adopt or reject it in the manner provided by the constitution, if the proceedings for the addition of the territory did not meet the constitutional requirements for the adoption of the tax."

The court, in the above case, in quite an extensive opinion, proceeded to review the various cases cited by counsel for defendant and many others, and distinguishes each of the cases upon which the defendant relied. It further points out the distinguishing feature between a statutory provision limiting tax rates without a vote of the people and a constitutional provision to the same effect, stating:

> "If we had no constitutional provision to grapple with, we would be constrained to hold that, where the legislative act gave the property owner the right to participate in the proceeding to determine whether or not the tax should be levied, another legislative act, authorizing an extension of the district where the tax

> had been voted, would subject the property within the extension to the tax, notwithstanding the nonparticipation of the property owner in the levy of the tax. This, however, is not the status of the case at bar; for here the right to participate in the levy of the tax is given the resident property owner by the Constitution, and the legislature is denied authority to abridge that right. Where there is no constitutional inhibition, the power of the legislature to enact laws is supreme and unlimited. But when the Constitution speaks, either by direction, negation, or necessary implication, its voice must be heeded even by the sovereign power of the legislative branch of the government."

Whatever may be said as to the soundness of pertinency of the foregoing case in the light of Ohio's constitutional ten mill limitation, it is authority for the position that in case of consolidation of two or more taxing districts into a newly created district or subdivision, no levies theretofore voted by only part of the consolidated subdivisions may be made outside of the constitutional ten mill limitation throughout the new subdivision unless voted by the new subdivision.

In the absence of pertinent applicable constitutional provisions, the principle has been almost universally applied by the courts that where the boundaries of a school district or other political subdivision are legally extended, the added territory becomes subject to the same obligations as the other territory in the district or subdivision. Annotated Cases, 1915B, page 1152. This applies generally to the burdens of taxation. In McQuillin on Municipal Corporations, 2nd Ed., Vol. 1, page 782, it is said:

> "The prevailing principle is that all powers which a municipal corporation is given by its charter, including the power of taxation, extend throughout its corporate limits." Citing authorities.

In the case of Pence v. Frankfort, 101 Ky. 534, it is held that:

> "The inhabitants of the annexed territory are subject to all the burdens of taxation."

It is universally held that where an entire school district or other political subdivision is absorbed in a consolidation and a new corporation is thereby formed, the district or subdivision so absorbed is dissolved and abolished and the new corporation succeeds to all the obligations including the burdens of taxation which were those of the dissolved corporation.

The statute itself, Section 4736, General Code, provides that in the creation of a new school district from one or more school districts or parts thereof, an equitable division of the funds or indebtedness between the newly created district and any districts from which any portion of such newly created districts is taken, shall be made. See generally Corpus Juris, Vol. 56, Schools and School Districts, Secs. 851 to 863.

The following is stated in Ruling Case Law, Vol. 24, page 590:

> "Where there is a constitutional provision requiring consent by the electors, a tax properly voted by the taxpayers of a school district cannot be extended over territory added to the district after vote was taken, without giving the taxpayers of such addition an opportunity to adopt or reject it in the manner provided by the Constitution, if the proceedings for the addition of the territory did not meet the constitutional requirements for the adoption of the tax. (Crabbe v. Celeste Independent School District, 105 Tex., 194). And the situation is not changed by the fact that the territory was added to the school district on petition of a majority of the taxpayers of the annexed territory after the tax had been voted. (39 L. R. A. (N. S.) 602, n.). But the situation is otherwise in cases where no such constitutional provision exists. (39 L. R. A. (N. S.) 602, n.—Annot. Cases 1915B, 1152 n.)"

In Corpus Juris, Vol. 56, page 647, it is stated:

> "Where a submission of the question to the voters of a district is necessary before a tax therein can be levied upon a valid enlargement or extension of such district bringing about the formation of a new district an election of such new district is required before a tax can be levied therein even although prior to the formation of the new district the question had been submitted to the voters in the old district. Likewise, where territory is annexted to a school district, the property in the added territory can not be subjected to the existing tax rates of the district until the matter is submitted to and approved by the qualified voters of the added territory."

It follows that when a new school district is created, embracing within its boundaries an entire former district wherein there had existed authority for the levying of taxes beyond the constitutional ten mill limitation for any purpose prior to such consolidation, the extra levies in the entire new district must be discontinued until such time as the proposi-

tion for the making of extra levies is submitted to and approved by the electors of the new district as so created, unless such discontinuance will result in the impairment of the obligation of the contracts of the old district or districts.

None of the above authorities involved the question of the duty of the taxing authority of the new district to levy taxes beyond constitutional limitations for debt charges where at the time of the issuing of bonds levies therefor had been authorized by a vote of the electors in the district or districts which form a part of the new district. It is a well known fact that many bond issues of school districts, and perhaps most of them, are made after a vote authorizing a levy to retire the bonds and pay the interest thereon outside of the constitutional limitation of ten mills. If the levy cannot be so made after the district has been incorporated in a new district, it must necessarily be made inside the ten mill limitation, and this, in some cases, is a physical impossibility. It follows that in all cases of the proposed creation of a new school district under and by authority of Section 4736, General Code, the question of the inviolability of contracts arises, as it is well settled that in the consolidation of the territory of public corporations the obligations of contracts must not be impaired. Wanamaker v. Rhode Island Hospital, 38 R. I., 517, 96 Atl., 508, 510. The question of what constitutes impairment of contracts is discussed in Cooley on Taxation, 4th Ed., Sec. 708, as follows:

> "The obligation of a contract is the law which binds the parties to perform their agreement. This law must govern and control the contract in every shape in which it is intended to bear upon it, whether it affect its validity, construction, or discharge. Any law which enlarges, abridges, or in any manner changes the intention of the parties discoverable in it, necessarily impairs the contract itself, which is but evidence of that intention. The manner or the degree in which this change is effected can in no respect influence this conclusion; for, whether the law affect the validity, the construction, the duration, the mode of discharge or the evidence of the agreement, its impairs the contract, though it may not do so to the same extent in all the supposed cases. It is not by the constitution to be impaired at all. This is not a question of degree or cause, but of encroaching in any respect on its obligation; dispensing with any part of its force. There is no room for any question, therefore, that when the state has stipulated by contract to give exemption from taxation, or has commuted the uncertain taxes for a definite and fixed sum or sums, and afterwards undertakes to tax, in the same manner as it taxes other subjects, the persons, corporations,

or property which were the subject of the exemption or commutation, the obligation of the contract is impaired.

The remedy for the enforcement of a contract is a necessary part of it, without which it could have no legal obligation whatever. But there is, and can be, nothing unchangeable in remedies, and the state must be left at liberty to change them at discretion. In the recognition of this right, however, it is always assumed that no change will be made which will leave the party without a remedy for the enforcement of his contract substantially equal to and as efficient and valuable as that the law entitled him to claim when his contract was made. If the remedy is wholly, in some distinct and important part, taken away, or is hampered with conditions or restrictions, or otherwise seriously impaired in value, the obligation of the contract is impaired in this particular."

Public corporations are under contract with bondholders to maintain a tax rate within rates fixed by law at the time the bonds were issued, to pay the principal and interest on such bonds as they fall due. People v. Chicago & E. I. R. Co., 300 Ill., 467, 133 N. E. 212. While the authorities seem to be uniform that creditors of a school district cannot be heard to complain when school district boundaries are changed even though it may materially affect tax levies within the district as so changed without a showing that the financial ability or the ability to levy taxes within the changed district will be impaired to the extent of endangering the security of the said creditors (Ancient Order of United Workmen v. Paragould Special School District No. 1, et al., 143 Ark. 493, 222 S. W. 368; State, ex rel., v. Hackman, State Auditor, 277 No. 56, 209 S. W. 92), a different question arises where the new district is not able to levy sufficient taxes within constitutional limitations to pay bonds assumed by it but issued by the old district or districts which are within the new district and which old district or districts were authorized at the time of the issuance of said bonds to levy taxes therefor outside of said limitations.

It is quite clear from the authorities hereinbefore referred to that in case of the creation of a new subdivision the right to levy taxes outside of limitations cannot be extended to territory within the new subdivision which had not issued said bonds or voted the levy therefor outside of the constitutional limitation. The question therefore arises whether there is any duty on the part of the taxing authority of the new district to levy taxes outside of limitations on the property in that part of the territory within such district, where such levy had been voted to pay the bonds assumed by such new district, which bonds cannot be paid from

proceeds of levies within limitations. If this question be answered in the negative, to that extent the statute impairs contractual obligations and is therefore unconstitutional.

The following was held in Memphis v. United States, ex rel., 97 U. S. 284, 24 L. Ed. 920:

> "A creditor by contract has a vested right to the remedies for the recovery of the debt which existed at law when the contract was made, and the Legislature of a State cannot take them away without impairing the obligation of the contract, although it may modify them and even substitute others, if a sufficient remedy be left or another provided."

The case of United States, ex rel. v. New Orleans, 103 U. S. 358, 26 L. Ed. 395, held as follows:

> "1. A legislature may, at any time, restrict or revoke at its pleasure any of the powers of a municipal corporation, including, among others, that of taxation, provided its action in that respect shall not operate directly upon contracts of the corporation, so as to impair their obligation by abrogating or lessening the means of their enforcement.
>
> 2. Legislation producing this latter result directly by operating upon those means, is prohibited by the Constitution, and must be disregarded.
>
> 3. The prohibition of the Constitution against the passage of laws impairing the obligation of contracts applies to the contracts of the State, and to those of its agents acting under its authority, as well as to contracts between individuals."

In Louisiana, ex rel. v. Pilsbury, 105 U. S. 278, 26 L. Ed. 1090, the following was held:

> "Legislation of a State, impairing the obligation of contracts made under its authority, is null and void; and the courts, in enforcing the contracts, will pursue the same course and apply the same remedies as though such invalid legislation had never existed."

The court in its opinion in this case said:

> "We do not deny that the power of taxation belongs exclusively to the Legislative Department of the Government,

that the extent to which it may be delegated to municipal bodies is a matter of discretion, and that in general the power may be revoked at the pleasure of the Legislature. But, as we said in the case of Wolff v. New Orleans, decided at the last Term (ante, 395), legislation revoking the power is subject to this qualification, which attends all state legislation, that it 'Shall not conflict with the prohibitions of the Constitution of the United States, and among other things, shall not operate directly upon contracts of the corporation, so as to impair their obligation by abrogating or lessening the means of their enforcement. Legislation producing this latter result, not indirectly as a consequence of legitimate measures taken, as will sometimes happen, but directly by operating upon those means, is prohibited by the constitution, and must be disregarded, treated as if never enacted, by all courts recognizing the Constitution as the paramount law of the land. This doctrine has been repeatedly asserted by this court when attempts have been made to limit the power of taxation of a municipal body, upon creditors' rights. It did not extinguish any of the means or which alone they could be performed. * * * However, great the control of the Legislature over the corporation while it is in existence, it must be exercised in subordination to the principle which secures the inviolability of contracts.'

The case of Von Hoffman v. Quincy, reported in 4th Wallace, 535 (71 U. S., XVIII., 403), is a leading one on this subject. The court there said: 'That when a State has authorized a municipal corporation to contract, and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied. The State and the corporation, in such cases, are equally bound.' "

In the case of Decatur v. Thames Bank and Trust Co., decided by the United States Circuit Court of Appeals for the Fifth Circuit on June 9, 1936, as yet unreported, the City of Decatur, Alabama, was a consolidated city made up of Decatur and Albany. Albany, prior to the consolidation, was authorized to levy taxes up to one per cent when certain bonds were issued by it. Levies by the consolidated city were limited by the constitution to five mills and said city was unable to pay said bonds at maturity within such limitation. This action was brought to compel the levy and collection of taxes on property in the Albany portion of the city up to one per cent for the purpose of paying said bonds. It was contended by the city that since the case of Re Opinion

of the Justices, 216 Ala. 239, held that the effect of the merger was to destroy the existence of Albany as a distinct municipality and therefore to remove it from all existing statutory or constitutional provisions and automatically to make applicable thereto such provisions as relate to the city of Decatur, Decatur's debt levying power, limited to five mills, was the only power remaining in existence. It was also contended that a rate could not be lawfully levied on property in one portion of the city different than that levied on property in another portion. The court said:

> "Appellants' imagined difficulties in the way of their levying the tax simply do not exist. Particularly does the advisory opinion appellants rely on not exist as a difficulty. Expressly reserving opinion as to the rights of the bondholders or other creditors existing at the time of the merger it but declared that the taking over of Albany by Decatur operated, as to future operations, to dissolve Albany and continue Decatur as consolidated under the powers it had theretofore had.
>
> As to the existing debts of each municipality, it is quite plain that while the consolidated municipality did indeed assume and become liable for them, this assumption, in the absence of agreement that it should be, was entirely without prejudice to the creditor's rights. It did not extinguish any of the means or powers available to be exerted when the debts were created. This is settled general law. It is the law of Alabama, Section 1827 of the Alabama Code in effect so provides. That Act declares that the city or town whose boundary limits have been altered or rearranged shall assume and pay all liabilities and bonds of the city whose government has been extinguished.
>
> One of the elements of those liabilities was the obligation to exert the taxing powers existing when the debts were incurred. The taxing power of Albany therefore as to these bonds has continued to exist. The property in and the inhabitants of Albany until these debts are extinguished or otherwise arranged by some kind of voluntary novation or release, remain subject, if necessary to provide for the debt service contracted for, to taxation up to the taxing limits fixed and existing when the bonds were issued. The authorities of the consolidated city are the ones to levy and collect the taxes necessary for this service. * * *
>
> The law being thus settled, the complaint of inequality Decatur makes, in subjecting property in one portion of the consolidated city to a burden different from that imposed upon

that in another portion, is, if the City of Decatur could raise it for the citizens, wholly without merit."

This, of course, results in a different rate of taxation being levied upon certain property of a subdivision than is levied upon other property of that subdivision. However, when at the time of issuance of bonds the property of a subdivision is subject to being taxed therefor outside of all limitations, no later consolidation of that subdivision with another can affect the right of the holders of those bonds to have a tax levied outside of limitations upon the property of the old subdivision at a rate sufficient to make up the deficiency in the event that the consolidated subdivision cannot levy sufficient taxes inside limitations to pay said bonds and interest when they mature. No constitutional or statutory provision of the state can operate so as to result in the impairment of the obligation of contracts in violation of Section 10 of Article I of the Federal Constitution.

I have confined my opinion upon the first question presented to the case of the creation of a new taxing district or subdivision. Although the Crabbe case, supra, and the language quoted from 24 R. C. L. and 56 C. J., supra, relate to cases of territory added to a subdivision rather than the creation of a new subdivision, as hereinabove noted these were not cases involving levies to pay previously issued bonds. As to the power to levy for previously issued bonds payable by levies outside of the constitutional ten mill limitation pursuant to vote, in the case of the addition of territory to a subdivision having voted such levies, no opinion is expressed.

With respect to your second question, the statute, Section 4696, General Code, is quite clear. In the interpretation and application of this statute, the courts have repeatedly declared that when a proper petition signed by three-fourths of the electors residing in the territory described in the petition is filed with a county board of education asking that the territory described be transferred to an adjoining county school district, it becomes the mandatory duty of the county board of education with which the petition is filed, to make the transfer as requested (State, ex rel. Brenner v. County Board of Education, 97 O. S., 336; Whartenbery v. County Board of Education, 122 O. S., 463; State ex rel. v. Board of Education, 128 O. S., 123), unless the territory described is a part of a district in which the schools have been centralized by authority of Section 4726, General Code (State, ex rel, Snapp v. Gaul, 97 O. S. 239; State, ex rel. v. Hadaway, 113 O. S. 658; Board of Education v. State, 115 O. S. 333), or unless a re-transfer spoken of in the last paragraph of the statute is involved and the consent of the Director of

Education is not obtained (Opinions of the Attorney General for 1930, page 421).

There is no reason for saying that this rule does not apply in all cases, regardless of the number of electors residing in the territory for which under the terms of the petition a transfer is sought. If such a petition describes territory within which one elector only resides and he signs the petition, it is the duty of the county board to make the transfer as requested unless the territory is a part of a district in which the schools have been centralized or a re-transfer is involved as provided by the statute and the consent of the Director of Education is not obtained.

I am therefore of the opinion in specific answer to your questions:

1. Where a new school district is created from two or more districts under Section 4736, General Code, and one or more, but not all, of said districts, have voted tax levies for any purpose outside of the limitations of Section 2 of Article XII of the Constitution, such new district may not levy such taxes outside of limitations for such purpose until the proposition to make such levy has been submitted to and approved by the electors of the new district, provided that no contractual obligations incurred by such old district or districts are thereby impaired.

2. The creation of such new district cannot affect the rights of the holders of bonds issued by any of the absorbed districts to compel the levy of the rate of taxation upon the property of such old district or districts which they were authorized to levy when the bonds were issued, if such levy be necessary to pay such bonds.

3. Where a new district is created from two old districts one of which had issued bonds and prior to their issuance had voted a levy therefor outside of the limitations of Section 2 of Article XII of the Constitution, and sufficient taxes to pay said bonds cannot be levied inside such limitations, it is the duty of the taxing authority of the new district to levy outside such limitations a sufficient rate of taxation upon the property of such old district to make up the deficiency so that said bonds and interest can be paid at maturity.

4. When a petition is filed with a county board of education asking for the transfer to another county school district of certain school territory described in the petition and lying within a district of the county school district within which said county board of education functions, signed by 75% or more of the electors residing within the territory so described, it becomes the mandatory duty of the county board of education to make the transfer as requested, unless the territory described is a part of a district in which the schools have been centralized by vote of the people as provided by Section 4726, General Code, or unless a re-

transfer as described in the last paragraph of Section 4696, General Code, is involved and the consent to the proposed transfer is not given by the Director of Education, or unless such proposed transfer does not conform to a "plan of organization" for a county school disrtict adopted and approved under and by authority of Section 7600-1, et seq., of the General Code of Ohio, regardless of the size of the territory described or the number of electors residing within such territory.

Respectfully,

JOHN W. BRICKER,

Attorney General.

5909.

DISAPPROVAL—LEASE TO LAND IN BLANCHARD TOWNSHIP, HANCOCK COUNTY, OHIO, FOR STATE GAME REFUGE-ANNABELL STITT.

COLUMBUS, OHIO, July 28, 1936.

HON. L. WOODDELL, *Conservation Commissioner, Columbus, Ohio.*

DEAR SIR: This is to acknowledge the receipt of your recent communication with which you submit for my examination and approval a certain lease executed to the State of Ohio, acting through you as Conservation Commissioner, by one Annabell Stitt, by which, in consideration of the sum of one dollar and the other matters and things to be done and performed by the Conservation Council acting for the State, there is leased and demised to the State, as the lessee therein named, certain tracts of land owned by the lessor in Blanchard Township, Hancock County, Ohio, and which is more particularly described as follows:

> The South Fractional Southwest quarter of Section Seventeen (17) excepting nine and forty-four hundredths (9.44) acres off the East side thereof leaving thirty-eight and forty-two hundredths (38.42) acres.
>
> The Northwest Fractional quarter excepting nineteen and fifty hundredths (19.50) acres off the east side of Section twenty (20) containing one hundred forty and fifty-seven hundredths (140.57) acres.
>
> The South fractional Southeast quarter of Section eighteen (18) containing five and sixty four hundredths (5.64) acres.
>
> The Southeast fractional northeast quarter of Section nineteen (19) containing one hundred forty-seven (147) acres.
>
> Also a part of the West Half of the Southeast quarter