

the 1933 licenses and say that it was an error and demand the difference in fees for the last year before issuing the 1934 licenses for such commercial cars.

Specifically answering your inquiries, it is my opinion:

1. By virtue of Section 6292 and 6294, General Code, if the weight of the commercial car reported by the applicant for 1933 licenses was not computed upon its weight "fully equipped" the Registrar of Motor Vehicles may refuse to issue 1934 licenses for such car to such applicant until he has paid for such additional weight for the year 1933.

2. By virtue of Section 6294, General Code, even though the applicant for licenses for a commercial car for the year 1933 did report the correct weight of the car fully equipped, if during the year he added additional weight, the Registrar of Motor Vehicles may refuse to issue 1934 licenses for such car until such applicant has paid for the additional weight for the remaining period of the year 1933.

3. By virtue of Section 6294, General Code, if the weight of the commercial car reported for 1933 licenses was incorrect, it being less than that reported for that of 1934, and such report was not made in good faith by the applicant for the 1933 licenses, the Registrar of Motor Vehicles may refuse to issue 1934 licenses for such car until such applicant has paid the true weight of such car fully equipped for the year 1933.

4. If, however, the applicant for 1933 licenses reported a lesser weight for the car fully equipped than the one he is reporting for the 1934 licenses and in good faith with complete absence of fraud reported such as the actual weight of the car "fully equipped", and no additional equipment was added during the year, the Registrar of Motor Vehicles may not refuse to issue 1934 license tags until such difference in fee is paid.

Respectfully,

JOHN W. BRICKER.

*Attorney General.*

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2086.

TAX REFUND—PAYMENT OF TAXES ON SAME PARCEL OF REAL ESTATE BY TWO RIVAL CLAIMANTS—EXCESS PAYMENT NOT RETURNABLE WHEN.

*SYLLABUS:*

1. *When by reason of a dispute between two or more parties as to the ownership of a parcel of real estate, each party claiming to be the owner of such parcel, pays the taxes thereon, and one of such excess payments by authority of Section 286, General Code, is placed in a special trust fund and no demand for refund of such excess payment is made until after the transfer of such moneys from the special fund to the general fund of the political subdivision, the party wrongfully paying such excess can not recover such excess payment.*

2. *Opinion of the Attorney General, reported in the Opinions for 1932, Volume III, page 1326, holding a former county treasurer personally liable after the expiration of his term of office for excess payment of taxes received during his term of office, discussed and restricted.*

COLUMBUS, OHIO, December 30, 1933.

HON. FRAZIER REAMS, *Prosecuting Attorney, Toledo, Ohio.*

DEAR SIR:—Your recent request for opinion, reads:

“In the year 1927, while the ownership of a certain piece of property was being litigated, both claimants paid the taxes thereon. The litigation has been terminated, and the party who was adjudged not to be the owner is demanding from the county treasurer a refund of the double payment.

The county auditor advises that this double payment was placed in the surplus fund for that year, and that said surplus fund has been exhausted by the refunding of other over-payments, and that there is now no fund available from which to make a refund to the present claimant.

Will you advise whether, in your opinion, the opinion of your predecessor in office, No. 4875, for the year 1932, providing in substance for the presentation of a claim like this to the former treasurer rather than his successor in office, would control in the present case.”

The opinion of my predecessor in office to which you refer as “Number 4875” is evidently Opinion No. 4785, appearing in Opinions of the Attorney General for 1932, Vol. III, p. 1326, the syllabus of which reads as follows:

“1. When an overpayment or a double payment of a certain item of taxes is made to the county treasurer such county treasurer is chargeable with such overpayment or double payment as an individual and not as county treasurer.

2. Sections 2589 and 2590, General Code, have no application to a recovery of an excess payment or a double payment of items of taxes to the county treasurer. The taxpayer’s legal remedy in the event that such sums are not refunded to him voluntarily, is by virtue of Section 12077, General Code, and in an action by virtue of such section the treasurer who received the overpayment or double payment is the proper party defendant rather than his successor in office. A county treasurer who receives from a taxpayer a sum in excess of the amount standing charged against an item of taxes in payment thereof, or who receives a payment of such item of taxes twice is not entitled to require an indemnifying bond before returning such excess to the taxpayer entitled thereto.”

In such opinion, my predecessor in office follows the reasoning of the court in the cases of *Homberger vs. Case, Treas.*, 13 Bull., 511; *Huzberg vs. Willey, Treas.*, 13 Bull., 334; *McCoy vs. Chillicothe*, 3 Oh. 37; *Loomis vs. Spenser*, 1 O. S. 153; *Champaign Co. Bank vs. Smith*, 7 O. S. 43. I concur with the reasoning and holdings of such cases, in view of the statutes which existed at the time they were rendered. However, after the date of such court decisions the legislature enacted different statutory provisions. In Section 286, General Code, the legislature has laid down the following rule to be followed by the county treasurer in the disposition of moneys received by him under color of his office:

“The term ‘public money’ as used herein shall include all money received or collected under color of office, whether in accordance with or

under authority of any law, ordinance or order, or otherwise, and all public officials, shall be liable therefor. All money received under color of office and not otherwise paid out according to law, shall be due to the political subdivision or taxing district with which the officer is connected and shall be by him paid into the treasury thereof to the credit of a trust fund, there to be retained until claimed by the lawful owner; if not claimed within a period of five years after having been so credited to said special trust fund, such money shall revert to the general fund of the political subdivision where collected."

By reason of the provisions of such statute, and the provisions of Section 2639, General Code:

"At the expiration of his term of office or on his resignation or removal from office, the county treasurer shall deliver to his successor all moneys, books, papers and other property in his possession as treasurer, and in case of the death or incapacity of the treasurer, they shall in like manner be delivered over by his legal representatives."

It would appear that all double payments of real estate taxes under present statutes, are required to be paid into a special trust fund in the possession of the treasurer and that title to such fund is transferred by one treasurer to his successor in office upon expiration of his term of office. I am therefore, unable to concur in that part of the conclusion of such opinion which holds a former county treasurer personally liable for the return of overpayments of taxes, when he has turned over, or delivered the proceeds of such overpayments to his successor in the manner required by Section 2639, supra.

From the provisions of Section 286, General Code, supra, it is evident that the moneys in such trust fund should at all times be equal to all unrefunded overpayments of taxes that were made during the preceding five years. There can be but one legal reason why this fund should not be equal to all outstanding overpayments of taxes, and that is when such overpayment has not been claimed within five years from the time of payment and it has been transferred to the general fund of the county. You state that this special trust fund has been exhausted and the claim in question is yet outstanding. While such shortage might possibly have been caused by unauthorized payments from such fund, I am not herein assuming such to be the fact, since no mention of such fact is made in your request.

Your inquiry raises a question as to whether such provision of statute is not a statute of limitations on the right of recovery of the overpayment by the taxpayer. In other words, do the provisions of Section 286, General Code, bar the right of the taxpayer to recover a double or overpayment of taxes after the lapse of five years? As stated in Lewis' Sutherland Statutory Construction, Section 544:

"Statutes limiting the right to bring actions to particular periods are restrictive and will not be extended to any other cases than the cases expressly provided for, and the exceptions are allowed a liberal effect;

\* \*"

In other words, statutes limiting the time within which a litigant may bring

his action must be liberally construed in favor of the right to maintain the action. Black on Interpretation of Laws, Section 122.

Section 286, General Code, does not, in specific terms, purport to set a time within which a claim must be filed or an action brought for the recovery of an overpayment of taxes. It, in terms, provides merely that the moneys shall be retained in a special trust fund during a five year period. It might well be assumed that the legislative intent was to permit such overpayment to be recovered by the taxpayer at any time within the five year period; for if such were not the intent no useful purpose for the holding of such moneys in trust for the five year period is readily discernable.

Some question also arises by reason of the provisions of Section 12075, General Code. Such section, in so far as material, reads:

"Common pleas \* \* courts may \* \* entertain actions to recover them (illegal collections of taxes) back when collected, without regard to the amount thereof, but *no recovery shall be had unless the action be brought within one year after the taxes or assessments are collected.*" (Italics, the writer's.)

It has been held that the county treasurer has no legal authority to collect or receive any moneys in payment of taxes unless by virtue of an entry on the tax duplicate in his possession or on warrant of the county auditor. *Hull vs. Alexander*, 69 O. S. 75; *Aetna Ins. Co. vs. Ginder*, 114 O. S. 55.

In Sections 2589, 2590 and 2591, General Code, the legislature has provided a method of repayment of taxes which have been "erroneously charged and collected." Such sections provide in substance, that when the county auditor has found that a tax has been erroneously charged and also erroneously paid within the five year period preceding such discovery, he shall call the attention of the county commissioners thereto; if the county commissioners find such reported facts to be true they are authorized to direct the county auditor to draw a warrant on the county treasurer in favor of the taxpayer for the amount of such payment. Such warrant is payable from any surplus or unexpended funds in the hands of the county treasurer.

These sections could scarcely be held to be applicable to the facts presented in your request, since in the case of an overpayment or double payment of taxes the excess payment is not supported by any charge whatsoever. The sections referred to above, only purport to provide the method of refund of payment in a case where there was both an erroneous assessment or charge and a payment of the amount so erroneously charged.

Section 12075, General Code, authorizes the taxpayer to bring an action for the recovery of taxes which have been illegally assessed, provided that such action to recover shall be brought within one year after the payment of such illegal taxes. There is considerable doubt in my mind as to whether such section has any application to the inquiry presented by you, in view of the fact that recovery sought is not of taxes illegally assessed, but rather of money received by the county treasurer without authority of law. However, assuming, for the purposes of this opinion only, that such contentions are entirely unfounded, there is another reason why the payment could not be recovered under such section even if within the one year limitation period. It has been repeatedly held by the Ohio courts that only such illegal taxes as have been involuntarily paid may be recovered under the authority of such section. *Mays vs. Cincinnati*,

1 O. S. 268, 274; *Marietta vs. Slocumb*, 6 O. S. 471; *Whitbeck vs. Minch*, 48 O. S. 210; *State vs. Bader*, 56 O. S. 718; *Wilson vs. Pelton*, 40 O. S. 306; *State vs. Commissioner*, 119 O. S. 504.

From an examination of such cases it would appear that in the absence of provisions of statute authorizing the repayment of moneys voluntarily paid into the county treasury no recovery is authorized.

See also, *Ex'rs. of Est. of Long vs. State*, 21 O. A., 412. As stated in an article appearing in 45 Harvard Law Review, 511:

"The generally stated rule in the absence of statute is that illegally collected taxes may not be recovered unless they are paid under protest. \* \* The rule applies generally to taxes generally, including special assessments and illegal as well as unconstitutional taxes."

See *Elliot vs. Swarthwout*, 10 Pet. (U. S.) 137; *State vs. Canfield Oil Co.*, 34 O. App. 267. At page 514 of such article it is stated, on authority of *McAdoo Petroleum Corp. vs. Pankey*, 294 Pac. 322, that:

"If the money had not been covered into the treasury action to recover it from a special fund would lie."

Logically, the statement of such author appears to be a fair interpretation of a statute directing the overpayment or excess payment to be paid into a "special trust fund" as in Section 286, General Code. While such section does not in terms grant specific authority for the return of the excess payment or overpayment to the taxpayer, yet I can conceive of no legislative purpose in the creation of such fund were it not to enable the treasurer to make the refund therefrom. It is an elemental rule applicable to the interpretation of statutes, that every statute shall, if possible, be so construed to carry out the purpose of the legislature in its enactment. I am therefore of the opinion that the overpayment may be returned to the taxpayer as long as the amount thereof remains in the special trust fund authorized by Section 286, General Code, to be created.

Your inquiry raises a further consideration as to whether the refund may be made after the moneys have been transferred from the special trust fund, pursuant to the authority of Section 286, General Code. In view of the rule hereinbefore referred to, that taxes illegally paid may not be recovered when the moneys therefrom have been commingled with the funds of the subdivision in the absence of statutory authorization, and further, in view of the fact that there is no statute in Ohio authorizing recovery after such time, it would appear that the taxpayer has no right of recovery after such time.

It is therefore my opinion, in specific answer to your inquiries, that:

1. When by reason of a dispute between two or more parties as to the ownership of a parcel of real estate, each party claiming to be the owner of such parcel pays the taxes thereon and one of such excess payments by authority of Section 286, General Code, is placed in a special trust fund and no demand for refund of such excess payment is made until after the transfer of such moneys from the special fund to the general fund of the political subdivision, the party wrongfully paying such excess can not recover such excess payment.

2. Opinion of the Attorney General, reported in the Opinions for 1932, Volume III, page 1326, holding a former county treasurer personally liable after

the expiration of his term of office for excess payment of taxes received during his term of office, discussed and restricted.

Respectfully,  
JOHN W. BRICKER,  
*Attorney General.*

2087.

CEMETERY LOT—DEED THERETO EXECUTED BY TOWNSHIP TRUSTEES RECORDED WITH TOWNSHIP CLERK.

*SYLLABUS:*

1. *A deed executed by township trustees for a cemetery lot, pursuant to section 3448, General Code, is not an absolute conveyance of land which requires presentation to and endorsement by the county auditor under section 2768, General Code.*

2. *Such a deed is not required by law to be filed with and recorded by a county recorder, the recordation thereof being controlled by section 3447, General Code, which provides that the township clerk shall record such deed in a book kept by him for that purpose.*

COLUMBUS, OHIO, December 30, 1933.

HON. JAMES M. HOURSARE, *Prosecuting Attorney, Eaton, Ohio.*

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

“I am hereby presenting to you a statement of a certain condition brought about by the deed for a cemetery lot having been marked ‘Transfer not Necessary’, by the auditor.

3448 G. C. Sale of lots and deeds therefor. \* \* \* Upon complying with the terms of sale, purchasers of lots shall be entitled to receive a deed or deeds therefor which the trustees shall execute, and which shall be recorded by the township clerk in a book for that purpose, the expense of recording to be paid by the person receiving the deed. \* \* \*

As no plat or title is shown for this or other cemetery lots in the auditor’s records, and such property being exempt as to taxes, does the auditor have authority to indicate by any statement on such deed that it had passed through his hands?”

Section 2768, General Code, provides in part as follows:

“The county recorder shall not record any deed of absolute conveyance of land \* \* \* until it has been presented to the county auditor and by him endorsed ‘transferred,’ or ‘transfer not necessary.’”

Your question requires a determination as to the character and effect of a deed executed by township trustees for a cemetery lot, and also as to the powers and duties imposed upon the county auditor and county recorder with respect to such a deed.

In this connection, reference must be had to section 2757, General Code, which provides that the county recorder shall keep four sets of records, specify-