ship be present. In reckoning a quroum the general rule is that, in the absence of a contrary provision affecting the rule, the total number of all the membership of the body be taken as the basis; and ordinarily a majority of the authorized membership of a body, consisting of a definite number of members, constitutes a quorum for the purpose of transacting business; but it is competent for the statute or constitution creating the body to prescribe the number of members necessary to constitute a quorum or to delegate to the created body the authority so to prescribe. And an assembly indefinite as to number may act by a majority of the members present at any legal meeting, no matter how small a proportion they may constitute of the whole number entitled to be present."

While Section 1261-18, supra, does not establish a fixed number of members who shall constitute a district advisory council in all general health districts, it does provide that this council shall be made up of a definite number of members determined by the number of townships and the number and population of municipalities not constituting city health districts within the general health district.

In view of the foregoing and in specific answer to your question, it is my opinion that a majority of a district advisory council of a general health district, such as is provided for in Section 1261-18, General Code, is necessary to constitute a quorum to transact business.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1946.

APPROVAL, BONDS OF MEIGS TOWNSHIP RURAL SCHOOL DISTRICT, MUSKINGUM COUNTY—$9,000.00.

COLUMBUS, OHIO, June 5, 1930.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

1947.

TRANSFER OF TERRITORY—PETITION FILED WITH COUNTY BOARD OF EDUCATION BY THREE FOURTHS OF ELECTORS OF TERRITORY —CONSOLIDATION OF SUCH TERRITORY BY COUNTY BOARD BEFORE ACTING ON PETITION—DATE WHEN TRANSFER EFFECTIVE FOR PROPORTIONING FUNDS AND INDEBTEDNESS.

SYLLABUS:

1. *When power is given under the statutes to two different governmental agencies to act with reference to the same subject matter, exclusive authority to act with reference thereto is vested in the agency first acting under the power.*

2. *When three-fourths of the resident electors of school territory file a petition with the county board of education of the county school district of which such territory is a part,*

under Section 4696, General Code, praying that said territory be transferred to a contiguous county, city or exempted village school district, and thereby there is imposed a mandatory duty upon said county board of education to make the transfer as prayed for, the said county board of education is precluded from thereafter, while said petition is pending, exercising any power over said territory by authority of sections 4092 or 4726, General Code.

3. *The date of the transfer of school territory made under and by virtue of Section 4696, General Code, is the date of the due legal acceptance of the territory transferred, and the apportionment of the funds and indebtedness between the districts involved in the transfer should be made as of that date. In cases where the transfer has been made upon petition of three-fourths of the electors residing in the territory transferred, the apportionment of funds and indebtedness between the districts involved in the transfer in disregard of any attempt that may have been made by the county board of education assuming to act by authority of either Section 4692 or Section 4736, General Code, after the filing of the petition, to change the relationship of said territory to the district of which it formerly had been a part.*

COLUMBUS, OHIO, June 5, 1930.

HON. C. G. L. YEARICK, *Prosecuting Attorney, Newark, Ohio.*

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

> "The preliminary steps in the transfer of a strip of territory from the eastern side of Delaware County to Licking County have been made and the pupils residing in that territory are being cared for by the Hartford District, Licking County. All that remains to complete the transfer is the adjustment of funds. The facts in the case are as follows:
>
> A petition signed by more than 75¾ of the residents of that territory asking to be transferred from the Delaware County School District to the Licking County School District was filed with the County Superintendent on May 3, 1929. With this petition on file, on May 11, 1929, the Delaware County Board of Education included this territory in a consolidation creating a new school district. This new district was composed of Sunbury Village District, Berkshire Township District and Trenton Township District.
>
> On July 6, 1929, the Delaware County Board of Education transferred to the Licking County District the territory covered by the petition filed on May 3, 1929. On July 15, 1929, this transfer was accepted by the Licking County Board of Education. The latter Board is now required to make an equitable division of funds and indebtedness between the district involved. G. C. 4696.
>
> The Licking County Board of Education has indicated that in making an equitable division it should consider the transfer as dating back to May 3, 1929, when by virtue of G. C. 4696 it became the mandatory duty of the Delaware County Board of Education to make the transfer. (*State ex rel* vs. *Board of Education*, 97 O. S., 336.) If the transfer should be made as of that time a portion of a surplus of four thousand dollars in the treasury of the Trenton Township District would be transferred to Hartford District of Licking County, to which the transferred territory has been attached.
>
> The Delaware County Board of Education has indicated its opinion that the transfer should be considered as made on July 6, 1929, at which time this territory had been included by it in the Sunbury Village Consolidated Rural School District. This latter district has an indebtedness of sixty-five thousand dollars, a part of which would thereby be transferred to the Hartford District.

I should like the benefit of your opinion as to the date of the transfer, for the purpose of making an equitable division of the funds and indebtedness referred to."

In substance, the facts upon which your inquiry is predicated are as follows:

On May 3, 1929, a petition signed by three-fourths of the resident electors of a portion of the territory of Trenton Township Rural School District in Delaware County School District was filed with the county board of education of Delaware County School District, under the provisions of Section 4696, General Code, asking that the territory embraced in that portion of said Trenton Township Rural School District be transferred to the Licking County School District.

On May 11, 1929, the Delaware County Board of Education, without taking any action whatever with reference to said petition, created a new school district in Delaware County School District by authority of Section 4736, General Code. There was included in the new district thus formed all of the territory embodied within the boundaries of Trenton Township Rural School District including the territory described in the aforesaid petition which had been filed on May 3, 1929.

On July 6, 1929, the Delaware County Board of Education passed a resolution transferring the territory described in the petition of May 3, 1929.

On July 15, 1929, the Licking County Board of Education accepted the transfer from the Delaware County School District as made on July 6, 1929, by the Delaware County Board of Education and attached the said territory to Hartford School District of the Licking County School District.

The pertinent provisions of Sections 4736 and 4696, General Code, read as follows:

Sec. 4736. "The county board of education may create a school district from one or more school districts or parts thereof, and in so doing shall make an equitable division of the funds or indebtedness between the newly created district and any districts from which any portion of such newly created district is taken. * * *"

Sec. 4696. "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, * * *"

The Supreme Court of Ohio 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, observes with reference to questions arising in connection with the division of funds and indebtedness between two school districts when transfers are made under the provisions of Section 4696, General Code:

" 'Funds' include all moneys rightfully in the possession of the board of the original district, and all moneys to which the board of the original district is entitled at the date of the transfer, * * *.

The date of the transfer is the date the transfer became effective by its due legal acceptance. * * *"

In the instant case the date of the acceptance of the transfer was July 15, 1929, at which time the territory transferred was a part of the new district created by act of the Delaware County Board of Education on May 11, 1929, if the said board of education acted within its power in creating such district and included within the boundaries of said new district the territory which the petitioners had previously asked to be transferred to the Licking County School District.

The substantial legal question therefore before me is whether or not the Delaware County Board of Education was empowered under the circumstances to include in a new district created by it under and by authority of Section 4736, General Code, the portion of Trenton Township Rural School District which the resident electors thereof had prior thereto fixed upon the said county board of education, by the filing with it of a petition, the mandatory duty of transferring to the Licking County School District, and, if such power did not rest in the said Delaware County Board of Education at that time, it becomes important to determine what relationship said territory bore to the remaining territory formerly embodied within Trenton Township Rural School District on July 15, 1929, the date when the transfer as finally made was accepted by the Licking County Board of Education.

A county board of education possesses the power by virtue of Section 4736, General Code, to create new school districts from one or more school districts of the county school district or from parts of such districts. It does not possess the power by virtue of any statute to transfer, upon its own initiative, territory within the county school district to a contiguous county school district.

The Legislature, where primarily the power lies to readjust the boundaries of school districts within the State, has reposed in the resident electors of school territory the power to transfer that territory to a contiguous county school district. Upon petition of a majority of the electors residing in any specified school district territory, filed with their county board of education, the said county board of education is vested with authority to make a transfer as prayed for in the petition but is not required to do so. If, however, such a petition is signed by 75% of said resident electors, the duty devolving upon the said county board of education to make said transfer is mandatory. The duty thus imposed is a mere ministerial duty which may be enforced by an action in mandamus. *State ex rel.* vs. *Board of Education*, 97 O. S., 336.

Under those circumstances, the petitioners, having imposed upon the county board of education the mandatory duty to carry out their will, would seem to have the right to have the territory transferred as prayed for and in the absence of any specific statute or holding to the contrary to have the rights and obligations of the school districts involved in the transfer determined as of the time that mandatory duty is imposed.

A petitioner in deciding whether or not he wishes to sign the petition and whether or not he wants the transfer made must be held to have had in contemplation the status of the territory as then existing with respect to the rights and burdens the transferred territory will carry with it to the district to which it will eventually be annexed. From that consideration alone, it would follow that the date of the transfer, so far as adjustment of funds and indebtedness between the districts involved is concerned, should be the date of the filing of the petition. However, the rights of the district receiving the territory are also to be considered, and to that end the Supreme Court has held as stated above, that the date of the transfer, the date which fixes the proportionate shares of the funds and indebtedness of the original district to be apportioned to the district to which the territory is annexed is the date of "its due legal acceptance."

As stated above, it would seem fair and just that the petitioners should be protected in all respects in having the transfer made as of the date when it is filed and the mandatory duty to make the transfer thus fixed. On the other hand, however, the petitioners must be charged with the knowledge that the county board of education at all times possesses the power conferred by statute to change the boundaries of school districts within the county school district by the creation of new districts under and by virtue of Section 4736, General Code, and of making transfers by authority of Section 4692, General Code.

The question therefore is narrowed down to the determination of whether or not a county board of education possessing concurrent power with the resident electors of school territory with respect to the transfer of school territory within the county school district may defeat or modify the action of those resident electors once taken by exercising that concurrent power in such a manner as to effectuate such defeat or modification.

It has been held by the Supreme Court of Ohio in the case of *Merrill* vs. *Lake*, 16 O. S., 373, that where two courts in this State have equal concurring jurisdiction in certain cases in chancery, the court first obtaining jurisdiction of the cause by bill will retain it for final decision.

In a recent case decided by the Supreme Court of Ohio, *Trumbull County Board of Education* vs. *The State ex rel. Van Wye*, 122 O. S. 247, O. L. B. and Rep., issue of May 19, 1930, Ohio Bar, issue of May 13, 1930, the rule laid down in *Merrill* vs. *Lake*, supra, as to courts, is applied to two boards authorized to exercise administrative functions. It is there held as stated in the first branch of the syllabus:

> "Where power is given under the statutes to two different governmental boards to act with reference to the same subject matter, exclusive authority to act with reference to such subject matter is vested in the board first acting under the power."

Briefly, the facts in the Trumbull County case are as follows:

On February 18, 1929, the rural board of education of Weathersfield Township Rural School District passed a resolution to hold an election on the question of centralizing the schools of the district pursuant to the provisions of Section 4726 et seq., General Code. Pursuant to said resolution an election was held on March 30, 1929, and a majority of the votes were cast in favor of centralizing such rural school district.

Prior to the election, but subsequent to the enactment of the resolution calling the election, namely, upon March 16, 1929, a petition was filed with the County Board of Education of Trumbull County seeking to have transferred a portion of said Weathersfield Township Rural School District to the City of Niles. Said petition was signed by more than 75% of the resident electors residing in the territory sought to be transferred. The Trumbull County Board of Education did not make the transfer as prayed for. A suit in mandamus was instituted to compel the board to make the transfer in accordance with the petition on March 29, 1929. The writ was refused. The second branch of the syllabus of the case reads as follows:

> "A rural board of education passed a resolution to hold an election under Section 4726, General Code, to submit to the voters the question of centralization of the schools within such rural school district and gave notice of such election under the statute. Subsequently to the adoption of the resolution by the rural board but before the holding of the election, a petition to transfer part of the territory of such rural school district to a city school district within the same county was filed with the county board of education, signed by seventy-five per cent. of the electors resident in the territory described in the petition. HELD, that mandamus will not issue

to compel the county board of education to transfer the territory in accordance with the provisions of Section 4696, General Code."

In my opinion the doctrine of the Trumbull County case supra, is controlling in this case.

True, we do not have here a question of power which may be exercised by two different governmental boards. We do, however, have a question involving a conflict of power between two agencies each vested with power by the Legislature to control transfers of the same school territory. While the resident electors of school territory are not empowered to actually make a transfer of that territory to a contiguous county school district they do have power to initiate proceedings for such transfer and if done by a proper and sufficient petition the duties of the county board of education in completing the transfer are merely ministerial. Neither did the local board of education under consideration in the Trumbull County School case, supra, possess the power to actually centralize the schools of the district but merely to initiate the proceedings looking to such transfer which depended upon the result of the election called by the said local board of education. This fact in my opinion renders the analogy between the facts here under consideration and the facts under consideration in the Trumbull County School case, complete.

In the course of the opinion in the Trumbull County School case the court said:

"Here the statutes give power over the same territory to two governmental bodies, one the board of education of a rural school district, which may institute proceedings to centralize its territory, the other a county board of education, which, upon petition of a certain number of voters, may transfer the same territory to another district. Here the petitioners instituted the proceedings for the transfer of the territory after the resolution had been duly enacted for the centralization election, and while the centralization proceeding was still pending and undetermined. Both proceedings had been authorized by the Legislature. The proceedings of the board of education of the rural school district gave that body exclusive authority over the subject-matter, and it could not be defeated by a subsequent act of the petitioners. When the rural board had once acquired authority, it was its duty to retain it and proceed to the final disposition of the matter."

In the instant case the statutes give power over the same territory to two agencies, one the resident electors of the territory, who may institute proceedings to have such territory transferred to a contiguous county school district, the other a county board of education, which may upon its own initiative, transfer the said territory to contiguous school districts of the same county school district by authority of Section 4692, General Code, or create a new school district and include therein the said territory. The resident electors of the territory in question instituted the proceeding for the transfer of the territory to a contiguous county school district and imposed upon the county board of education of the county school district of which it was a part, the mandatory duty to complete such transfer, and before such transfer was completed the county board of education transferred the territory to another district by including it in a new district created by authority of Section 4736, General Code. In my opinion the mandatory duty imposed upon the county board to make the transfer in accordance with the petition of May 3, 1929, could not be defeated by a subsequent act of the county board of education. This duty having once been imposed, the said territory was withdrawn from the county board of education in so far as it was empowered to exercise any power with reference thereto by authority of Sections 4692 or 4736, General Code.

The Supreme Court having fixed the effective date of a transfer of territory made

under Section 4696, General Code, as the date of its due legal acceptance, we must consider here the date of the transfer as being July 15, 1929, and the funds and indebtedness apportioned to the Hartford School District of the Licking County School District should be apportioned as though the territory transferred were still a part of Trenton Township School District of Delaware County as that district would have existed on July 15, 1929, considering its incorporation in a new district by the Delaware County Board of Education as being unauthorized and of no effect, so far as it affected the distribution of funds and indebtedness between it and the Hartford District of Licking County.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1948.

JURY FEES—NOT TAXABLE AS COSTS AGAINST DEFENDANT IN CRIMINAL CASE.

SYLLABUS:

The Legislature having failed to fix in Section 13451-18, *General Code, the amount of jury fees which shall be included as costs, therefore, no authority exists to tax jury fees and include them in a judgment against the defendant in a criminal case.*

COLUMBUS, OHIO, June 6, 1930.

HON. RICHARD C. THRALL, *Prosecuting Attorney, Marysville, Ohio.*

DEAR SIR:—I am in receipt of your letter of recent date which is as follows:

> "Section 13451-18 of the General Code provides that in sentence in a criminal case tried by a jury, a jury fee of $---------- should be included in the costs, which when collected should be paid into the Public Treasury from which the jury was paid.
>
> In cases tried in the Common Pleas Court before a jury and in which the defendant was found guilty, what amount, if anything, should be taken from the defendant as jury fees?
>
> Second, if such jury fee be taken against the defendant, who is found guilty and sentenced to the Penitentiary, should the State repay this amount?
>
> We are somewhat uncertain as to the exact effect of this Section of law and would like your opinion on these two points of the matter."

Authority to include jury fees as costs which may be taxed and included in a judgment rendered against a defendant in a criminal case must come from the provisions of Section 13451-18, General Code, for this section is held to be inclusive and no further charge for jury fees may be taxed as costs in any criminal case. *State ex rel. Board of Commissioners of Gallia County* vs. *Board of Commissioners of Meigs County*, 14 O. C. C. 26.

Section 13451-18, General Code, provides as follows:

> "In all sentences in criminal cases, including violations of ordinances, the judge or magistrate shall include therein, and render a judgment against the defendant for the costs of prosecution, and if a jury has been called to the trial of the case, a jury fee of $---------- shall be included in the costs,