comes necessary, whether by reason of an emergency within the meaning of section 7630-1 or not, such bonds may lawfully be issued, the building being a school building of the district within the meaning of the sections relating to the issuance of bonds for the repair of school buildings.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1469.

TAXES AND TAXATION—NOTICE AND OPPORTUNITY TO BE HEARD REQUIRED BY SECTION 5401 G. C. MUST BE GIVEN BY COUNTY AUDITOR IN PROCEEDING EITHER UNDER SECTION 5398 OR SECTION 5399 G. C. TO PLACE OMITTED PROPERTY ON DUPLICATE.

The notice and opportunity to be heard required by section 5401 *of the General Code must be given by the county auditor in proceeding either under section* 5398 *or section* 5399 *of the General Code to place omitted property on the duplicate.*

COLUMBUS, OHIO, July 29, 1920.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—The commission recently submitted to this department for opinion thereon certain questions raised by Mr. M. E. Thrailkill in respect to omitted taxes charged against the estate of a certain deceased person. In the view which will be taken of the questions submitted it will be necessary to consider but one of them. The facts may be abstracted as follows:

> "The decedent died testate very soon prior to tax listing day in 1919. His will was admitted to probate after tax listing day of that year and shortly thereafter the executor qualified and filed an inventory and appraisement of the estate, in which certain taxable stocks and bonds were listed as assets of the estate at their par or face value.
>
> The then county auditor, without giving any notice whatever, without conducting any investigation other than to examine the inventory, and without having in his possession any information other than said inventory tending to establish the value of such securities listed them for taxation for five years previous and charged the omitted taxes against the estate of the decedent together with a penalty of fifty per cent.
>
> In the course of the settlement of the estate it has developed that the assets thus listed for taxation were in value only about three-fourths the amount charged by the auditor on the duplicate as aforesaid.
>
> The executor being prepared to establish the discrepancy in value, raises the question as to whether on the facts he is obliged to pay the full tax and penalty assessed by the auditor, or whether he may pay taxes on the basis of the actual value as subsequently developed, without penalty."

It is understood that both parties in interest have submitted the question to the commission, and that the commission desires the advice of this department in the premises.

It is obvious that if no valid listing has been made the questions about valuation,

penalty, etc., do not arise. In the opinion of this department, the facts fail to show valid action on the part of the auditor.

It is requisite in proceedings by the county auditor to place property on the duplicate for omitted taxes that some kind of notice be given and opportunity afforded to the parties in interest to be heard. It is true that the statutory provision for notice is not clear. The auditor evidently assumed to act under section 5398 of the General Code, which provides simply that

> "If a person required to list property * * * makes a false return * * * the county auditor for each year shall ascertain as near as practicable, the true amount of personal property, moneys, credits, and investments that such person ought to have returned * * * for any year * * * for which the inquiries and corrections *provided for in this chapter are made.* * * *"

Similarly, section 5399, under which section in all probability the auditor should have proceeded in this case as that is the section which provides for his supplying omissions in contradistinction to action in case of false returns, is, in part, as follows:

> "If any person required to list property, * * * in the year nineteen hundred and eleven, or in any year or years thereafter fails to make a return * * *, or if such person makes a return * * * of only a portion of his taxable property * * * the county auditor for each year as to such property omitted and as to property not returned or taxed according to its true value in money, shall ascertain as near as practicable the true amount of personal property * * * that such person ought to have returned or listed, and the true value at which it should have been taxed in his county for not exceeding the five years next preceding the year in which the inquiries and corrections provided for in this section *and in the next preceding and the next two succeeding sections are made* * * *."

In both these sections reference is made to section 5401 G. C., which begins by authorizing the county auditor to proceed as for a correction of the returns of the assessor to add property to the duplicate for the current year. The last two sentences of the section must be considered. They are as follows:

> "The auditor, in all such cases, shall notify every such person, before making the entry on the tax list and duplicate, that he may have an opportunity of showing that his statement or the return of the assessor was correct. The auditor, in all such cases shall file in his office a statement of the facts or evidence upon which he made such correction; * * *."

These last two sentences in the context in which they are found are ambiguous because it is not clear that the phrase "in all such cases," occurring in each of them, refers only to the cases mentioned in section 5401 G. C. or to the cases mentioned in that section and in the preceding sections of the subdivision of the chapter in which the section is found. Indeed, it would be reasonable to assume that the former is the correct view if attention were centered upon section 5401 alone, to the exclusion of all other sections. However, it is believed that these two sentences, and indeed the immediately preceding sentence of section 5401 which authorizes the auditor to issue compulsory process for the attendance of witnesses, apply not only to proceedings for the correction of the living duplicate but also to all proceedings for placing omitted taxes on the duplicate. This conclusion is arrived at for the following reasons:

(1) No machinery is found in sections 5398 and 5399 whereby the auditor is to proceed to make the determinations which he is therein commanded to make. Un-

less section 5401 is at least available to him in connection with these sections, he has no authority to issue compulsory process for the attendance of witnesses; yet it is clear that except in cases in which information as to omitted taxes comes to him through the inventory of a decedent's estate or in some such fortuitous manner, the power which he has under sections 5398 and 5399 would be useless to him unless he did have the power to issue compulsory process.

In the second place, sections 5402 and 5403 of the General Code, which need not be quoted, seem to apply to all forms of correction.

Lastly and most significant is the fact that sections 5398 and 5399 both refer to "the inquiries and corrections provided for in this chapter." In other words, it is a necessary predicate of action under section 5398, for example, that "the inquiries and corrections provided for in this chapter" shall be made. The most natural meaning to give to the phrase "the inquiries * * * provided for in this chapter," as used in section 5398, is to read it as connoting the procedure referred to in section 5401. Had it been the intention of the general assembly that section 5398 should, so to speak, stand by itself there would have been no reference to "this chapter" at all. The same remark can be made of section 5399, which refers to "the inquiries and corrections provided for in this section and in the next preceding and in the next two succeeding sections;" except that here the specific reference to section 5401 is express and nothing is left to inference.

It is true that in *Myers* vs. *Shields*, 61 Fed., 713, it was held that no notice was required by what is now section 5398 of the General Code; and for that reason the federal district court held section 5398 to be unconstitutional as not affording due process of law. The decision is believed to be erroneous for reasons already pointed out, and because the supreme court of this state, which may of course speak with authority binding the federal courts with respect to the interpretation of the statutes of this state, has seemingly held otherwise.

Gager vs. *Prout*, 48 O. S., 89, was decided under the statutes in the form in which they existed when Myers vs. Shields was decided. It involved the interpretation and application of what was then section 2781 of the Revised Statutes and is now section 5398 of the General Code. One of the defenses in the action, which was to recover the omitted taxes charged on the duplicate against the estate of a deceased person, was that no notice was given and that a statement of facts was not placed on file in the office of the county auditor as required by present section 5401 of the General Code. The case was really decided on other grounds, but in the syllabus and opinion the following is found:

> "No particular style for the proceeding, or form of notice is prescribed and it is sufficient if the notice fairly informs the party of the nature of the proceeding and the capacity in which he is required to appear and answer." (3d branch of syllabus.)

In the opinion at p. 110, per Minshall, J., appears a recital of the facts, from which it is discovered that two notices were actually given and that the executors were told thereby that the auditor would place certain amounts on the duplicate unless they appeared before him at a certain time and place and showed cause to the contrary. In connection with these facts the language above quoted from the syllabus is repeated in the opinion.

It clearly appears that if the sentences quoted from section 5401 apply at all compliance with them is jurisdictional.

For the foregoing reasons, it is the opinion of this department that the assessment of omitted taxes made by the county auditor in question was illegal and could be successfully enjoined by the executor by action brought under section 12075 of the General Code.

It may be added that the present county auditor, having knowledge of the facts should proceed in compliance with the statute to place the correct amount of omitted taxes on the duplicate for the five years preceding the current year. Indeed, this is his mandatory duty. State ex rel. vs. Crites, 48 O. S. 142.

Obviously, the penalties will fall with the principal taxes which have been erroneously assessed. Whether the proceedings of the present auditor should be under section 5398 or under section 5399 depends upon whether or not the returns of the taxpayer for the years in question were "false" within the meaning of section 5398. Mr. Thrailkill asserts that the taxpayer made his tax returns in good faith and failed to list these assests through a mistake of law. This is, of course, a question of fact upon which the present auditor must pass, and no opinion is expressed thereon.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1470.

INHERITANCE TAX LAW—IN EVENT OF TESTATE SUCCESSIONS WHERE CASE FOR AN ELECTION ARISES AND WIDOW ELECTS TO TAKE UNDER WILL INSTEAD OF UNDER LAW—NO DEDUCTION TO BE MADE FOR INHERITANCE TAX PURPOSES FROM VALUE OF ESTATE WHICH SHE THUS TAKES UNDER WILL ON ACCOUNT OF DOWER INTEREST OF WHICH SHE HAS THUS BARRED HERSELF.

In the event of testate successions, where a case for an election arises, and the widow elects to take under the will instead of under the law, no deduction is to be made for inheritance tax purposes from the value of the estate which she thus takes under the will on account of the dower interest of which she has thus barred herself.

COLUMBUS, OHIO, July 29, 1920.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Acknowledgment is made of the commission's request for the opinion of this department, as follows:

> "In the administration of the inheritance tax law this commission has suggested to probate judges throughout the state that they should follow what seems to be the weight of authority and exempt dower estates from inheritance tax.
>
> The question now arises in a case where under a will a widow takes the fee in the realty, shall any allowance or deduction therefrom be made on account of her dower in the same land, or shall inheritance tax be assessed on the full value of the land without regard to dower?"

The rule in New York, from the statutes of which state our own inheritance tax law of 1919 is very largely copied, is to the effect that where a testamentary provision for the widow is made in lieu of dower, the whole succession thus accruing is taxable without any deduction for dower.

> Matter of Gordon, 172 N. Y. 25;
> Matter of Riemann, 87 N. Y. Supp. 731;
> Matter of Barbey, 114 N. Y. Supp. 725.

This rule seems to be followed in other states.

> State vs. Simms (Utah), 173 Pac. 964;
> State vs. Lane (Ark.), 203 S. W. 17.