

teachers and other employes can not be induced to continue the term and wait for their pay, the schools should be taken over by the county board of education and operated as directed by Section 7610-1, General Code.

Respectfully,

GILBERT BETTMAN,
Attorney General.

4212.

APPROVAL, BONDS OF UHRICHSVILLE CITY SCHOOL DISTRICT,
TUSCARAWAS COUNTY, OHIO—\$15,000.00.

COLUMBUS, OHIO, March 31, 1932.

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

4213.

APPROVAL, BONDS OF VILLAGE OF DENNISON, TUSCARAWAS
COUNTY, OHIO—\$1,000.00.

COLUMBUS, OHIO, March 31, 1932.

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

4214.

OMITTED TAXES—COUNTY AUDITOR LIMITED TO ASSESSING FOR
LAST FIVE YEARS—WHERE OWNERSHIP OF PROPERTY HAS
CHANGED DURING THAT PERIOD, LIMITED TO TAXES DURING
LAST OWNERSHIP.

SYLLABUS:

Where, in pursuance of former sections 7232, et seq., General Code, the county commissioners have ordered the county auditor to levy upon the grand duplicate an extra tax for a certain number of years for the purpose of constructing and improving a free turnpike road upon lands within the bounds of said road and upon the personal property listed and to be listed from year to year within said bounds, and where such auditor has omitted from such levy certain tracts of land within said district, he is limited in charging the omitted taxes against said properties to the tax chargeable for not more than the five next preceding years unless such properties have changed ownership within said

five year period, in which event he is limited to the tax chargeable since the last change of ownership.

COLUMBUS, OHIO, March 31, 1932.

HON. JOHN I. MILLER, *Prosecuting Attorney, Van Wert, Ohio.*

DEAR SIR:—I am in receipt of your communication which reads as follow:

“In February, 1915, a petition was filed with the Van Wert County Commissioners, praying for the establishment of a Free Turn Pyke Road in Tully Township, under the law of one mile assessment pikes as provided for at that time in Sections 7232 Et. Seq., of the General Code.

On the 16th day of March, 1915, the said county commissioners approved the findings of the road commissioners so appointed for the said road improvement, which is known as the Murphy Free Turn Pike Number 90, and at that time the commissioners made the following order which is found in Volume 4, Commissioners Pike Journal, Van Wert County, Ohio, at Pages 253 and 254, to-wit:

‘Therefore it is ordered that said map, report, statement, specifications and lists be submitted to the County Auditor of Van Wert County, Ohio, and that said Auditor levy upon the grand tax duplicate of the County for taxation, according to law, for the purpose of constructing, improving and repairing said road, the amount of the tax and for the number of years petitioned for in said matters, upon said lands aforesaid and upon the personal property listed and to be listed from year to year within said bounds.’

Then follows a duplicate of the Murphy Free Turn Pike Number 90, all in Tully Township in said County. Omitting all matters in this duplicate not required for this inquiry, we find that the following lands listed in Section 11 in said Township, to-wit:

Wm. Barz, E½, NE ¼, 80 Acres, appraised at.....	\$8640.00
Wm. Scharlet, Jr. NW ¼, 160 Acres, appraised at.....	\$14670.00
George Missler, W½, NE¼, 80 Acres, appraised at.....	\$8250.00

Which were located on said pike improvement, were by error of the County Auditor omitted being placed on the duplicate for the purpose of collecting the assessments necessary for the building of the Murphy Free Turn Pike Number 90 for the years 1915, 1916, 1917, etc., until 1930, when the error was discovered and the said lands were placed on the duplicate.

In other words there is a period of fifteen years during which time no charge was made against these lands as was ordered by the county commissioners for the Auditor to place on the duplicate, and which the Auditor failed to do.

I would like to know whether we can go back to the certification of the county commissioners to the County Auditor of March 16, 1915, by which certification the county commissioners ordered the said lands placed on the duplicate and, which was never done by the County Auditor, and legally charge said assessments against the said lands for the years named, or whether the statute of limitation would operate as described in Section 3906 of the General Code against the collection or attempt to collect the amounts in question?

It seems to me that the certification made by the county commissioners at the time stated above which was made within less than two years from the time 'it is payable,' would make these assessments a valid lien against said lands.

Two tracts of the lands are in different hands from those that owned the same in 1915. A mortgage has been placed upon two different tracts. It is claimed now that said tracts are owned by innocent persons who should not be compelled to pay the deficiency above stated.

Will you please let me have your opinion on this as soon as possible?"

Section 7232, General Code, provided that a petition for such improvement shall be signed and presented to the county commissioners by a majority of the owners of lands lying within the bounds of a free turn pike, stating in such petition that they desire the county commissioners to levy an extra tax, the amount of which shall not exceed ten mills on the dollar valuation in any year, on the lands and taxable property within the bounds of the road, and stating also the number of years they desire the levy to continue, not exceeding twenty-five years.

Section 7234, General Code, provided for the appointment by the county commissioners of three road commissioners for the purpose of laying out and establishing a free turn pike road between the points within the county named in the petition.

Section 7237, General Code, provided that such road commissioners shall return to the county commissioners a map and profile of the road, including upon the map, as near as can be done, the names of the land owners, whose property is liable to be taxed, with a statement of the probable cost of the improvement.

Section 7238, General Code, provided as follows:

"The board of county commissioners shall forthwith thereafter transmit to the auditor of the county the map, profile and statement as returned to them by the road commissioners, and, at the same time, direct the auditor to levy upon the grand duplicate of the county, for the purpose of constructing, improving and repairing such road, the amount of the tax, and for the number of years petitioned for. The auditor shall enter the levy upon the duplicate for collection, on all the lands and taxable property within the bounds of the road, as laid out and established, in like manner and subject to like penalties and forfeitures as other taxes are entered thereon. No such tax shall be levied for an amount or for a term of years greater than that set forth in the petition."

The one-mile assessment pike law was repealed in 106 O. L. 574, effective September, 1915.

Section 3906, General Code, to which you refer applies only to municipal assessments and would therefore have no application to the question involved in your case.

The levy provided for in the statutes herein involved is a levy upon both real and personal property, and is not apportioned to the property benefited. It is therefore a tax and not an assessment, and the district within the bounds of such road constitutes a special taxing district. *Carlyle vs. Hetherington*, 47 O. S. 235.

In the case of *Bowles vs. State*, 37 O. S. 35, the court in discussing these statutes said:

"Much has been said in argument against the validity of this statute, on the assumption that it was intended as an exercise of the power of local assessment; but inasmuch as the burden does not purport to have been apportioned to property benefited, according to benefits, it was not a rightful exercise of such power. We do not think the legislature intended to exercise the power of local assessment according to benefits. Except as to property within a mile of the crossing of free turnpikes, there is no indication that special benefits were either the rule or the limit, of the burden imposed. The intent of the legislature, we think, was to establish special taxing districts for the purpose of defraying the expenses of the construction of free turnpikes therein, and to impose the burden thereof by taxation upon all the property within the district by a uniform rate, according to its true value in money."

In the case of *Miller, et al., vs. Hixson, Treasurer*, 64 O. S. 39, it was held:

"In *Bowles vs. State*, 37 Ohio St., 35, this court held, and we think correctly, that the levy under this one mile assessment law is a tax and not an assessment."

and on page 55 the court said:

"The doctrine of assessments cannot be applied, because assessments are only according to benefits, and this section requires that the amount be assessed upon the lands and lots, and no provision is made for the ascertaining of benefits; and moreover assessments according to benefits cannot be made on personal property."

Although the county commissioners in the case you present ordered the auditor in 1915 to levy upon the grand duplicate the extra tax petitioned for upon the lands within the bounds of such road and upon the personal property listed and to be listed from year to year within said bounds, it appears that the county auditor omitted to charge three tracts of land within said district with such tax until 1930, and the question arises whether the auditor can now charge upon such properties the tax for the preceding years for which said levy was ordered made.

Section 2593, General Code, provides as follows:

"When the county auditor is satisfied that lots or lands on the tax list or duplicate have not been charged with either the county, township, village, city, or school district tax, he shall charge against it all such omitted tax for the preceding years, not exceeding five years unless in the meantime such lands or lots have changed ownership, in which case only the taxes chargeable since the last change of ownership shall be so charged."

Is the tax in question a county tax? While it has been held that the territory within the bounds of a one mile assessment pike is a taxing district, it is not a taxing district in the sense that it has power to levy taxes, but only in the sense that it comprises the territory which is subject to the extra tax which is levied by the county commissioners. Although the tax is levied only on property in a

portion of the county, nevertheless it is levied by the county, through its taxing authorities, and I am of the view that, within the meaning of section 2593, General Code, it is a county tax.

I am therefore of the opinion, that under this section, the auditor is limited in charging the omitted taxes against the properties in question to the tax chargeable for not more than the five next preceding years, unless such properties have changed ownership within said period in which event he would be limited to the tax chargeable since the last change of ownership.

I might add, in construing section 5573, General Code, providing for adding omitted property to the tax lists, which section contains the same limitation as does section 2593, General Code, it has been held that "change of ownership" means a change of ownership by a bona fide purchase and does not include change of ownership by inheritance or devise. *Scott vs. Raine*, 25 Bull. 154; *Shields vs. Gibson*, 1 C. C. (N. S.) 532.

Respectfully,
GILBERT BETTMAN,
Attorney General.

4215.

APPROVAL, NOTES OF BUCHTEL VILLAGE SCHOOL DISTRICT,
ATHENS COUNTY, OHIO—\$1,800.00.

COLUMBUS, OHIO, March 31, 1932.

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

4216.

ELECTION LAW—PRIMARY—ELECTOR MAY NOT VOTE BALLOT OF
DIFFERENT POLITICAL PARTY FROM PREVIOUS PRIMARY—
MAY VOTE AT PRIMARY WHERE FAILED TO VOTE AT LAST
GENERAL ELECTION.

SYLLABUS:

1. *An elector cannot vote the ballot of a different political party at the May, 1932, primary than of the one he voted in the August, 1931, primary.*
2. *A voter cannot be prohibited from voting at the May, 1932, primary because of the fact that he did not vote at the 1930 election.*
3. *A voter cannot be denied the right to have his name appear on the primary ballot because of the fact that he did not vote at the last general election held in even numbered years.*

COLUMBUS, OHIO, March 31, 1932.

HON. G. H. BIRRELL, *Prosecuting Attorney, Warren, Ohio.*

DEAR SIR:—I acknowledge receipt of your communication which reads in part as follows: