

to improve a portion of a highway within a municipal corporation under provisions of the then two-mile-assessment pike law. The law under which this decision was reached has been repealed and not re-enacted in the same form. The law giving control to municipalities of its streets has also been amended since that opinion was rendered. This case and the matter under discussion may be distinguished in that the opinion dealt with a state or county highway probably existing long before it became a street of the municipality, while in the present case no sewers have been laid nor have any legal steps been taken to construct or create the same. So it is believed that even if county commissioners have authority to deal with highways in the municipalities, that in no way affects our question, since only a paper sewer district has been created wherein no sewers exist.

It is therefore believed that the county commissioners cannot maintain a sewer district within the limits of a municipality, unless they have constructed a system of sewers therein prior to annexation or prior to the creation of a municipal corporation within the area of the sewer district, over which an agreement as to joint ownership can be had, and in such a district, where no sewers have been constructed, the creation of a municipal corporation or the annexation of a portion of the territory excludes such areas from the jurisdiction of the county commissioners for county sewer purposes.

Respectfully,
 JOHN G. PRICE,
Attorney-General.

2072.

TAXES AND TAXATION—COMPANIES ENGAGED IN BUSINESS OF DEALING IN MORTGAGES ARE NOT “MERCHANTS” WITHIN MEANING OF PROPERTY TAX LAWS.

Companies engaged in the business of dealing in mortgages are not “merchants” within the meaning of the property tax laws.

COLUMBUS, OHIO, May 12, 1921.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—The commission requests the opinion of this department upon a question submitted by the Fidelity Mortgage Company of Cleveland, Ohio, as follows:

Is a company which takes and deals in mortgages entitled to list such mortgages on the average basis as a “merchant,” or must it list the amount in value of mortgages held by it on tax listing day?

Section 5381 of the General Code defines a “merchant” for the purposes of the regulations governing the listing of personal property for taxation, as follows:

“A person who owns or has in possession or subject to his control personal property within this state, with authority to sell it, which has been purchased either in or out of this state, with a view to being sold at an advanced price or profit, or which has been consigned to him from a place out of this state for the purpose of being sold at a place within this state, is a merchant.”

It is admitted in the brief filed on behalf of the mortgage companies that this section is not broad enough to sustain the view for which they contend, if the effect of the following sections dealing with the forms of returns to be made by merchants is limited to the class of persons or corporations described by the section as quoted. The contention is made, however, that the whole group of sections is merely declaratory of the common law, and that whoever is a "merchant" in the eye of the common law is entitled to list his property on the average basis, though he may not come within the letter of the definition found in section 5381.

This claim must be rejected. There is no common law of taxation. Only such persons can be considered to be "merchants" who are within the letter or fairly within the spirit of the definition found in the code. It is too much to say that the statutes are not susceptible to a liberal interpretation, but it is impossible by any such interpretation to read out of section 5381 the essential language

"which has been purchased * * * with a view to be sold at an advanced price or profit";

nor is it possible to read out of the section the phrase "personal property," which is hardly broad enough to include mortgages, though mortgages happen to be defined as "personal property" for certain limited purposes in section 5325 of the General Code.

See *Engle vs. Sohn*, 41 O. S. 691.

As reflecting upon the meaning of the statute see section 5383, which is *in pari materia* and was a part of the same section of the revised statutes (section 2740). This section relieves a merchant from listing the value of property "the product of this state, which has been consigned to him, for sale or otherwise, from a place within this state." Very cogent evidence of the kind of "property" which was in the contemplation of the legislature is afforded by this and other expressions found in the same section.

Nor do the authorities cited in the brief sustain the claim that a person engaged in the sale or re-sale of mortgages is a "merchant." In all the definitions the phrase "goods, wares or merchandise" or "goods or commodities" is found. The most liberal interpretation that has ever been given to this familiar phraseology is to apply it to a share of stock. It is not believed that it has any application to a mortgage.

Without discussing the question further, it is the opinion of this department that companies of the character above described are not "merchants" within the meaning of the property taxation laws of Ohio, and are therefore not entitled to list their property on the average basis.

Respectfully,
JOHN G. PRICE,
Attorney-General.