PUBLIC INSTRUCTION, OFFICE OF SUPT. OF: Delphi-Deer Creek Township Consolidated Schools, status of relative to construction of new school building.

September 21, 1936.

Hon. J. W. Bosse,
Director of Statistics and Finance,
Department of Public Instruction,
Indianapolis, Indiana.

Dear Sir:

I have before me your request for an official opinion concerning the status of the Delphi-Deer Creek Township Consolidated Schools in view of the desire of the school board to erect a new school building. The primary question has to do with the correct apportionment of the expense of such construction between the School City of Delphi and Deer Creek School Township outside of the City of Delphi.

The above consolidation was effected under the 1917 Act for the consolidation of schools in incorporated towns or cities of the fifth class with the schools of the township in which such town or city is situated. Acts of 1917, page 545. At the time of the consolidation, Delphi was a city of the fifth class under the Act then in force classifying cities and, of course, in effecting the consolidation, the city and township availed themselves of the applicable provisions of the above Act, which are the same whether the municipal unit involved in the consolidation is a city of the fifth class or a town.


The provision for the apportionment of the cost of new buildings as provided in the above Act is contained in Section 7 of said Act which is as follows:

"Whenever it shall become necessary to build a new building or buildings, or to make repairs on old ones, said school trustees shall have the power to build such new building or buildings or repair such old ones as they may deem necessary, and to purchase the necessary site therefor; and the cost thereof shall be apportioned between the city or town and the township in the territory outside of such city or town in the
ratio that the taxable property of such city, or town, and the territory in the township outside such city or town bears to the whole amount of taxable property of said city, or town and township.

"Said school trustee shall have the sole power to issue bonds of the separate corporations comprising said consolidated school district to meet the cost of said new building or buildings or the repair of old ones. Such bonds authorized by this Act shall be payable in such amounts and at such times as the school trustees may determine, and shall bear such rate of interest as may be determined, not exceeding four and one-half per cent. (4½%). Said board shall have the power to levy and collect taxes to meet the payment of any bonds issued pursuant to this Act: Provided, That said school trustees shall have all of the powers given and granted to school trustees for the appropriation of real estate for school purposes, by Chapter 87 of the Acts of 1907, page 114, being Sections 6633-6636 Burns Revised Statutes of 1914."


In 1925 the General Assembly enacted a new Act providing for the consolidation of schools in cities of the fifth class with the schools of the township in which such city is situated, Acts of 1925, page 328, which the court in the case of Quick et al. vs. Smith et al., 86 Ind. App. 676, held impliedly repealed the 1917 Act supra insofar as it applied to consolidations where the municipal unit involved was a city of the fifth class. The above case involved the consolidation of the School City of Delphi with the Deer Creek Township Schools and held that after the effective date of the 1925 Act such consolidation in all of its aspects should be governed by the 1925 Act.

The provision of this Act for the apportionment of the cost of new buildings is contained in Section 9, which is as follows:

"Whenever it shall become necessary to build a new building or buildings, or to make repairs on old ones, said school trustees shall have the power to build such new buildings or repair such old ones as they may deem necessary, and to purchase the necessary site therefor; and the cost thereof shall be apportioned between the
city and the township in the territory outside of such city in proportion to the number of children of school age enumerated to each school corporation. Said school trustees shall have the sole power to issue bonds of the separate corporations comprising said consolidated school district to meet the cost of such new building or the repair of old ones. Such bonds authorized by this Act shall be payable in such amounts and at such times as the school trustees may determine, and shall bear such rate of interest as may be determined, not exceeding five per cent. Said board shall have the power to levy and collect taxes to meet the payment of any bonds issued pursuant to this Act: Provided, That said school trustees shall have all the powers given and granted to school trustees for the appropriation of real estate for school purposes, by Chapter 87 of the Acts of 1907, page 114, being Sections 6633-6636, Burns Revised Statutes of 1914.”


The above holding of the court was predicated upon the proposition that the 1925 Act, in cases where the municipal unit involved is a city of the fifth class, covered the entire subject of the 1917 Act as respects such consolidation so as to furnish a complete substitute rather than an additional method for the management of such consolidations. It was held that as applied to such situations the new took the place of the old and impliedly repealed it and that thereafter the new should govern, not only as to the new consolidations but as to existing ones.

In 1929 the General Assembly enacted a further Act upon the subject of the consolidation of township schools with the schools of incorporated towns or cities of the fifth class, being Chapter 205 of the Acts of 1929, entitled as follows:

“An Act providing for the consolidation of schools to form a new school corporation in incorporated towns or cities of the fifth class with schools of the township in which such town or city is situated, where the schools of said township have been abandoned and the pupils thereof are being transported to the schools of such town or city of the fifth class, providing for the
abandonment of such township school corporation, providing for the abandonment of such school town or school city of the fifth class, providing for the management, control and maintenance of such new school corporation, and providing for repairs of old school buildings and the building of new ones, and the issuance of bonds in payment thereof, and declaring an emergency."


While the above title seems to limit the contemplated consolidations to cases "where the schools of said township have been abandoned and the pupils thereof are being transported to the schools of such town or city of the fifth class," the Act is not so limited. It does provide, however, that upon the completion of the consolidation, which under the Act results in the formation of a new school corporation, both of the old school corporations are to be deemed abandoned. Waiving any possible constitutional objection which may exist by reason of the above limitation of the title of the 1929 Act supra, I do not think that it can be said to include the whole of the subject included in either the 1917 or the 1925 Act. Indeed, it seems to me clearly to provide for an entirely new type of consolidation, the distinctive feature of which is the formation of a new corporate unit. This, it may be noted, seems to be a rather desirable form of organization, but I doubt whether an organization effected under either the 1917 or the 1925 Act, one of the features of which is the retention of the corporate identity of the consolidating units, can automatically and without further action become a new corporate identity which is to be deemed as the abandonment of each of the separate units. In my opinion the 1925 Act supra is not repealed by the 1929 Act and the management of the Delphi-Deer Creek Township Consolidated Schools is not affected by the latter Act.

With the adoption of the 1933 Act for the classification of civil cities, Acts of 1933, page 1042, assuming that said Act is valid, Delphi became a civil town. However, in Cause Number 7916 in the Carroll Circuit Court in an action by Alfred H. Brewer vs. City of Delphi et al. the court found Section 2 of said Act, the Section which would classify Delphi as a
town, to be unconstitutional, and entered a decree enjoining
the holding of an election in 1933 for the election of city or
town officers. The decree proper, however, is limited to the
enjoining of the defendants from holding an election in 1933
and from spending the city's funds for that purpose, and, in
my opinion, does not preclude the reopening of the constitu-
tional question. It, at any rate, would not bind the school
trustees who were not parties to the action.

It has been the position of this Department that the Act
of 1933 for the classification of civil cities is valid, but, I know
of no case decided by the Supreme Court in which the par-
ticular Section here involved was passed upon. See, however,
Conter vs. Post (Ind. Sup.), 194 N.E. 153.

A serious question arises, moreover, as to whether the
question of the legal status under the 1933 Act supra is of any
consequence in the consideration of the matter now before
me; in other words, whether the change from a city of the
fifth class to a town by reason of subsequent legislation ef-
flecting a reclassification of cities and towns, has the effect
of transferring a consolidation legally entered into under a
statute applicable to such cities only, to a consolidation which
could be formed under a statute applicable in towns only.
I do not think such a result would follow. I am familiar with
the rule of statutory construction that where a statute adopts
the law generally which governs a particular subject by refer-
ence such reference means the law as it exists from time to
time or at the time the exigency arises to which the law is to
be applied; in other words, in such a case the adoption includes
subsequent additions and modifications.

Lewis' Sutherland Statutory Construction (2nd
Ed.), Section 405.

But these consolidation Acts did not adopt in the sense above
referred to the statute on the classification of cities and towns
but rather used the simple terminology "city of the fifth
class" rather than setting out in detail the requirements which
were necessary to make of a municipality a city of the fifth
class. The situation here, in my opinion, is more like the situa-
tion presented in Linn v. Reid (Wash.), 196 Pac. 13.

In the above case, the decision turned on the meaning of
the word "larceny" as used in a statute which provided as
follows:
"All property obtained by larceny, robbery, or burglary, shall be restored to the owner; and no sale, whether in good faith on the part of the purchaser or not, shall divest the owner of his rights to such property, * * *

The above Section was enacted in 1854 and is Section 2129 Rem. Code of Washington. It is unnecessary to go into the details of the facts since the language of the court clearly shows the legal principle adhered to without them. I desire, however, to quote somewhat at length. The court said on page 15:

"At the time of the trade of the Maxwell car to appellant's vendors, Section 2129 meant just what it did in 1854, when it was enacted. In endeavoring to ascertain just what the legislature of 1854 intended in enacting that statute, we must, as far as possible, place ourselves in the light that legislature enjoyed, and discover its purpose and intent from the language used."

Again on the same page:

"It may be observed here that at common law there was a distinction between larceny and obtaining goods by false pretenses. They were separate and distinct crimes. Smith v. People, 53 N. Y. 111, 13 Am. Rep. 474; Thorne v. Turck, 94 N. Y. 90, 46 Am. Rep. 126; People v. Rae, 66 Cal. 423, 6 Pac. 1, 56 Am. Rep. 102; 17 R. C. L. (Larceny), Section 6, page 8; Chitty's Blackstone, Vol. 2, Book 4, page 229 et seq., and page 158 and note.

They were treated as distinct crimes by the legislature of 1854, as already seen. They were so considered in the same chapter of the same Act. It follows, therefore, from the settled rule of statutory construction adverted to, that when in that same chapter and Act the legislature of 1854 provided that no sale, whether in good faith on the part of the purchaser or not, shall divest the owner of his rights to property obtained from him by larceny, robbery, or burglary, it was the equivalent of declaring that no sale, whether in good faith on the part of the purchaser or not, shall divest
the owner of his rights to property obtained from him by the feloniously stealing, taking and carrying, leading or driving it away, or by embezzlement, or by the false personation of another, or by robbery or burglary. If that statute were in such substituted words now (as in legal effect it is) there could not be any controversy in this case. Those were the only ways in which larceny could be committed. That was all the word 'larceny' meant. It was in that sense it was employed and understood by the legislature. In addition to the word 'larceny,' it did not say 'as herein defined or as it may be hereafter defined by the legislature,' nor did it use any other words of similar import."

Another view, which I think may be admissible and reaches the same result in the present case, is the view that the consolidation acts providing differently for cases where one of the units is a city of the fifth class from cases where such consolidating unit is a town has reference only to the original organization.

However, even if the above propositions be questioned, I do not think such a change from a city of the fifth class to a town would automatically take the consolidation previously effected out of the provisions of a statute under which it was formed and place it under the terms of a statute under which it actually was never effected. If the result is not as already indicated, then, I think, it must follow that the subsequent change from a city of the fifth class to a town has the effect of terminating the consolidation because the facts under which it could legally exist as entered into have ceased to exist. I think, however, that the situation is as previously indicated and the question as to whether Delphi now is a city of the fifth class or a town is unimportant. For the reasons given, I am of the opinion that the consolidation originally effected continues to exist and that the applicable statute, upon the basis of the decision in Quick et al. vs. Smith et al. supra, is the 1925 Act. The apportionment of the expense of the construction of new buildings, therefore, should be in accordance with the provisions of said Act.

It has been suggested that the question as to whether Delphi is now a city of the fifth class or a town may have a bear-
ing upon the legality of the appointment of the present school trustees who were appointed by a "city council." I do not think this question is of any vital importance. Delphi is operating as a city of the fifth class, and, at least, has a de facto government as such. The prevailing rule in such a case, upon the basis of the public policy involved, would sustain the Acts of such de facto government to the same extent as if it were de jure.

See Opinions of Attorney General of Indiana 1929-1930, page 14, for a full discussion of this subject, including a review of numerous authorities.

Your question as to the amount of money that can be raised by a bond issue cannot be answered upon the basis of the facts as submitted.

As to whether the township owes the Delphi school corporation anything for the use of buildings owned by Delphi upon the basis of the facts as submitted, the answer is that it does. See Sections 6 and 7 of the 1925 Acts, Acts of 1925, page 333. The period of time to be used in figuring such amounts would, in my opinion, begin with the effective date of the 1925 Act.

As to whether the Township Advisory Board must approve the bond issue payable out of taxation upon the property of the township outside of the city before the same is legal, I think it must so approve.

Quick et al. v. Smith et al. supra.

TAX COMMISSIONERS, STATE BOARD OF: Mortgage exemptions not allowable to holders of executory contracts.

September 22, 1936.

Hon. Philip Zoercher,
Chairman, State Board of
Tax Commissioners,
State House,
Indianapolis, Indiana.

Dear Sir:

This is in response to your request for an opinion construing the Indiana "Mortgage Exemption Law." That law is as follows: