

omitted sum or sums by the rate of taxation belonging to said year or years, and accordingly enter the amount on the tax lists in his office, giving a certificate therefor to the county treasurer, who shall collect it as other taxes. * * *

This section provides that for each year as to such property omitted and as to property not returned or taxed according to its true value in money, the county auditor shall ascertain as nearly as practicable the true amount of personal property, moneys, credits and investments that such person ought to have returned or listed and the true value at which it should have been taxed in his county for not exceeding the five years next preceding the year in which the inquiries and corrections provided in this section are made. This section mentions the year 1911 as the maximum limit to which the auditor could investigate a listing of personal property but it also contains the express provision that the county auditor's examination and corrections are limited to the first five years next preceding the year in which the inquiries and corrections provided for in this section are made.

It is therefore clear that under the provisions and limitations of Section 5399, General Code, the county auditor is limited in his examination of the administrator to the five years next preceding the year in which his inquiries and corrections are made.

Respectfully,
EDWARD C. TURNER,
Attorney General.

3081.

BOARD OF EDUCATION—TRANSFER OF TERRITORY FROM SCHOOL DISTRICT IN ONE COUNTY TO CONTIGUOUS SCHOOL DISTRICT—WHEN COMPLETE—WHEN OBLIGATIONS BEGIN—EQUITABLE DISTRIBUTION OF FUNDS WITHIN DISCRETION OF ANNEXING BOARD.

SYLLABUS:

1. *A transfer of territory from a school district in one county school district to a contiguous county school district is 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.*

2. *A board of education of a school district to which territory is transferred does not become obligated to assume charge of the education of the children residing in the territory transferred, until the transfer is complete.*

3. *The making of an equitable distribution of funds and indebtedness between two school districts, when a part of the territory of one district is annexed to another, is purely within the discretion of the board of education charged by law with the duty of making this equitable distribution, and in the absence of fraud or abuse of discretion the distribution as made by such board of education will be final.*

COLUMBUS, OHIO, December 31, 1928.

HON. JAY S. McDEVITT, *Prosecuting Attorney, Mt. Vernon, Ohio.*

DEAR SIR:—I am in receipt of your communication requesting my opinion as follows:

"I wish to submit for your consideration several questions which have arisen out of the statement of facts as appears as follows:

On July 3, 1928, a petition was filed with the County Board of Education of the Holmes County School District by the electors of a portion of the Glenmont Rural School District of the Holmes County School District, requesting the transfer of certain territory set forth therein to the Knox County School District to be annexed to the Brink Haven Village School District, which territory was contiguous thereto, under the provisions of Section 4696 of the General Code. More than seventy-five per cent of the electors of said territory to be transferred signed said petition. Thereafter at the next regular meeting of the Holmes County Board of Education on August 28, 1928, said County Board of Education refused to transfer said territory. Thereafter mandamus proceedings were instituted by a certain elector and tax payer of said District in the Court of Appeals of Holmes County, Ohio, to compel said County Board to make said transfer. On October 24, 1928, a peremptory writ of mandamus was issued by said Court requiring said County Board of Education of Holmes County to pass a resolution making said transfer in accordance with Section 4696 of the General Code. In compliance with said writ said County Board of Education of Holmes County did on November 3, 1928, pass a resolution transferring said territory. On November 16, 1928, a map of said territory to be transferred was filed with the County Auditor of Holmes County, Ohio. On November 17, 1928, the County Board of Education of Knox County, Ohio, passed a resolution in accordance with Section 4696 of the General Code. As yet no distribution of the funds or indebtedness has been made and no map has been filed with the County Auditor of Knox County, for the reason that the questions hereinafter propounded have arisen as to the method of making said equitable distribution of the funds and indebtedness.

Question 1. By virtue of the holding in the case of *State Ex Rel. Stipe vs. Board of Education, et al.* 23rd Appellate, page 329, that such territory is transferred in contemplation of law from time of filing said petition and the provisions of the Code, to wit: 4696 that such transfer shall not be completed until the distribution is made, the Board would like to know as what date said equitable distribution is to be made, is, whether it is of the date of July 3, the date when the territory was ordered transferred? the date when the resolution was passed by the Holmes County Board or when?

Question 2. Should the Knox County Board make a distribution of the funds which arise from the taxes collected in December, 1927, for the taxes collected in June, 1928, for the taxes to be collected in December, 1928, for the taxes to be collected in June, 1929?

Question 3. The taxes levied for the year 1928 will be collected in December, 1928, and June, 1929. Will these taxes be collected by the Holmes County authorities and prorated to the Districts? Should they be included in the distribution?

Question 4. State generally the principles which should govern this distribution, bearing in mind the fact that the Glenmont Rural School District has a bonded indebtedness for a new building and also other funded indebtedness, and now operate schools of the territory to be transferred from funds collected from tax levies in the year 1927.

Question 5. When will the Brink Haven School District be obligated to assume charge of the Education of the children of the territory being transferred?

I realize that your office is busy with numerous questions from all over the State, but I should greatly appreciate your opinion in these matters at your earliest convenience."

Section 4696, of the General Code of Ohio, under which transfers of school territory from a school district of a county school district to an adjoining county school district are made, 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 per cent 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 which must be taken to effect the transfer of school territory from a school district of a county school district to another county school district.

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.

Before a county board of education has jurisdiction to make a transfer of school territory from a school district of a county school district to an adjoining county school district, a petition must be filed, as provided by the statute, and after the jurisdiction is thus conferred, the terms of the statute are specific to the effect that in "any case, before such a transfer is *complete*" three specific things must be done. The first of these is the passing of resolutions by both county boards of education concerned, as one of them makes the transfer and the other accepts it if

the transfer is to be completed at all. There can be no question, upon consideration of the plain and specific terms of the statute, that a transfer of school territory from one county school district to another is not complete until all the steps enumerated in the statute are taken. The case to which you refer in your inquiry, *State ex rel. Stipe vs. Board of Education*, 23 Ohio App. 329, was reversed by the Supreme Court in the case of *Summit County Board of Education et al. vs. State ex rel. Stipe*, 115 O. S. 333.

Inasmuch as when school territory is transferred from one county school district to another the transfer is not complete until the board of education of the county school district, to which the territory is transferred, makes an equitable distribution of the funds and indebtedness between the two districts concerned and a proper map is filed with the county auditor of each county affected by the transfer, the equitable division of the funds should be as of the date when the last of the steps is taken, which it is necessary to take to complete the transfer, and of course the district receiving the territory will not be obligated to assume charge of the education of the children of the territory transferred until the transfer is complete.

Upon just what basis an equitable division of the funds and indebtedness between two political subdivisions should be made, and the principles which should govern that distribution, is a subject of considerable difficulty and has occasioned some considerable controversy. The best that may be said of it is that it should be fair and equitable; and that, what is fair and equitable in any particular case depends on the circumstances. In any event it is a matter within the discretion of the board or officer making the distribution and involves discrimination and judgment, judicial in their nature. There have been a number of former opinions of this office suggesting certain general principles for the guidance of boards of education in making equitable distribution of funds and indebtedness between two school districts, but no hard and fast rule can be applied. The determination of what is an equitable division of 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 abuse of discretion, is final.

Of course the amount of territory transferred and the ratio it bears to the remaining territory of the district, the number of pupils of school age residing in the territory transferred in proportion to the pupils of school age residing in the remaining territory, the indebtedness of the school district as it existed prior to the transfer, the school property in the territory transferred and in the territory remaining after the transfer, and the condition of that property, and the funds in the treasury of the district from which the territory was transferred, are all elements which should be taken into consideration in determining what an equitable distribution of the funds and indebtedness should be, but are not necessarily all the elements to be taken into consideration.

The questions raised by your inquiry have been discussed in many former opinions of this office. I would particularly direct your attention to an opinion rendered on September 21, 1927, and addressed to the Prosecuting Attorney of Darke County, which opinion is reported in the Opinions of the Attorney General for 1927, Volume III, page 1806, the syllabus of which reads as follows:

"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.

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."

In the aforesaid opinion there will be found a discussion of the manner in which an equitable distribution of funds and indebtedness between two school districts should be made. The opinion concludes:

"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."

In the case to which you refer in your inquiry, it appears that a petition was filed with the Holmes County Board of Education asking for a transfer of certain territory embraced within one of the local districts within the Holmes County School District to the Knox County School District, and that later, on October 24, 1928, a peremptory writ of mandamus was issued by the Court of Appeals of Holmes County, requiring the Holmes County Board to pass a resolution making this transfer in accordance with the petition. Accordingly, the Holmes County Board passed the resolution as directed by the writ of mandamus, and, on November 17, 1928, the Knox County Board of Education passed a resolution accepting the transfer, but has not yet made the equitable distribution of funds or filed a map with the Auditor of Knox County. Therefore, the transfer is not yet complete and will not be completed until the Knox County Board of Education makes the equitable distribution of funds and a proper map is filed with the County Auditor of Knox County.

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

First. The transfer of the territory in question is not yet complete, and will not be completed until the board of education of Knox County School District passes a resolution making an equitable distribution of funds between the school districts concerned and a proper map is filed with the Auditor of Knox County. If the Knox County Board of Education makes an equitable distribution of funds between the two districts concerned, it should not be made as of July 3, 1928, but as of the date when the distribution is made and a proper map filed.

Second. In making the equitable distribution of funds and indebtedness between the two school districts concerned, the Knox County Board may, if in its discretion the circumstances warrant it, order that certain taxes, whether collected in the past or to be collected in the future, should be divided between the districts concerned. Taxes when collected should be paid to the school district from which they are collected, that is to say, to the school district whose board of education had made the levy even though between the time of the levy and the collection of the taxes a portion of the territory of the district had been detached therefrom and attached to another district. Section 7600, General Code, provides:

" * * * The school taxes levied by boards of education and collected from the several districts or parts of districts in the county shall be paid to the districts from which it was collected."

However, circumstances do arise sometimes whereby, in making an equitable distribution of funds and indebtedness, the board making the distribution orders the proceeds of certain taxes to be collected in the future to be paid to the school district, which has received territory by annexation from the district receiving the taxes.

Third. Whether or not the taxes levied for the year 1928 and collected in December, 1928, and June, 1929, should be divided and prorated between the school districts effected by the transfer, is a matter to be considered by the Knox County Board of Education in making the equitable distribution of funds and indebtedness between the two districts, and whatever conclusion is arrived at by the board is a matter within its discretion.

Fourth. The principles which should govern in making an equitable distribution of funds and indebtedness between two political subdivisions are discussed in the body of this opinion and in the 1927 opinion referred to herein.

Fifth. The Brink Haven School District will be obligated to assume charge of the education of the children residing in the territory, which has been transferred to the district, when the transfer becomes complete; that is to say, when the Knox County Board of Education passes a resolution making an equitable distribution of the funds and indebtedness between the two school districts and a proper map is filed with the Auditor of Knox County.

Respectfully,
EDWARD C. TURNER,
Attorney General.

3082.

TOWNSHIP TRUSTEES—ROADS—LIABILITY IN DAMAGES FOR INJURIES PROXIMATELY CAUSED BY NEGLIGENT IMPROVEMENT.

SYLLABUS:

Where a road under the jurisdiction of a board of township trustees is being improved by such trustees, the board may become liable in its official capacity for damages received by any person when the proximate cause of the injury was the negligence of said board of trustees in failing to erect proper barriers or signals to warn travelers upon the highway of the presence of danger due to such construction work.

COLUMBUS, OHIO, December 31, 1928.

HON. C. E. MOYER, *Prosecuting Attorney, Sandusky, Ohio.*

DEAR SIR:—Receipt is acknowledged of your communication of recent date requesting my opinion as follows:

"Several days ago a person drove his automobile off of an embankment on a township road, which was, at the time, being improved by the township trustees and the work was being done by their road men, this embankment was at a curve and was being cut out and refilled to widen the curve and there were no danger signals or barriers to warn anyone using said road of the danger, placed there at the time said accident occurred.