

parcels through regularly salaried officers, is not a real estate broker within the terms of Section 6373-25 of the General Code, and its officers employed upon a regular salary are likewise not real estate brokers in the absence of any commissions, compensations or considerations accruing to them by reason of such sales on behalf of the corporation, other than their regular salaries.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1033.

TRANSFER OF TERRITORY FROM SCHOOL DISTRICT IN ONE COUNTY TO CONTIGUOUS SCHOOL DISTRICT IN ANOTHER COUNTY—DIVISION OF FUNDS—WHAT SHOULD BE CONSIDERED IN DIVISION OF FUNDS.

SYLLABUS:

1. *Transfers of territory from a school district in one county to a contiguous county school district of another county are not complete until the board of education of the county school district to which the transfer is being made makes an equitable division of the funds and indebtedness between the two districts involved and if such county board of education neglects or refuses to make such equitable division of funds as is contemplated by the statutes the transfer will never become effective.*

2. *In making a division of the funds and indebtedness between two school districts involved in the transfer of territory from one to the other, consideration should be given not solely to the comparative tax valuation of the property located within the territory transferred and that of the entire districts before transfer, but to other factors bearing on the situation as well.*

COLUMBUS, OHIO, September 21, 1927.

HON. HERMAN F. KRICKENBERGER, *Prosecuting Attorney, Greenville, Ohio.*
Ohio.

DEAR SIR:—This will acknowledge receipt of your request for my opinion as follows:

“For several months past there has been a controversy between the county board of education of this county and the county board of education of an adjoining county (Preble County) and certain individuals in this county who have been trying to get transferred from a school district in this county to a school district in the adjoining county, and, in connection therewith, there are several questions involving the construction of the statute (Section 4696 of the General Code) concerning which I would like to have your opinion. I will first state the facts:

On June 8, 1926, one McClure, et al., residing in the Hollansburg Village School District of Darke County, Ohio, petitioned the Darke County Board of Education for transfer to a district in Preble County, Ohio. The Darke

County Board of Education tabled the petition on August 4, 1926, and, on August 14, 1926, the petitioners instituted proceedings in mandamus against the Darke County Board of Education to compel said board to make the transfer. On September 11, 1926, the Court of Common Pleas, the court in which the proceedings was brought, issued a writ of mandamus ordering the said board to act on the petition. The defendant board then prosecuted error to the Court of Appeals of Darke County, Ohio, which Court, on the 6th day of January, 1927 affirmed the decision of the Court of Common Pleas. Thereafter, the board, in compliance with the writ, acted on said petition on the 18th day of January, 1927, transferring the disputed territory to the district in the adjoining county.

In the meantime, while this proceeding was pending in the Court of Appeals, an election was held in the Hollansburg Village School District (in November, 1926) on the question of issuing bonds for the construction of a consolidated school, and at said election it was voted to issue such bonds in the amount of \$72,000.00.

In view of this situation, the Darke County Board of Education and the Preble County Board of Education have been unable to agree on a division of funds and indebtedness, and the result is that the transfer is, to date, ineffective. This raises the question upon which I first desire your opinion, namely whether the failure of these two boards of education to agree on a division of funds and indebtedness can render the transfer incomplete, and thereby defeat the same?

If you answer this question in the negative, and hold that this state of facts will not defeat the transfer, then I would like to know whether, in your opinion, the Preble County Board of Education should assume the pro rata share of the \$72,000.00 bonded indebtedness, calling your attention to the fact that the transfer by the Darke County Board of Education was not made until January 18, 1927, although the writ of mandamus was issued by the Court of Common Pleas on September 11, 1926, prior to the election at which the bond issue was voted?

Finally, I would have your opinion, in the event you hold the transfer complete, as to whether there should be a division of the funds received by the Hollansburg Village School District in the February and August settlements of the year of 1927, regardless of the division of the \$72,000.00 bonded indebtedness?

Your opinion on these matters will end the dispute between these parties and will be of great benefit to the Auditor and the Budget Commission in levying taxes and making up the budget for the Hollansburg district."

Transfers of territory from one school district to another, where the transfer proposed to be made is from a district of one county school district to another county school district such as the case about which you inquire, are governed by Section 4696, General Code, which reads as follows:

"A county board of education may, upon a petition of a majority of the electors residing in the territory to be transferred, transfer a part or all of a school district of the county school district to an exempted village, city or county school district, the territory of which is contiguous thereto. Upon petition of seventy-five percent of the electors in the territory proposed to be transferred the county board of education shall make such transfer. A county board of education may accept a transfer of territory from any such

school district and annex same to a contiguous school district of the county school district.

In any case before such a transfer shall be complete (1) a resolution shall be passed by a majority vote of the full membership of the board of education of the city, exempted village or county school district making or accepting the transfer as the case may be, (2) an equitable division of the funds and indebtedness between the districts involved shall be made by the county board of education, which in the case of territory transferred to a county school district shall mean the board of education of the county school district to which such territory is transferred, and (3) a map shall be filed with the county auditor of each county affected by the transfer.

When such transfer is complete the legal title of the school property shall become vested in the board of education of the school district to which such territory is transferred."

It will be noted that there are five separate and distinct steps that must be taken to effect a transfer of territory under such circumstances. First, a petition must be filed by the electors, residing in the territory proposed to be transferred, with the county board of education of the county school district in which is located the district from which the territory to be transferred is proposed to be taken. Second, the county board of education of the county school district in which is located the territory proposed to be transferred must pass a resolution making the transfer. Third, the county board of education of the county school district to which the transfer is being made must pass a resolution accepting the transfer. Fourth, a resolution must be passed by the board of education of the county school district to which the territory is being transferred making an equitable division of the funds and indebtedness of the districts involved in the transfer. Fifth, a map showing the territory involved must be filed with the county auditor of each county affected by the transfer.

By the plain terms of the statute the transfer is not complete until all of these steps are taken. It would therefore appear that inasmuch as the Preble County Board of Education has not made the equitable division of funds as directed by the statute in the case about which you inquire the transfer is not complete.

You state that the Preble County Board of Education and the Darke County Board of Education are unable to agree as to an equitable division of funds and inquire whether or not the failure of these two boards to agree will defeat the transfer.

You will observe that the division of funds and indebtedness between the districts involved is to be made by the county board of education of the county to which the transfer is being made, in this case the Preble County board. The Darke County board has nothing to say about the matter save perhaps whatever right of action it might have to enjoin fraudulent action or abuse of discretion on the part of the Preble County board.

If the Preble County board should neglect or refuse to make the division the transfer would not be complete, and there is no way by which it may be required to do so.

When a petition is filed, signed by seventy-five per cent of the electors residing in the territory proposed to be transferred the county board of education with which it is filed is required to make the transfer as requested by the petitioners, and upon its refusal an action in mandamus will lie to compel it to act, as was done in this case, but there is no provision of law requiring the county board of the county to which the proposed transfer is to be made to accept the transfer if it does not desire

to do so. If it desires to accept the transfer it must not only declare its acceptance but must make the division of funds and indebtedness as well.

On what basis the equitable division of funds and indebtedness as directed by the statute should be made has been the subject of considerable controversy.

In former opinions rendered by this department, particularly opinions found in the Annual Report of the Attorney General for 1914, Vol. II, page 1333; Opinions of the Attorney General for 1915, Vol II, page 1970; and Opinion No. 190 rendered March 15, 1927, and addressed to the Prosecuting Attorney at Hillsboro, Ohio, it was held that no hard and fast rule can be applied, but that the determination of what is an equitable division of the funds and indebtedness rests in the discretion of the board making the division, which in the absence of fraud or the taking of such arbitrary or whimsical action as to amount to an abuse of discretion, is final. In the opinion of 1914, above referred to, it was said:

“The situation presented, then, is that the rural district as originally constituted, has no bonded indebtedness, whereas the district from which the territory is transferred is burdened with an indebtedness.

In such a situation the statute requires that a proportional part of the indebtedness of the old district, from which the territory was transferred, shall be assumed by the new district. What proportion shall be thus assumed depends upon various factors. If, for example, a school house, on account of which a bonded indebtedness has been incurred, is located in the transferred territory, then the new district should assume the entire indebtedness, allowance being made for the exclusion from the territory transferred, of any territory formerly tributary to such school house. If, on the other hand, the indebtedness is not on account of any building which is located in the transferred territory, the assumption of indebtedness, if deemed equitable, should be made only on the basis of the fact that the new district will reap some benefit from the use of public buildings, i. e., that territory in the former township district and outside of the territory transferred will be served by the school house thus acquired. If no school building is acquired by such transfer, then such portion of the bonded indebtedness of the old district should be assumed by the new district to which the transfer is made as will be equitable, having regard to the tax duplicate of the transferred territory, as compared with the tax duplicate of the original indebted district as it existed prior to the transfer, due allowance being made for whatever economy in the administration of the schools of the indebted district may be affected by detaching that territory from it and whatever additional burden the new district to which the transfer is made will assume by reason of the addition of such territory, in the administration of its schools.

In any event, if the school district which is indebted has accumulated money in a sinking fund for the retirement of the bonds, such portion of such sinking fund should be paid to the board of education of the new district to which the transfer of territory was made, as corresponds to the proportion of the indebtedness assumed.

The indebtedness so transferred becomes an indebtedness of the whole district thus formed, and is not to be met by levies upon the transferred territory, only.

In all such cases, there is no hard and fast rule to be applied. The statute requires an equitable division of property and indebtedness; and this requirement has the effect of reposing in the county board of education making the transfer, a sound discretion with respect to the determination

which it is required to make, which will only be disturbed by the courts, in case of its abuse. The above discussion is intended merely to indicate some of the factors which should be taken into consideration by the county board of education in arriving at the determination."

After quoting the above opinion at length with approval, in the opinion of 1915, this department continued:

"In determining what proportion of the funds in the treasury of Milton township rural school district or in the process of collection shall be paid over to the treasurer of the Weston village school district, the county board of education will doubtless take into consideration the tax duplicate of the territory transferred as compared with the tax duplicate of the original district as it existed prior to said transfer, due allowance being made for the economy in administration which will be affected by said transfer of territory.

Likewise, in determining what proportion of the indebtedness of said rural township district shall be assumed by said village school district, the county board of education will take into consideration various factors upon which an equitable division of such indebtedness must be based."

In Opinion No. 190, rendered March 15, 1927, it was said:

"An equitable division means a fair, reasonable division to the end that justice may be done to both parties. The county board of education is vested with the discretion to determine what is fair and just, and so long as it acts in good faith and does not abuse the discretion vested in it there is no provision of law by which its discretion in the matter can be controlled. Of course, if it should act fraudulently or dishonestly its orders might be corrected by means of an independent action in a court of law.

The board in exercising its discretion in the matter should take into consideration various factors upon which to base its determination of what is an equitable division of the indebtedness of the districts, such as the tax duplicates of the two districts both before and after the transfer, the difference in the cost of administration of the schools in each district by reason of the transfer, the number and age of the pupils and prospective pupils in the two districts both before and after the transfer, the cost of transporting pupils, the condition of the school properties in the two districts with respect to the proximity of the time when necessary replacements of such property must be made and any other factors that would enter into a fair and just determination of what would be an equitable division of the indebtedness of the two districts."

In the case of *State ex rel. Board of Education of Swanton Village School District vs. Board of Education of Sharples Village School District*, 114 O. S. 602, at page 605, the court said:

"We therefore reach the conclusion that a division in the proportion that the taxable value of the transferred district bears to the taxable value of the original district is not only an *equitable* division, but the *only* basis upon which an equitable division can be made." (Italics the writer's.)

I can not believe that the Supreme Court has by this language meant to reduce the rule for making an equitable division of funds and indebtedness between two

school districts to such mathematical precision as a cursory reading of the language would indicate. It would seem that the language here used must be read in the light of the facts before the court. In that case the question arose between two school districts where territory with 51.15% of the taxable value of all the territory of a village school district had been transferred to an adjacent county district. The board of education of the latter district in making the division of funds and indebtedness assumed 51.15% of the former district's indebtedness and demanded 51.15% of the funds in the treasury of the former district. The court said that this division was fair and proper under the circumstances. The circumstances are stated by the Reporter on page 602 as follows:

"At the general election in November, 1924, the respondent district voted in favor of \$12,000 issue of bonds, under Section 7625, and kindred sections, General Code. Subsequent thereto 75 per cent of the resident electors in the territory described in the petition prayed the Lucas county board of education for a transfer of such territory to the Fulton county school district, pursuant to Section 4696, General Code, and on May 5, 1925, the Lucas county board of education granted the prayer of the petitioners for the transfer of the Fulton county school district. On May 16, 1925, the bonds, having theretofore been duly advertised and sold, were delivered to the purchaser. On May 19, 1925, the Lucas county board of education, on reconsideration of the petition for transfer, reaffirmed its order of May 5, 1925. On May 20, 1925, the Fulton county board of education accepted the transfer of the territory in question to the Fulton county school district and annexed the territory to the relator's district, which is a part of the Fulton county school district.

On May 23, 1925, the Fulton county board of education, under Section 4696, General Code, adopted a resolution making an equitable division of funds and indebtedness between the respondent and relator, and provided that the district of the relator should assume (a) 51.15 per cent, of a bonded indebtedness of \$1,260, interest due on deficiency bonds, (b) bonded indebtedness of \$12,000 under Section 7625, General Code, and ordered the respondent to transmit to the relator (a) 51.15 per cent of money in treasury, (b) 51.15 per cent of the \$12,000 bond issue proceeds.

On May 28, 1925, the respondent commenced advertising for bids for the construction of a school building in its district, to be received until June 25, 1925."

Suppose, however, the transfer and division of funds and indebtedness had been made a few weeks later, and in the meantime contracts had been let in accordance with the bids received on June 25, 1925, and the funds in the treasury of the Sharples Village School District in Lucas County had been encumbered to the extent of the contracts let. Or, to go further, suppose the transfer had not been made until the school building had been erected and paid for, the Sharples Village School District would then have had a considerable bonded indebtedness and a small amount of funds in its treasury. A division of funds in the proportion that the taxable value of the portion of Sharples Village School District transferred to the taxable value of the original district obviously would have been inequitable.

Just five months prior to the decision of the Swanton Village School District case above referred to, the Supreme Court decided the case of *Ross, et al., vs. Adams Mills Rural School District, et al.*, 113 O. S. 466, in which a division of funds between school districts was approved, where in making the division the ratio between the taxable value of the territory transferred and the taxable value of the entire district as it existed before the transfer was not the sole consideration.

In the Adams Mills case a portion of the Jefferson Rural School District in Muskingum County with a tax value of \$1,489,000 out of the tax valuation for the entire district of \$2,741,210 was transferred to the Adams Mills School District. The outstanding indebtedness of the Jefferson School District was \$111,000 and the county board of education determined that \$86,000 of this debt should be and remain an obligation on the Jefferson School District as constituted after the transfer, and \$25,000 thereof should be an obligation of the Adams Mills District to which the territory had been transferred. The court said on page 481 :

“The facts disclosed would not warrant the conclusion that the county board had abused its discretion in the matter of the division of indebtedness.”

My conclusion is that the determination of what is an equitable division of the funds and indebtedness of two school districts involved in a transfer is dependent upon the facts existing in each particular case.

With respect to your specific case, I am of the opinion that the transfer from the Hollansburg Village School District to the Preble County School District will not become complete until the Preble County Board of Education accepts the transfer as made by the Darke County Board of Education and makes an equitable division of the funds and indebtedness between the two districts and if the Preble County Board of Education neglects or refuses to make this division the transfer will not become effective.

In making such a division consideration should be given not only to the comparative tax valuation of the property lying within the Hollansburg Village School District before and after the transfer, but to all other factors that would tend to make such division of funds and indebtedness fair and equitable. Among other things, consideration should be given to the fact that the funds of the Hollansburg Village School District as constituted after the detachment therefrom of the territory transferred to the Preble County School District will be enhanced by disbursements from the proceeds of taxes thereafter collected which had been previously assessed on the entire taxable property of the district as constituted before the transfer.

You do not state whether the bonds in the sum of \$72,000 authorized at the election of November 26, 1926, have been issued and sold, or whether if sold, the proceeds therefrom are in the treasury of the Hollansburg Village School District, or whether such proceeds have been encumbered by the letting of contracts for a school building, or disbursed, in whole or in part, on contracts for the construction of the school building for which they were issued. An equitable division of funds and indebtedness between these two districts would be dependent to a large extent on the state of the funds arising from this bond issue.

In any event, it should be understood that this department is not empowered to actually make a division of funds and indebtedness between two school districts, or to say what it should be in any particular case. That is a matter purely within the discretion of the board of education making the transfer and is dependent on many considerations as I have above indicated.

Respectfully,
EDWARD C. TURNER,
Attorney General.