

original principal sum of \$6500.00. Such mortgage is a lien on the parcel shown on page 2 of the abstract as .628 acres. Also a mortgage to the First Citizens Trust Company dated August 30, 1930, recorded in Vol. 859, p. 1, Franklin County deed records, in the original principal sum of \$11,000, which mortgage is a lien upon the same parcel above referred to and other lands. Also mortgage to the Guarantee Title and Trust Company, assigned to the Ohio State Life Insurance Company of Columbus, Ohio, dated February 24, 1930, recorded in Vol. 831, p. 126, Franklin County deed records, which mortgage is in the original principal sum or \$20,000. Also subject to taxes for the last half of the year 1931.

An examination of the warranty deed submitted shows that the same has been properly executed and acknowledged by the grantors and that such deed is as to form sufficient to convey to the State of Ohio a fee simple title to the above described premises free and clear of all encumbrances except the life estate in and to five acres of land described in such deed preserved in favor of the grantors.

An inspection of Encumbrance Estimate No. 1512 shows that it has been properly executed and that there is a sufficient balance in the proper appropriation account to pay the purchase price of this property.

Assuming that the mortgages above referred to are properly cancelled of record or releases are obtained of the land intended to be conveyed from the lien of such mortgages and the taxes for the last half of the year 1931 are paid, I will approve the condition of the title and form of conveyance.

I am herewith returning to you the warranty deed above mentioned, abstract of title, encumbrance estimate and other enclosures.

Respectfully,

GILBERT BETTMAN,

*Attorney General.*

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4524.

DELINQUENT TAXES—COUNTY AUDITOR MAY NOT REMIT PENALTY  
—LIABILITY OF COUNTY AUDITOR FOR REMOVAL OF PENALTY  
FROM TAX DUPLICATE.

*SYLLABUS:*

1. *When a county auditor has legally assessed and placed upon the tax duplicate a penalty against an entry of real estate for the reason that the taxes for the preceding half year were not paid at the time of the semi-annual settlement between the county auditor and the county treasurer, the county auditor has no legal authority to remit such penalty so added.*

2. *If after the county auditor has legally placed a penalty on the tax duplicate, he issues an abatement certificate for such penalty and removes it from the duplicate, such abatement certificate is VOID and the county auditor not only has the power, but it is his duty to re-enter such item so removed, on the duplicate, unless after such item has been so removed the legal title to the item of property against which the penalty is taxed has been conveyed to a holder for value, who relied upon the tax duplicate as it existed at the time of his purchase;*

*the county auditor and his bondsmen are liable for any loss occasioned by reason of such transfer.*

COLUMBUS, OHIO, July 27, 1932.

HON. JOSEPH T. TRACY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Your recent request for opinion reads as follows:

“Under the provisions of Section 5678 if taxes and assessments charged against an entry of real estate, are not paid on or before the 20th day of December or collected prior to the February settlement, a penalty shall be added to such half of said taxes and assessments on the duplicate.

QUESTION 1: After such penalty has been assessed and placed upon the duplicate, has the county auditor any authority to remit such penalty if same has been assessed in accordance with this section?

QUESTION 2: In the event you think in answer to the above question that the auditor has no such authority, would he and his bondsmen be liable if he does illegally remit the penalty?”

The county auditor is the chief assessing officer of all real estate within the county, subject to uniform rules prescribed by the Tax Commission of Ohio. See Sections 5579 and 5623 et seq. of the General Code. Such office being created by statute, it can have no powers or duties except such as are given it by statute.

The legislature has given to the county auditor the duty of making additions to tax returns if the taxpayer has omitted to list all of his property for taxation. See Sections 5390 and 5604, General Code. It has also given him the authority to correct the tax list and duplicate. Section 2588, General Code, gives to the county auditor the power to correct clerical errors which he discovers thereon,

“either in the name of the person charged with the taxes or assessments, the description of the lands or other property, the valuation or assessment thereof, or when property exempt from taxation has been charged with tax, or in the amount of such taxes or assessments.”

Section 2591, General Code, authorizes the county auditor to make deductions from the duplicate in the event that a part of the property assessed for taxation is destroyed.

Section 5571, General Code, authorizes the correction by the county auditor of such clerical errors as he may discover on the duplicate in a similar manner to that authorized by Section 2588, General Code.

Section 5573, General Code, authorizes the addition of omitted taxes for the preceding five years to the duplicate of real property. Sections 5576 and 5577, General Code, authorize the county auditor to correct the valuation of improvements to real property in the event that they have been erroneously valued or if they have been omitted from the duplicate.

The sole authority vested in the county auditor to abate penalties on real estate taxes is contained in Section 5721, General Code, enacted by the 89th General Assembly, which reads as follows:

“If the taxes and assessments charged on land or lots are regu-

larly paid in full, and such land erroneously returned delinquent, and the land is listed on the delinquent land tax certificate record, the auditor shall correct the duplicate and issue an abatement for penalties and interest added to such land on account of such error, the same as provided for in making errors on the tax duplicate."

This section confers no authority on the county auditor to abate a penalty on real estate taxes except in the event such penalty has been erroneously assessed. It merely gives him the authority to correct a clerical error or to correct an entry which he had no legal right to make where he, through error, has returned as delinquent, taxes on lands which have, in fact, been already paid.

Section 5678, *supra*, referred to in your request, specifically directs the county auditor to add a penalty of ten percent to one-half of the real estate taxes due December 20th, in the event such taxes are not paid prior to the February settlement.

Section 5721, General Code, *supra*, does not purport to authorize the abatement of the penalty assessed by virtue of the provisions of this section.

I do not find any provision of the statute which purports to give any administrative body the authority to remit penalties legally assessed. Section 5624-10, General Code, gives to the Tax Commission of Ohio power to remit certain taxes and penalties, but only when illegally assessed. Such section reads:

"The tax commission of Ohio may remit taxes and penalties thereon, found by it to have been illegally assessed, and such penalties as have accrued or may accrue, in consequence of the negligence or error of an officer required to perform a duty relating to the assessment of property for taxation, or the levy or collection of taxes. It may correct an error in an assessment of property for taxation or in the tax list or duplicate of taxes in a county, but its power under this section shall not extend to taxes levied under the provisions of subdivision 2 of chapter 15 of title 2, part second of the General Code."

Since the county auditor has no legal authority to assess any penalty on the taxes for the first half of the year until after the February settlement (Section 5678, General Code) I am taking the liberty of assuming that the penalties were assessed pursuant to the provisions of this section and were legally assessed and if so, no legal authority has been given to the county auditor to abate such penalties.

In reply to your second inquiry, as to whether the county auditor and his bondsmen are liable in the event that the county auditor illegally issues a certificate of abatement for tax penalties, it must be remembered that every illegal act performed by a public officer does not create a personal pecuniary liability against such officer. While it might be stated that the legal obligation of the county auditor is to faithfully perform each, any and all the duties imposed upon his office by law, a breach of this duty would only render him personally liable in the event that the county suffered financial loss by reason of his unfaithful performance of his duties.

The duty imposed upon the county auditor to place the penalty on the tax list and duplicate is definite, that is, he must place a penalty of ten

percent, no more or no less, on the tax list and duplicate. It must be placed on all taxes that remain unpaid at the times of the February and August settlements. Nothing is left to the discretion of the county auditor; his sole duty with reference to the assessment of the penalty is clerical. He merely computes the amount of the penalty and inscribes it upon the proper list and duplicate. Section 2588, General Code, gives to the county auditor the right to correct clerical errors on the tax list and duplicate. Under the provisions of such section the county auditor is limited to the correction of clerical errors; he may not correct fundamental errors. *State vs. Commissioners of Montgomery County*, 31 O. S., 271; *Insurance Company vs. Cappellar*, 38 O. S., 560; *State ex rel. Poe vs. Raine*, 49 O. S., 447; In the case of *Lewis, Auditor vs. State ex rel. Mullikan*, 59 O. S., 37, the Supreme Court held that when evidence was produced which established the fact that a clerical error appeared on the tax list and duplicate, it was not only the right of the county auditor but his duty to make a correction thereof.

The question then arises as to whether, when the county auditor, by reason of mistake as to his legal rights or otherwise, omits penalties already assessed, such omission is a fundamental error or a clerical error.

In the case of *State ex rel. Poe vs. Raine*, cited above, the court held that where the board of equalization illegally reduced the valuation on certain real estate and the county auditor relying upon such action of the board, transferred such lands at the reduced valuation on the new duplicate, such error in the preparation of the new duplicate was not a fundamental error, but a clerical one, which it was his duty to correct.

This case is followed by the Circuit Court of Hamilton County in the case of *Heave Building Company vs. Brooks, Treas.*, 9 O. C. C. 151, but limited to the extent of holding that such error cannot be corrected by the addition of taxes chargeable prior to the last change of ownership.

In the case of *Brooks vs. Lander, County Treasurer*, 14 O. C. C., N. S., 481, affirmed without opinion in 74 O. S., 428, the Circuit Court of Cuyahoga County held that where the board of equalization ordered certain taxes expunged from the duplicate, acting under an unconstitutional law, and the county auditor had expunged such entries pursuant to such order, the deductions so made were clerical errors and should be restored to the tax duplicate by the county auditor, by authority of a statute authorizing him to correct clerical errors appearing on the duplicate.

The first paragraph of the syllabus of *State ex rel. Lewis, County Auditor*, 1 O. C. C., N. S., 56, decided by the Circuit Court of Hamilton County, reads:

"1. An error in a tax list, which has been committed by a board of equalization, or by any other board or officer, while acting without authority of law, or in excess thereof, cannot be said to be fundamental and beyond the power of the county auditor to correct."

In view of the reasoning and holding of such courts, I am of the opinion that the county auditor not only has the power, but it is his duty to restore the unpaid penalties illegally abated by him to the tax list and duplicate thereof, unless since such abatement and removal from the duplicate the title to the real estate has been transferred to a purchaser for value, who has relied on the entry on the duplicate, which showed the taxes fully paid. (See Section 5573, General Code.)

The legislature having in part provided the remedy for the wrong, to

that extent I believe it is exclusive and no recovery could be had against the county auditor for the tax penalties replaced on the duplicate; however, to the extent that the legislature has not provided a remedy and loss has been suffered by the county by reason of the illegal act of the county auditor, the auditor and his bondsman would be personally liable, because of his neglect to faithfully perform the duties of his office.

Specifically answering your inquiries it is my opinion that:

1. When a county auditor has legally assessed and placed upon the tax duplicate a penalty against an entry of real estate for the reason that the taxes for the preceding half year were not paid at the time of the semi-annual settlement between the county auditor and the county treasurer, the county auditor has no legal authority to remit such penalty so added.

2. If, after the county auditor has legally placed a penalty on the tax duplicate he issues an abatement certificate for such penalty and removes it from such duplicate, such abatement certificate is *void* and the county auditor not only has the power but it is his duty to re-enter such item so removed on the duplicate unless after such item has been so removed the legal title to the item of property against which the penalty is taxed has been conveyed to a holder for value, who relied upon the tax duplicate as it existed at the time of his purchase; the county auditor and his bondsmen are liable for any loss occasioned by reason of such transfer.

Respectfully,

GILBERT BETTMAN,

*Attorney General.*

4525.

APPROVAL, ABSTRACT OF TITLE TO LAND AT KENTON, OHIO, OF  
THE KENTON BRICK AND TILE COMPANY.

COLUMBUS, OHIO, July 27, 1932.

HON. O. W. MERRELL, *Director of Highways, Columbus, Ohio.*

DEAR SIR:—You have submitted for my examination an abstract of title, deed, encumbrance estimate 1395, copy of approval of the Board of Control and a blue print, relating to the proposed purchase of a 1.82 acre tract of land at Kenton, Ohio, from The Kenton Brick and Tile Company.

Said abstract, certified under date of May 17, 1932, indicates that The Kenton Brick and Tile Company has a good and merchantable fee simple title to said property, subject to the following encumbrances:

1. A mortgage in the amount of \$7500 executed by The Kenton Brick & Tile Co. on January 29, 1931 to The Commercial Bank (Abstract, page 42), which mortgage was, on June 30, 1931, assigned by The Commercial Bank to The First Commercial National Bank of Kenton, Ohio (Abstract, page 43-44).

2. Tax liens, covering the second half of the year 1931 and all of the taxes for the year 1932.

Encumbrance estimate No. 1395 indicates that there is sufficient money in the proper appropriation account to finance this purchase.