

2958.

APPROVAL, NOTES OF CHAMPION TOWNSHIP RURAL SCHOOL DISTRICT, TRUMBULL COUNTY, OHIO—\$3,000.00.

COLUMBUS, OHIO, July 25, 1934.

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

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2959.

APPROVAL, NOTES OF BRUSH CREEK RURAL SCHOOL DISTRICT, MUSKINGUM COUNTY, OHIO—\$2,250.00.

COLUMBUS, OHIO, July 25, 1934.

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

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2960.

SCHOOL DISTRICT—UNAUTHORIZED TO LEVY TAXES OUTSIDE LIMITATIONS OF SECTION 2, ARTICLE XII, OHIO CONSTITUTION, WHEN.

*SYLLABUS:*

*Since the repeal of sections 5625-18a, 5625-18b, 5625-18c and 5625-18d, General Code, there is no longer any authority for a school district to levy the taxes therein authorized outside of the limitations of section 2, Article XII of the Ohio Constitution, even though such levies were approved by a vote of the electors in the years 1931, 1932 or 1933.*

COLUMBUS, OHIO, July 26, 1934.

HON. B. O. SKINNER, *Director of Education, Columbus, Ohio.*

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

“House Bill No. 9, enacted by the Ninetieth General Assembly, Third Special Session, repealed Sections 5625-18a, 5625-18b, 5625-18c and 5625-18d, under which approximately 277 school districts had voted in November 1931, 1932 or 1933 ‘For Participation in State Educational Equalization Fund,’ and thereby approved a tax to be levied, ‘outside of the fifteen mill limitation for the current expenses of said school district in an amount equal to the average tax levy voted outside of

said limitation for the current expenses of schools by all the school districts in the state of Ohio which do not participate in said fund (but in no event to exceed three mills) *for such period as the district may continue to participate in said educational equalization fund.*'

The ten mill limitation has now caused boards of education and county budget commissions to inquire *whether or not the levies authorized by vote under Section 5625-18a, during 1931, 1932 or 1933, may be continued beyond December 31st, 1934.* If these levies expire on that date, boards of education requiring levies outside the ten mill limitation should submit the question to the voters in November, 1934.

An early opinion on this inquiry will be appreciated, since it is necessary for such information to be available for the fixing of levies at the August meetings of the county budget commissions. Also, the State Tax Commission desires to advise county auditors on this point at a meeting of all county auditors and their deputies which is called for Thursday, July 26, 1934."

In House Bill No. 9 of the third special session of the 90th General Assembly certain sections of the Uniform Bond Act and the Budget Act were amended so that references to the former fifteen mill limitation were changed to conform said sections to the present one per cent limitation of section 2 of Article XII of the Ohio Constitution.

It may be pertinent to note here that said House Bill No. 9, in addition to repealing sections 5625-18a, 5625-18b, 5625-18c and 5625-18d, General Code, also repealed section 7575, General Code, which provided for an annual levy in each county of 2.65 mills for school purposes, but did not expressly repeal section 7600, General Code, which provides for the distribution of the proceeds of such levy. It did, however, repeal section 7600-1, General Code, which provides for distribution of the proceeds of such levy where a village or rural school district is located in two or more counties. In amending section 5625-6, General Code, which specifies the special levies which are authorized without vote of the people, the following former language of paragraph d was omitted:

"d. In the case of a school district, for the purposes of section 7575 of the General Code, or for any school equalization levy which may be authorized."

And in amending section 5625-23, General Code, which specifies what levies, if properly authorized, must be approved without modification, the following former language of paragraph c was omitted:

"c. The levy prescribed by section 7575 of the General Code, or any other school equalization levy which may be authorized."

Also former paragraph d of said section which provided for a minimum school levy of 4.65 mills was omitted.

Sections 5625-18a, 5625-18b, 5625-18c and 5625-18d, General Code, read as follows:

Section 5625-18a. "If the board of education of any school district shall have applied to the director of education for participation in the state educational equalization fund under the provisions of section 7595-1 of the General Code for the school year 1931-1932, but cannot make tax levies sufficient to meet the requirements of such section, there shall be submitted to the vote of the electors of such district at the November election in the year 1931, the question whether the people of said district shall approve such application and authorize a tax for the current expenses of the school district outside of the fifteen mill limitation for so long a period as said district participates in said fund, the rate of such extra levy to be not greater than the average levy for the current expenses of schools, authorized by vote of the people in all districts throughout the state which do not participate in the state educational equalization fund, but in no event to exceed three mills. The board of elections of the county shall submit the question to the electors of the district in accordance with the provisions of section 5625-17 of the General Code but the form of the ballot shall be as follows:

'Shall the ..... school district apply for participation in the state educational equalization fund, and levy a tax outside of the fifteen mill limitation for the current expenses of said school district in an amount equal to the average tax levy voted outside of said limitation for the current expenses of schools by all the school districts in the State of Ohio which do not participate in said fund (but in no event to exceed three mills) for such period as the district may continue to participate in said educational equalization fund.

FOR PARTICIPATION IN STATE EDUCATIONAL EQUALIZATION FUND.

AGAINST PARTICIPATION IN STATE EDUCATIONAL EQUALIZATION FUND.'

Section 5625-18b. "If the majority of the electors voting thereon at such election vote in favor thereof, the taxing authority of said school district may levy a tax within such school district at such additional rate outside of the fifteen mill limitation during the period and for the purpose stated in the resolution or at any less rate, or for any of said years. The result of the election shall be certified immediately after the canvass by the board of election to the taxing authority, who shall forthwith make the necessary levy and certify it to the county auditor who shall extend it on the tax list for collection after the next succeeding February settlement; in all other years it shall be included in the annual tax budget that is certified to the county budget commission."

Section 5625-18c. "In any year subsequent to the year 1931, in which any school district which has not voted a levy under section 5625-18a applies to the director of education under the provisions of section 7595-1 for participation in the state educational equalization fund, the same question shall be submitted to the electors of said district at the ensuing November election in the same manner provided in section 5625-18a."

Section 5625-18d. "For the purposes of sections 5625-18a to 5625-18c, inclusive, the tax commission shall calculate the average levy voted for the current expenses of schools outside of the fifteen mill limitation by all school districts throughout the state of Ohio which do not par-

ticipate in the educational equalization fund, which average shall be computed by calculating the total amount of money levied throughout the state under such voted authority and dividing the same into the total duplicate of the aforesaid districts, using the figures for the preceding year.”

Section 5625-18c, General Code, which was not expressly repealed, reads as follows:

“If an extra levy of taxes is voted under the provisions of sections 5625-18a to 5625-18c inclusive, and any levy voted in years prior to 1931 shall not yet have expired, the rate of such levy voted in such prior year shall be reduced by the amount of the rate voted under the provisions of sections 5625-18a to 5625-18c inclusive. A school district which votes a levy under the provisions of sections 5625-18a to 5625-18c inclusive may vote additional levies from time to time under the general provisions of sections 5625-15 to 5625-18 inclusive.”

It seems quite clear that the amendment of section 2 of Article XII of the Constitution does not affect the right to continue to make such levies outside of the present one per cent limitation, in view of the schedule to said constitutional amendment which provides that the following levies shall not be subject to such limitation:

“All tax levies authorized prior to said date by vote of the electors of any political subdivision of the state, pursuant to laws in force at the time of such vote, to be made for or during a period of years extending beyond January 1, 1934, which levies are outside of the present limitation of one and one-half per cent imposed by section 2 of article XII and the schedule thereto as approved on November 5, 1929.”

A more serious question arises as to whether there is now any authority for a school district to make such levies in view of the repeal of these sections, even though they were submitted to a vote of the electors in 1931, 1932 or 1933. Since these sections authorize the levy of such tax outside of the constitutional limitation for such period as the school district may continue to participate in the state educational equalization fund, provided the question submitted to the electors received a favorable vote, their repeal operates to take away such authority, unless the fact that the question was submitted to the electors prior to the effective date of the repealing act makes future levies a pending proceeding within the meaning of section 26, General Code, because the general rule is that when an act of the legislature is repealed without a saving clause or in the absence of a saving statute, it is considered, except as to transactions passed and closed, as though it had never existed. Lewis' Sutherland Statutory Construction, section 282.

Section 26, General Code, reads as follows:

“Whenever a statute is repealed or amended, such repeal or amendment shall in no manner affect pending actions, prosecutions, or proceedings, civil or criminal, and when the repeal or amendment relates to the

remedy, it shall not affect pending actions, prosecutions, or proceedings, unless so expressed, nor shall any repeal or amendment affect causes of such action, prosecution, or proceeding, existing at the time of such amendment or repeal, unless otherwise expressly provided in the amending or repealing act."

° In some states having saving statutes similar to section 26, General Code, the term "proceedings" has been held to apply only to judicial proceedings, but in this state a much wider scope has been given to this term. It has been held to apply to proceedings for the issue of bonds, road and street improvements, and the assessing of property therefor, and other similar proceedings. The authorities which have construed this statute are set forth in Opinions of the Attorney General for 1931, Volume III, page 1359. I do not believe, however, that the fact that question of participation in the educational equalization fund and the levy of taxes necessary therefor outside of limitations was submitted to the electors in previous years, makes the levy of said taxes in future years a pending proceeding at the time of the effective date of this repeal. I am of the view that each year's levy is a separate proceeding. A favorable vote of the electors is simply a condition precedent to the authority which was given by these statutes to make the necessary levies. When the legislature repeals the statutes authorizing the levy, the authority to make it is taken away regardless of the fact that the condition precedent to such statutory authority was performed.

In the case of *Alexander, et al., vs. Spencer, Treasurer*, 13 C. C. (N. S.) 475, affirmed without opinion, 83 O. S. 492, the court held:

"The repeal of former Section 2713, Revised Statutes, by the municipal code which went into effect May 4, 1903, took away the power of municipal councils to levy taxes upon sewer districts for the redemption of sewer district bonds, including bonds issued to pay for sewers, the construction of which had been begun before said repeal took effect. The levying of taxes, unlike the levying of special assessments, is no part of any other 'proceeding.'"

The opinion reads in part as follows:

"The question involved is whether the city can now levy taxes by sewer districts to provide a sinking fund for sewer district bonds issued since the new municipal code went into effect, May 4, 1903, for the purpose of paying that portion of the cost of sewers constructed in certain districts not assessed upon the property specially benefitted, the councilmanic proceedings for the improvements paid for by the bonds having been begun before said date.

The whole matter grows out of the repeal of Section 2713, Revised Statutes, by the new municipal code. That section read as follows:

'The levy to provide a sinking fund for the redemption of bonds issued for sewerage purposes shall, where the corporation is divided into sewer districts, be upon the property of the district for which the bonds were issued.'

The levy here mentioned is strictly a tax, as distinguished from a

special assessment. It is a tax to pay a debt of the city. That debt, it is true, was contracted for the benefit of a certain district of the city. Who shall now pay it, the sewer district or the city at large?

The city urges that the levying of a tax to pay these bonds is part of the original 'proceeding' under which the improvements were begun to pay for which the bonds were issued, and claims that rights under repealed Section 2713 are saved to the city, by virtue not only of Section 26, General Code, but also of Section 211 of the municipal code (Section 1536-910, Revised statutes; not found in the General Code), which reads in part as follows:

'No rights or liabilities, either in favor of or against such corporation, existing at the time of the taking effect of this act, and no suit, prosecution, or proceeding shall be in any manner affected by such change, but the same shall stand or proceed as if no such change had been made.'

The rule contended for has been held to apply to the case of special assessments (*Raymond vs. Cleveland*, 42 O. S., 523, and other cases cited by Counsel), but we have been unable to find a case where the same rule was applied to the levying of taxes. There is a decided distinction between the two kinds of impositions. The levying of an assessment to pay for a street improvement is clearly a part of the proceedings, and is so treated in the municipal code. Notice is given to the owners of benefitted property, and they, in a manner, take part in the proceedings. The whole assessment at once becomes a continuing lien, though it may be collected through a series of years. Not so with regard to the levying of taxes. That power is in the state to be exercised as the Legislature directs within the rules laid down in the Constitution. So long as the constitutional limits are observed the tax-payer must submit and has no part in the matter, and one Legislature can not bind another or make a bargain about the right to levy taxes, with a municipal corporation or any other agency.

Each year's tax levy is a new and distinct matter having no reference to any previous levy."

In view of the statutory changes which have been pointed out in this opinion taking away the authority to make the levy of 2.65 mills each year for school purposes, the legislature evidently contemplates that a larger part of the cost of maintaining the schools is to be borne by state levies rather than by local levies. Furthermore, it must be assumed that the legislature repealed sections 5625-18a, 5625-18b, 5625-18c and 5625-18d, General Code, for some purpose. The purpose of repealing sections 5625-18a and 5625-18b could only be to take away the authority to levy these taxes outside of limitations which received a favorable vote of the electors in the 1931 election, since these two sections refer only to that election. If the repealing act does not apply to future levies, by reason of the fact that a favorable vote was had thereon prior to the effective date of the act, then the repealing of these two sections would be meaningless. Of course, the collection of levies which were made prior to said repeal would not be affected by it.

Answering your inquiry, I am of the opinion that since the repeal of sections 5625-18a, 5625-18b, 5625-18c and 5625-18d, General Code, there is no longer any authority for a school district to levy the taxes therein authorized outside of the

limitations of section 2, Article XII of the Ohio Constitution, even though such levies were approved by a vote of the electors in the years 1931, 1932 or 1933.

Respectfully,

JOHN W. BRICKER,  
*Attorney General.*

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2961.

APPROVAL, CONTRACT BETWEEN THE STATE OF OHIO AND THE CARMICHAEL CONSTRUCTION COMPANY OF AKRON, OHIO, FOR THE CONSTRUCTION AND COMPLETION OF CONTRACT FOR PLUMBING AT BROADCASTING STATION AND BARRACKS FOR THE STATE HIGHWAY PATROL, MASSILLON, OHIO, AT AN EXPENDITURE OF \$3,335.00—CONTRACT BOND EXECUTED BY THE UNITED STATES GUARANTEE COMPANY.

COLUMBUS, OHIO, July 26, 1934.

HON. T. S. BRINDLE, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—You have submitted for my approval a contract between the State of Ohio, acting by the Department of Public Works, for the Department of Highways, and the Carmichael Construction Company of Akron, Ohio. This contract covers the construction and completion of Contract for Plumbing for a project known as Broadcasting Station and Barracks for the State Highway Patrol, Massillon, Ohio, in accordance with Item No. 2 and Item No. 8 (Alt. P-1) of the Form of Proposal dated July 3, 1934. Said contract calls for an expenditure of three thousand three hundred and thirty-five dollars (\$3,335.00).

You have submitted the certificate of the Director of Finance to the effect that there are unencumbered balances legally appropriated in a sum sufficient to cover the obligations of the contract. You have also submitted a certificate of the Controlling Board, showing that said board has released funds for this project in accordance with section 8 of House Bill No. 699 of the 90th General Assembly, regular session.

In addition, you have submitted a contract bond upon which the United States Guarantee Company appears as surety, sufficient to cover the amount of the contract.

You have further submitted evidence indicating that plans were properly prepared and approved, notice to bidders was properly given, bids tabulated as required by law and the contract duly awarded. Also it appears that the laws relating to the status of surety companies and the workmen's compensation have been complied with.

Finding said contract and bond in proper legal form, I have this day noted my approval thereon, and return the same herewith to you, together with all other data submitted in this connection.

Respectfully,

JOHN W. BRICKER,  
*Attorney General.*