2377.

APPROVAL, NOTES OF SHAWNEE RURAL SCHOOL DISTRICT, ALLEN COUNTY, OHIO—$8,500.00.

COLUMBUS, OHIO, March 13, 1934.

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

2378.

INTERURBAN RAILROAD—TAXES PAID PRIOR TO ENACTMENT OF HOUSE BILL NO. 674 NOT ENTITLED TO REFUNDER.

SYLLABUS:

An interurban railroad company which prior to the enactment of House Bill No. 674, 115 O. L. 546, paid the taxes for the year 1932 assessed on its property used in operation in a county of this state, is not entitled to a refunder from the county of such taxes either under the provisions of House Bill No. 674 or sections 2588 and 2589, General Code.

COLUMBUS, OHIO, March 14, 1934.

HON. NORTON C. ROSENTRETER, *Prosecuting Attorney, Port Clinton, Ohio.*

DEAR SIR:—This is to acknowledge the receipt of your recent communication which is as follows:

> "I respectfully request your opinion concerning the following:
>
> The Ohio Public Service Company has recently made demand on the Treasurer and Auditor of this Ottawa County for a refund of taxes paid by this company covering the interurban railroad property of the company in Ottawa County.
>
> The company is claiming the sum of $10,064.26 as a refund of taxes paid for the year 1932, under authority of House Bill No. 674, otherwise known as the (Cassidy Bill) and based on a corrected Certificate of Valuation and Distribution received by the Auditor from the State Tax Commission, covering the interurban property of the company in Ottawa County, reduced from the original certified value of $639,510 as of October 20th, 1932, to the amount now shown in the corrected certificate of $36,080.
>
> The Ohio Public Service Company has already paid taxes on the original valuation as certified for the year 1932.
>
> The Interurban Railroad is merely an adjunct or department of the Ohio Public Service Company. This company has in its employ individuals drawing salaries in excess of $5000 per annum. However, as nearly as I can determine, there is no officer or employee directly employed in the railroad department of the company receiving a rate of compensation in excess of $5000 per year.
>
> The records, I believe, will show that the interurban operations show a deficit. Tax returns of this county show a dividend of 6 per cent on

Ohio Public Service stock, although I understand the paying of such dividends is made possible by its electric light holdings, not from its interurban operations.

May I point out in this connection the retroactive character of this legislation, viz., making the provisions of the enactment effective at a date previous to the date of passage of the bill.

May we have your opinion as to whether or not this claimed refund should be paid?"

Upon inquiry at the office of the Tax Commission of Ohio, I find that the facts stated in your communication are correct; and upon the facts stated in your communication, the question presented is whether the proper county officials of Ottawa County, Ohio, are authorized to refund from the treasury of said county taxes for the year 1932 paid by the Ohio Public Service Company on the property of said company (other than real estate) on the ascertained valuation thereof apportioned to said county and to the taxing districts therein on account of property owned and used by the company in this county.

House Bill No. 674, referred to in your communication, is an act passed by the 90th General Assembly under date of July 1, 1933, and which went into effect on the 19th day of October, 1933. Section 1 of this act provides as follows:

"That the interurban railroad companies within the state of Ohio, as defined in sections 614-2 and 501 of the General Code of Ohio, and so much of the property thereof, excepting real estate, as may be used for railroad purposes by said companies be exempt from all state taxes and charges and from all county, city, and other political subdivision taxes and charges in the nature of a tax, except special assessments for the years during which such interurban railroad companies are operated and such property so used but not exceeding three years from January 1, 1932. Provided, however, that during such period if any interurban railroad company has in its employ an officer or an employe at a rate of compensation in excess of five thousand dollars per year, such company shall not be entitled to remission of taxes and charges."

Section 2 of this act provides for the suspension, during the period of time mentioned in section 1, of certain designated sections of the General Code, in so far as said sections are applicable to the levy and assessment of taxes on interurban railroad companies. By section 3 of this act, it is provided that the act shall not be construed to exempt from taxation in and during said three-year period, such interurban railroad companies as are paying or during said period have paid dividends or other earnings on the common or preferred stock of such companies.

In the consideration of the question presented in your communication and on the facts therein stated, it is noted that, although the Ohio Public Service Company is a single corporate entity, this company, for purposes of taxation, is two separate and distinct public utilities classified by sections 5415 and 5416, General Code, as an electric light company and as an interurban railroad company, respectively. And the property of said company used by it in the operation of these utilities is separately assessed for taxation pursuant to the requirement of section 5423, General Code, which provides that each year the Tax Commission shall ascertain and assess at its true value in money all the property in this state of each public utility, other than express, telegraph and telephone companies.

In this connection, it is noted, on the facts stated in your communication, that the Ohio Public Service Company is paying one or more of its officers or employes annual salaries in excess of five thousand dollars, and that, during the tax exemption period provided for in the statute, it has paid a six per cent dividend upon its stock. It further appears from your communication, however, that the salaries and dividends above referred to have been paid by the company out of its earnings as an electric light company, and that such payments of salaries and dividends have not been made by the company as an interurban railroad company nor out of its earnings as such. With respect to the situation here presented, I am advised that the Tax Commission of Ohio has consistently held that the fact that a corporation which owns and operates as public utilities an electric light company and an interurban railroad company, pays out of its earnings as an electric light company and in the operation of the same as a public utility, dividends on its stock as well as official salaries in excess of five thousand dollars, does not under said act operate to prevent the exemption from taxation of the property, other than real estate, used by the company in the operation of the interurban railroad company as a public utility. I am not at this time disposed to question the ruling of the Tax Commission on this question or to discuss the same further than to say that, under the provisions of the act here under consideration, no exemption of the property of an interurban railroad in this situation should be granted unless it clearly appears that no part of the dividends and excessive salaries paid by the company were paid from the earnings of the interurban railroad as a public utility.

Dismissing from consideration, therefore, this preliminary question suggested by the facts stated in your communication, which question has been disposed of by the ruling of the Tax Commission, the question here presented is whether on any view of the facts stated by you, the act above referred to considered with the provisions of sections 2588, 2589 and 2590, General Code, authorizes a refunder to the Ohio Public Service Company of the taxes paid by this company as an interurban railroad prior to the enactment of House Bill No. 674. In this connection, it is noted that on the facts stated in your communication there is no suggestion that the payment by this company of the taxes here in question was other than a voluntary payment of such taxes and, in this view, it is clear that unless the statutory provisions above noted authorize the county officials of Ottawa County to make this refunder, the taxes paid by the company cannot be recovered by refunder order or otherwise. *State, ex rel.,* vs. *Board of County Commissioners,* 119 O. S. 504, 510; *Whitbeck, Treasurer,* vs. *Minch,* 48 O. S. 210.

Although House Bill No. 674 provides generally for the exemption from taxation of the property of interurban railroad companies, other than real estate, used for railroad purposes by such companies, for the period of time therein designated, this act makes no provision whatever for the refunder of taxes paid by interurban railroad companies during the period of time designated in the act but prior to its enactment. The question therefore requires a consideration of the provisions of sections 2588, 2589 and 2590 of the General Code in connection with those of House Bill No. 674 providing for said exemptions. Section 2588, which, together with sections 2589 and 2590, General Code, was formerly a part of section 1038, Revised Statutes, provides that from time to time the county auditor shall correct all errors which he discovers in the tax list and duplicate, either in the name of the person charged with taxes or assessments, the description of 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 assessment.

Section 2589, General Code, provides that if, after the county auditor has delivered the duplicate to the county treasurer for collection, the county auditor is satisfied that any tax or assessment thereon, or any part thereof, has been erroneously charged, he may give the person so charged a certificate to that effect to be presented to the treasurer, who shall deduct the amount from such tax or assessment; and that if at any time the county auditor discovers that erroneous taxes or assessments have been charged and collected in previous years, he shall call the attention of the county commissioners to the fact at a regular or special session of the board, and if the county commissioners find that taxes or assessments have been so erroneously charged and collected, they shall order the auditor to draw his warrant on the county treasurer in favor of the person paying them for the full amount of the taxes or assessments so erroneously charged or collected, and the county treasurer shall pay such warrant from the general revenue fund of the county. By section 2590, General Code, it is provided that at the next semi-annual settlement with the auditor of state after the refunding of such taxes, the county auditor shall deduct from the amount of taxes due the state at such settlement the amount of such taxes as have been paid into the state treasury. In the case of *Butler* vs. *Commissioners,* 39 O. S. 168, which was decided after the amendment of the original act which was carried into the Revised Statutes as section 1038, so as to require the county auditor to correct all errors in the tax list and duplicate "when property exempt from taxation has been charged with tax", the court, in speaking of this amendment, said that the change in the statute was for the purpose of enabling the county commissioners to order the repayment of taxes erroneously collected upon property exempt from taxation. Assuming, therefore, that the above noted sections of the General Code authorized the refunder of taxes on exempt property, it is noted that under the statute such right of refunder is limited to cases where "property exempt from taxation has been charged with tax". It follows from this that the right of refunder of taxes paid with respect to property which is exempt from taxation exists only in cases where the property in question is exempt from taxation at the time the taxes are assessed against it.

In view of the provisions of section 28 of article II of the state constitution, which inhibits the enactment of retroactive laws, it is more than doubtful whether any construction can be given to the provisions of sections 2588 and 2589, General Code, with respect to the refunder of taxes other than that above indicated. In the case of *Commissioners* vs. *Rosche Brothers,* 50 O. S. 103, it was held that an act of the legislature requiring the county commissioners of Hamilton County to repay out of unexpended funds belonging to the county in the county treasury moneys in amounts theretofore erroneously paid by manufacturers on manufactured and partly manufactured articles, was retroactive in effect and in conflict with the above noted section of the state constitution. The court in its opinion in this case, after noting the essential features of a retroactive law within the meaning of constitutional provisions of this kind, as indicated by previous decisions of the federal and state courts, said:

> "The statute under consideration, when tested by these principles, operates retroactively in its application to the claim of defendants in error. The last payment of the taxes that they sought to recover, was made more than nine years before the law was passed. The property had been listed and the taxes thereon paid voluntarily. They interposed no objection or protest to the payment, nor was any threat or offer made by the county treasurer to compel payment by summary or other process

provided by statute for that purpose. For money paid under these circumstances the well settled law of this state, as it then stood, and remained up to the time of the passing of this statute, forbid a recovery. *Mays* vs. *Cincinnati,* 1 Ohio St., 268; *Marietta* vs. *Slocomb,* 6 Ohio St., 471; *Wilson* vs. *Pelton,* 40 Ohio St., 306; *Whitbeck, Treas.* vs. *Minch,* 48 Ohio St., 210. Nor did the circumstances under which it was listed constitute such an error as might be corrected, and a refunding order drawn by the county auditor by virtue of sec. 1038, Revised Statutes, for the excess that was thus paid. *State* vs. *Commissioners,* 31 Ohio St., 271; *State ex rel.* vs. *Cappellar,* 5 W. L. B., 833. Therefore when the defendants in error voluntarily, though erroneously, listed their property, and voluntarily paid the taxes assessed upon it, neither by statute nor by any principle of the common law as administered in Ohio, was an obligation imposed upon the county of Hamilton to refund the money received. If such an obligation had existed, the forms of procedure then provided by our system of practice, were ample to afford complete relief. The obstacle in the way of the defendants in error was not inadequate methods of procedure, but the absence of a law vesting in them a right of recovery. This want the statute under consideration attempted to supply.

This statute, it is contended, is remedial, and remedial statutes may be retroactive. It is remedial no doubt, in that enlarged sense of that term, where it is employed to designate laws made to supply defects in, or pare away hardships of, the common law, but not remedial in the sense of providing a more appropriate remedy than the law before afforded, to enforce an existing right or obligation. The statute under consideration provided no new method of procedure; it simply imposed upon Hamilton county an obligation towards these plaintiffs in error that did not attach to the transaction when it occurred. In attempting to accomplish this result the legislature transcended its constitutional powers.

Counsel contend that the statute is in furtherance of natural justice, and that the clause of the constitution under consideration does not prohibit retroactive laws of that character. *Lewis, Trustee,* vs. *McElvain,* 16 Ohio, 347; *Trustees* vs. *McCaughy,* 2 Ohio St., 152; *Acheson* vs. *Miller,* 2 Ohio St., 203; *Burgett et al.* vs. *Norris,* 25 Ohio St. 308.

To uphold a statute on this ground, where it seeks to create a liability upon a past transaction, where none existed when it occurred, if it can be done at all, the natural justice of the object sought to be accomplished should be indisputable. In the case before us no misconduct is chargeable to the officials of Hamilton county. If the defendants in error are to be held free from negligence, and to have been innocently misled, it was the result of the erroneous instructions sent out by the auditor of state. The money that they now seek to recover from the county was voluntarily paid to the treasurer who was bound to receive it. Without notice of any claim to its repayment by defendants in error, he distributed to the city of Cincinnati and the state, their respective proportions of the fund. Under these circumstances the natural justice of requiring the tax payers of Hamilton county to refund the entire sum is a question upon which minds may differ."

As indicated by the decision of the Supreme Court in the case of *Commissioners* vs. *Rosche Brothers, supra,* neither the state nor the counties wherein interurban railroad companies paid taxes on property owned and used by them were under any moral obligation to refund such taxes at the time of the enactment of House Bill No. 674, above referred to. See *Spitzig* vs. *State, ex rel.,* 119 O. S. 117, 120. In this view, it seems clear that the statutory provisions here under consideration cannot be construed so as to authorize the refunder of taxes voluntarily paid by interurban railroad companies prior to the enactment of House Bill No. 674, without offending the provisions of section 28 of article II of the state constitution, above noted.

Upon the considerations above discussed and by way of specific answer to the question made in your communication, I am of the opinion that the county auditor and county commissioners of Ottawa County are not authorized to refund to the Ohio Public Service Company the taxes heretofore paid by it upon property owned and used by it in the operation of an interurban railroad in said county.

In conclusion, it is, perhaps, pertinent for me to say that no opinion is here expressed or intended with respect to the constitutionality of the provisions of House Bill No. 674 generally or in their application to unpaid taxes for the year 1933 assessed against the property of interurban railroad companies used in operation. As above indicated, this opinion is limited solely to the question of the authority of the county to refund property taxes which were paid by an interurban railroad company prior to the enactment of House Bill No. 674, above noted and discussed.

Respectfully,
JOHN W. BRICKER,
Attorney General.

2379.

BARBER—BOARD OF BARBER EXAMINERS UNAUTHORIZED TO REVOKE LICENSE OF BARBER BECAUSE CONVICTED OF FELONY PRIOR TO SEPTEMBER 28, 1933.

SYLLABUS:

The State Board of Barber Examiners is without authority to suspend or revoke a license of a barber because of the fact that he has been convicted of a felony prior to September 28, 1933, in the absence of a showing of misrepresentation in the original application for such license.

COLUMBUS, OHIO, March 16, 1934.

State Board of Barber Examiners, Columbus, Ohio.

GENTLEMEN:—This will acknowledge receipt of your request for my opinion, which reads as follows:

> "This board requests an opinion on Section 1081-17 (1) of the General Code as to the suspension of a license of a barber who has been convicted of a felony before September 28, 1933."