

4106.

FORECLOSURE—DOW-AIKEN TAX—LIEN MAY NOT BE FORECLOSED  
TILL THREE YEARS AFTER PROPERTY CERTIFIED DELINQUENT.

SYLLABUS:

*The county prosecutor can not proceed to foreclose the lien, of the state created by virtue of the imposition of the Dow-Aiken tax until such tax shall have been certified delinquent, and after the expiration of three years the county auditor shall deliver his certificate by reason of the provisions of Section 5718 of the General Code, to the county prosecutor authorizing such foreclosure.*

COLUMBUS, OHIO, February 27, 1932.

HON. CAMERON MEACHAM, *Prosecuting Attorney, Portsmouth, Ohio.*

DEAR SIR:—I am in receipt of your request for my opinion, as follows:

“Section 6080 of the General Code of Ohio, provides that Dow-Aiken taxes shall be collected as other taxes and assessments on the real estate.

Section 5718 of the General Code provides the conditions precedent to the sale of real estate; the method to be pursued and the steps to be taken to sell real estate that has become delinquent. We would like to have an interpretation of Section 6080 of the General Code and especially the words ‘shall be collected as other taxes and assessments on such premises.’ In other words is it necessary to predicate an action under Section 6080 that the Dow-Aiken tax must be unpaid for a period over four years.”

Section 6080, General Code, referred to in your request, reads as follows:

“If the county treasurer under the levy heretofore provided is unable to collect the amount due thereunder or any part thereof, the county auditor shall place the amount due and unpaid on the tax duplicate against the real estate in which such traffic is carried on, and it shall be collected as other taxes and assessments on such premises.”

Your inquiry, no doubt, arises by reason of the amendment of Section 2667 of the General Code, which, before amendment, authorized the county treasurer, when taxes and assessments were not paid within the time prescribed by law, in addition to other remedies provided, to bring a foreclosure suit against the property subject to the lien. Section 5718, General Code, as then existing, further provided that after the expiration of four years from the time taxes were certified delinquent, the Auditor of State could bring a similar act to foreclose the lien of these taxes. Each of these sections have been amended by the legislature. Section 2667, General Code, has been amended so as to make it applicable only to special assessments and not to taxes. Such section now reads as follows:

“When special assessments, charged against lands or lots or parcels thereof upon the tax duplicate, authorized by law, or any part thereof, are not paid within the time prescribed by law, the county treasurer in

addition to other remedies provided by law may enforce the lien of such assessments, and any penalty thereon, by civil action in his name as county treasurer, for the sale of such premises, in the court of common pleas of the county, without regard to the amount claimed, in the same way mortgage liens are enforced."

This section can have no application to a foreclosure action as to an item of Dow-Aiken tax unless such tax is a special assessment within the meaning of the terms as contained in said Section 2667, *supra*.

The Supreme Court, in the first paragraph of the syllabus of the case of *Lima vs. Cemetery Association*, 42 O. S., 128, has laid down the distinction between an assessment and a tax, as follows:

"In a general sense, a tax is an assessment, and an assessment is a tax; but there is a well recognized distinction between them, an assessment being confined to local impositions upon property for the payment of the cost of public improvements in its immediate vicinity, and levied with reference to special benefits to the property assessed."

The distinction between a tax and an assessment, as above quoted, has been approved by the Supreme Court in its later decisions. *State ex rel vs. Moenter*, 99 O. S. 110, 116, *Jackson vs. Board of Education*, 115 O. S. 372. Although in Sections 6212-31, 6212-32 and 6212-33 of the General Code, the Dow-Aiken tax is referred to in some places as an assessment, it is also referred to and recognized as a tax. The last paragraph of Section 6212-33, *supra*, is as follows:

"The payment of such tax shall give no right to engage in the traffic of intoxicating liquors, nor relieve anyone from criminal liability."

The Dow-Aiken tax then, being a tax as distinguished from a special assessment and since the legislature has specifically removed the authority of the county treasurer to bring an action in foreclosure for taxes as distinguished from special assessments, I must conclude that there is no authority to bring a foreclosure of the lien of the Dow-Aiken tax for the collection thereof under such section.

Section 5718 of the General Code, has been amended to authorize the county auditor rather than the auditor of state, to direct the bringing of a foreclosure. It has further been amended, reducing the time which must expire before the bringing of the action from four years to three years after the tax shall have been certified delinquent. Said section, in so far as material, reads as follows:

"At the expiration of three years after certification, the county auditor shall make, in quadruplicate, a certificate, to be known as a delinquent land tax certificate of each delinquent tract of land, city or town lot, or part of lot contained in the delinquent land list, upon which the taxes, assessments, penalties and interest have not been paid, describing each tract of land, city or town lot the same as it is described on the tax list and the amount of taxes, assessments, penalty and interest thereon due and unpaid, and stating therein, that the same has been certified to the prosecuting attorney of the county as delinquent. Such certificate shall be signed by the county auditor, or his deputy, and the original filed

with the prosecuting attorney, one copy with the county treasurer, and one copy sent to the auditor of state. \* \*"

Section 5718-3 of the General Code, provides how and when the action shall be commenced and reads in part as follows:

"It shall be the duty of the prosecuting attorney of the county upon the delivery to him by the county auditor of a delinquent land tax certificate, to institute a proceeding thereon in the name of the county treasurer to foreclose the lien of the state, in any court of competent jurisdiction within nine months thereafter unless the taxes, assessments, penalty, interest and charges are sooner paid, and to prosecute the same to final judgment and satisfaction. \* \*"

It is a uniform rule of statutory construction concerning taxation, that the rights of the taxing authorities to collect taxes must be derived from the statutes. There is now no other provision of law authorizing the subjection of real property to the payment of taxes as distinguished from special assessments through action in foreclosure or sale other than that contained in the section just cited. Since the recent legislature has seen fit to amend Section 2667, of the General Code, by striking out the words "taxes or" and inserting in lieu thereof, the word "special" immediately preceding "assessments" such statute no longer permits a foreclosure for taxes to be brought under such section. It is fundamental that when the legislature amends a statute it is its intention to change the meaning of the statute to the extent of the change of language.

In specific answer to your inquiry it is my opinion that the county prosecutor can not proceed to foreclose the lien of the state created by virtue of the imposition of the Dow-Aiken tax until such tax shall have been certified delinquent, and after the expiration of three years the county auditor shall deliver his certificate by reason of the provisions of Section 5718 of the General Code, to the county prosecutor authorizing such foreclosure.

Respectfully,

GILBERT BETTMAN,  
*Attorney General.*

4107.

SINKING FUND COMMISSIONERS—SCHOOL DISTRICT—AUTHORITY  
TO SELL INVESTED SECURITIES LIMITED TO EXTINGUISHING  
BONDED INDEBTEDNESS.

**SYLLABUS:**

*The sinking fund commissioners of a school district are without power to sell securities in which the moneys of the sinking fund have previously been invested according to law, for any purpose other than for the purpose of raising funds for the extinguishment of bonded indebtedness or for paying the interest thereon.*