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1. TRANSFER—PART OR ALL OF TERRITORY OF LOCAL SCHOOL DISTRICT WITHIN COUNTY DISTRICT TO ADJOINING LOCAL SCHOOL DISTRICT—SOLE POWER AND DISCRETION LODGED IN COUNTY BOARD OF EDUCATION—RIGHT OF ELECTORS TO FILE WRITTEN REMONSTRANCE—SECTION 3311.22 RC.
2. COUNTY BOARD OF EDUCATION—DETERMINATION TO TRANSFER PART OR ALL OF TERRITORY OF LOCAL SCHOOL DISTRICT TO ADJOINING DISTRICT—COUNTY SCHOOL DISTRICT—BOARD OF EDUCATION—ELECTORS IN DISTRICT—TRANSFER PROPOSED TO BE MADE—NO RIGHT OF PROTEST OR REMONSTRANCE.
3. CONSOLIDATION—UNION OF TWO OR MORE EXISTING DISTRICTS—TAX LEVIES—SECTION 3311.26 RC—RIGHT OF REMONSTRANCE NOT PROVIDED FOR IN SECTION 3311.22 RC.

SYLLABUS:

1. Under the provisions of Section 3311.22, Revised Code, the county board of education has the sole power and discretion to transfer part or all of the territory of a local school district within the county district to an adjoining local school district, and in the absence of proof of fraud or gross abuse by the county board, its discretion in ordering such transfer is limited only by the right of a majority of the electors residing in the territory proposed to be transferred to file a written remonstrance against such transfer as provided in said section.

2. In case a county board of education determines to transfer a part or all of the territory of a local school district to an adjoining district of the county school district, neither the board of education nor the electors in the district to which such transfer is proposed to be made have any right of protest or remonstrance.

3. Where a school district consolidation involves the union of two or more existing districts having in effect special tax levies at varying rates, and a question is involved of applying a uniform levy throughout the consolidated district at a rate higher than that voted in one or more of the constituent districts, such consolidation may more appropriately be effected under the provisions of Section 3311.26, Revised Code, whereby a right of remonstrance is afforded to the electors of all of such constituent districts, rather than under the provisions of Section 3311.22, Revised Code, under which such right of remonstrance for all electors concerned is not provided.

Columbus, Ohio, March 9, 1956

Hon. Gibson L. Fenton, Prosecuting Attorney
Williams County, Bryan, Ohio

Dear Sir:

I have before me your communication requesting my opinion and reading as follows:

“The Superintendent of Schools has raised the following question and we would appreciate your giving us an opinion concerning same:

“We have two local school districts, A and B. District A has sufficient school facilities to care for their present pupils. District A does not have sufficient facilities to care for any additional pupils; therefore, they do not wish to have any additional territory transferred from adjoining District B. May the Williams County Board of Education transfer territory from District B to District A even though District A is unwilling to accept any territory which might be transferred from District B to District A? If the Williams County Board of Education transferred territory from District B to District A under the conditions named, might not the courts hold Williams County Board of Education abused their discretion in making the transfer of territory?”

The procedure contemplated in your statement is set out in Section 3311.22, Revised Code, which reads in part as follows:

“A county board of education may, by resolution adopted by majority vote of its full membership, transfer a part or all of a school district of the county school district to an adjoining district or districts of the county school district. Within ten days after the adoption of such resolution the clerk of the county board of education shall file with the county auditor of the county in which the transferred territory is situated a map showing the boundaries of the territory transferred. Such transfer shall not take effect if, within thirty days after the filing of such map, a majority of the qualified electors residing in the territory transferred voting at the last general election file with the county board of education a written remonstrance against such transfer. * * *”

This section further provides that the legal title of all property of the board of education in the territory transferred shall become vested

in the board of education of the district to which transfer is made. There is the further provision that the county board of education shall make an equitable division between the districts involved, of the funds and indebtedness of the school district from which territory is transferred.

It will be noted that the above section provides for a remonstrance which may be filed within thirty days after the filing of the map, and if such remonstrance is signed by a majority of the qualified electors residing in the territory transferred, voting at the last general election, then the transfer shall not take effect. There is no provision in the law for any protest or remonstrance either by the board of education to which the transfer is made, or by the inhabitants of that district.

In the case of *Cline v. Martin*, 5 Ohio App., 90 (1915), the Court of Appeals of Holmes County had before it a situation quite similar to that which you present. The county board of education had transferred four rural school districts to the Nashville village district, under authority of Section 4736, General Code, then in force, which provided:

“The county board of education shall as soon as possible after organizing make a survey of its district. The board shall arrange the schools according to topography and population in order that they may be most easily accessible to pupils. To this end the county board shall have power by resolution at any regular or special meeting to change school district lines and *transfer territory from one rural or village school district to another.*”
(Emphasis added.)

The action was by a taxpayer to enjoin the village board of education from attempting to issue bonds of the enlarged district, claiming that the county board had exceeded its authority and had abused its discretion in making the transfer and further that the statute under which it pretended to act was unconstitutional.

The court sustained the constitutionality of the law, and as to the power of the county board held:

“What is known as the rural school code confers a broad discretion on the county board of education in the matter of the establishment of new school districts, and where this is done by attaching four subdistricts to a village school district a court will not grant relief to a complaining taxpayer in the absence of a showing of fraud or an intentional abuse of discretion.”

The supreme court in *Cline v. Martin*, 94 Ohio St., 420, affirmed

the court of appeals, and while its syllabus dealt only with the constitutionality of Section 4736, General Code, it clearly appears that the court agreed with the lower court as to the power of the county board. It was said at page 429 of the opinion :

“Other questions of fact are presented by this record, but upon the evidence introduced in the trial of the case the court of appeals determined these facts adversely to the contention of the plaintiff in error. Yet, even if the finding and judgment of the court of appeals were against the weight of the evidence, that could not affect the disposition of this case.

“Section 4735, General Code, provides that the present existing township and special school districts shall constitute rural school districts until changed by the county board of education. Section 4736, General Code, authorizes the county board of education to create a new school district from one or more school districts or parts thereof.”

In the case of *Wogoman v. Board of Education*, 5 Ohio App., 380, decided by the court of appeals of Montgomery County in 1916, a situation was presented substantially identical to that set forth in your letter. The action was brought by a taxpayer who also challenged the constitutionality of Section 4236, *supra*, and maintained that the board had abused its discretion in making the transfer in question, and an injunction was sought against the completion of the transfer of territory. The court, after holding that the statute was constitutional, disposed of the question as to the power of the county board in the matter, as follows :

“2. The county board of education has authority under said act to transfer territory from a rural to a village school district, and in the absence of fraud or gross abuse of discretion, the courts cannot control or interfere with the exercise of such discretion.”

In the course of the opinion, at page 386, it was said :

“We are forced to the conclusion that under the broad grant of power conferred upon the county board of education by the statutes in force when this transfer was made it had authority to make the transfer in question, and that the power to make such transfer can be questioned only upon the grounds of fraud or gross abuse of discretion. * * *

“The legislature having conferred upon such board the power of making a transfer of territory, this court cannot substitute its judgment for the judgment of the county board of education,

upon whom such power has been expressly conferred, and overthrow the decision of such board upon a mere difference of opinion.”

The Supreme Court, in 95 Ohio St., 409, affirmed the above decision, stating that it did so on the authority of *Cline v. Martin*, 94 Ohio St., 420.

It therefore appears to me that if, in the case you present the county board of education determines to transfer a portion of the territory of local school district B to local district A, and the electors residing in territory proposed to be transferred do not file the remonstrance specified in Section 3311.22, *supra*, within the time therein limited, the transfer will, in the absence of proof of fraud or gross abuse of discretion on the part of the board, become effective regardless of the desire or protests of district A, there being no provision in the law for a protest or remonstrance, either by the board of education or the electors of the district to which the transfer is proposed to be made.

Since it appears from your letter that the procedure mentioned therein has not been taken, but only contemplated, I think it proper to point out that the county board could accomplish the same result, and meet the opposition of District A, not by proceeding to transfer to District A a portion of District B, but instead of proceeding under the terms of Section 3311.26, Revised Code, to “create a new local school district” by uniting District A and a part of District B. If this were done, then by the terms of said Section 3311.26, the electors in the *entire territory of the proposed new district* would have the right of remonstrance.

Such a course would also reduce the chance of a claim that the board has abused its discretion in choosing the procedure that would bar the electors of District A from objecting to the proposed change.

An even more cogent reason for proceeding under Section 3311.26, Revised Code, rather than under Section 3311.22, Revised Code, will be seen in those cases where the special tax levies in varying amounts are involved. In *Gigandet v. Brewer*, 134 Ohio St., 86, the court upheld the validity of a tax throughout a consolidated school district where the levy had been approved by a vote of the electors in only one of the constituent districts. The consolidation was effected under authority of former Section 4736, General Code, now Section 3311.26, Revised Code, and the court seemingly justified the imposition of the tax, in the district which had not voted thereon, on the theory that the electors in such district had a

statutory right of remonstrance but had not exercised it. From this it may be concluded that where a tax problem of this sort is involved, it would not be desirable to proceed under Section 3311.22, Revised Code, which affords no right of remonstrance, but that proceedings under authority of Section 3311.26, Revised Code, would be more appropriate.

Accordingly, it is my opinion that :

1. Under the provisions of Section 3311.22, Revised Code, the county board of education has the sole power and discretion to transfer part or all of the territory of a local school district within the county district to an adjoining local school district, and in the absence of proof of fraud or gross abuse by the county board, its discretion in ordering such transfer is limited only by the right of a majority of the electors residing in the territory proposed to be transferred to file a written remonstrance against such transfer as provided in said section.

2. In case a county board of education determines to transfer a part or all of the territory of a local school district to an adjoining district of the county school district, neither the board of education nor the electors in the district to which such transfer is proposed to be made have any right of protest or remonstrance.

3. Where a school district consolidation involves the union of two or more existing districts having in effect special tax levies at varying rates, and a question is involved of applying a uniform levy throughout the consolidated district at a rate higher than that voted in one or more of the constituent districts, such consolidation may more appropriately be effected under the provisions of Section 3311.26, Revised Code, whereby a right of remonstrance is afforded to the electors of all of such constituent districts, rather than under the provisions of Section 3311.22, Revised Code, under which such right of remonstrance for all electors concerned is not provided.

Respectfully,
C. WILLIAM O'NEILL
Attorney General