Note from the Attorney General's Office:

1933 Op. Att'y Gen. No. 33-1856 was overruled in part by 2011 Op. Att'y Gen. No. 2011-009.

to the requirements of Title I of said Act, but reserving to me the power to approve or disapprove of the provisions of any code of fair competition entered into in accordance with Title I of said Act. This Order is to remain in effect until revoked by me.

(Signed) FRANKLIN D. ROOSEVELT

June 26, 1933."

Since the Secretary of Agriculture is an officer having a seal, he might authenticate the "authenticated copies" of codes with reference to industries engaged in the handling of foodstuffs and tobacco products. When such exemplification is presented his name, title and seal should be substituted for that of the President in the above authentication form.

Respectfully,
JOHN W. BRICKER,
Attorney General.

1856.

DISTRIBUTION OF TAXES—UNJUST ENRICHMENT OF ONE POLITICAL SUBDIVISION AT EXPENSE OF ANOTHER THROUGH ERRONEOUS DISTRIBUTION—HOW RECOVERED—STATUTE OF LIMITATIONS—AUTHORITY OF COUNTY AUDITOR TO RECTIFY ERROR.

SYLLABUS:

1. *Where a political subdivision has been enriched at the expense of another subdivision, by reason of there having been distributed to it through a mistake of fact, tax revenues which should have been distributed to the other subdivision, the latter may recover from the former in an action in the nature of an action for money had and received, the amount which the former subdivision had been so unjustly enriched.*

2. *In such an action recovery is limited to the amount of such unjust enrichment which has accrued to the defendant during the six years immediately preceding the filing of the action provided the statute of limitations is pleaded by the defendant.*

3. *In an action by a political subdivision against another subdivision on account of the loss to it of public revenues which had wrongfully been distributed to the defendant subdivision, the statute of limitations being pleaded, the time should be computed from the date when the officer whose duty it was to distribute the revenues should have distributed them to plaintiff and not from the time the plaintiff learned of the wrongful distribution.*

4. *A county auditor is without authority to correct, on his own initiative, errors in apportionments of real estate taxes at the next or any succeeding apportionment after an erroneous distribution has been made.*

5. *By force of Section 2602, General Code, a county auditor is authorized, when settling with the treasurer on account of general personal and classified property taxes and when apportioning those taxes to the taxing districts entitled to the same, to correct any error which may have occurred in the apportionment of these taxes at any previous settlement.*

6. *Where the proceeds of tax levies have been erroneously distributed to a political subdivision not entitled to the same, restitution may lawfully be made by*

it to the subdivision to which apportionment and distribution should have been made in the first place, regardless of the time when the erroneous distribution took place, and in such case a county auditor as distributing officer, may be authorized by the proper subdivision to withhold future apportionments from one subdivision and make distribution thereof to another in such manner as may be agreed upon by the subdivisions interested.

COLUMBUS, OHIO, November 10, 1933.

HON. RUSSEL E. LYONS, *Prosecuting Attorney, Coshocton, Ohio.*

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

> "The Board of Education of the Crawford Township Rural School District have asked us to secure your opinion upon the following matter:
>
> A number of farms located in Clark Township, Holmes County, are joined for school purposes with Crawford Township, Coshocton County, by action of the Joint Board of District School Supervisors and the Holmes County Board of Education, at numerous times up to 1917.
>
> By error or oversight, a portion of these farms were not transferred to the joint school district and taxes assessed and collected from the owners thereof were distributed to the Board of Education of the Clark Township School District, Holmes County, instead of to the Board of Education of Crawford Township, Coshocton County. The result of this oversight or error has been that Crawford Township has paid for the education of a number of Clark Township school children.
>
> What procedure should be followed to refund these undistributed taxes to Crawford Township and for how many years can the adjustment go back? During a number of these years the tax assessed in the Clark Township portion of the school district has been at the rate for Clark Township, Holmes County, which has been much lower than the Crawford Township rate, Coshocton County. If an adjustment is made, should it be made at the Clark Township rates or the Crawford Township rates?"

From your statement it appears that at all times since a portion of the territory of Clark Township Rural School District in Holmes County was transferred to the Coshocton County School District and attached to the Crawford Township Rural School District in Coshocton County, the school pupils who resided in the territory thus attached to the Crawford Township district have been attending schools supported with funds of the Crawford Township District although that district has not received the proceeds of school taxes levied for school purposes in the territory of the Clark Township District which had been transferred to the Crawford Township District due to an error of the county auditor of Holmes County in not making the proper distribution of these taxes. The result is, that the Clark Township District has been enriched at the expense of the Crawford Township District, and this should be corrected if the law permits.

When transfers of school territory were made from one county school district to another, or from one local district to another prior to 1917 as well as since, a map showing the change, should have been filed with the county auditor

or county auditors of the county or counties affected by the transfer. I assume this was done in these cases. It therefore became the duty of the auditor of Holmes County to thereafter distribute the proceeds of tax levies for school purposes in the territory transferred, to the school district to which the territory had been annexed. In order to correct the matter, it will be necessary to take from the treasury of the Clark Township District the money which it received that really belonged to the Crawford District, and pay it into the Crawford District treasury, or withhold from future distributions to the Clark Township District a sufficient amount to reimburse the Crawford Township District and distribute it to the Crawford Township District.

Obviously, neither the county auditor of Holmes County nor anyone else, has the power to withdraw funds from the Clark Township District treasury for this purpose, except the clerk of the Clark Township Board of Education, and he can not lawfully do so except by order of the board. I am of the opinion that if the board of education of the Clark Township District wishes to do so, and funds are available, it is within its power to pay to the Crawford Township District a sufficient amount to cover the school tax revenues which it had wrongfully received from territory lying in the Crawford Township District. If this is not done, it then becomes necessary to inquire as to the power of the Holmes County Auditor to withhold from future tax revenues which accrue to the Clark Township District, a sufficient amount to cover what that district had improperly received, and pay it to the Crawford Township District.

I do not find any express authority for a county auditor when making settlements with the county treasurer and when determining the proper amount of tax revenues with which the several taxing districts in the county are to be credited, to correct errors in previous apportionments of real estate taxes. In present Section 2602, General Code, relating to the settlements by the county auditor with the treasurer for general personal and classified property taxes on the 10th of May and October of each year, the certification by the treasurer of the delinquent list and the liability of the treasurer with reference thereto, there will be found the following provision:

> "After first correcting any error which may have accrued in the apportionment of taxes at any previous settlements, the auditor shall certify the balance due the state, the balance due the county and the balance due each other taxing district, and forthwith shall record such list of delinquencies in his office."

The corresponding statute, Section 2596, General Code, relating to the settlement by the county auditor with the county treasurer for real and public utility property taxes on the 15th day of February and the 10th day of August of each year, does not contain the provision quoted above, from Section 2602, General Code, or any similar provision. It does not extend power to the auditor to correct errors in previous apportionments of this class of taxes nor is this power expressly granted to the auditor by any other statute.

Sections 2588 and 5571, General Code, authorize the auditor to correct certain classes of clerical errors therein enumerated. An examination of these statutes discloses that reimbursement of a political subdivision for losses accruing by reason of erroneous apportionments in the past is not provided for.

Although the question has never come before the courts of Ohio, at least so far as officially reported decisions disclose, I am of the opinion that the Crawford Township District would in an action of the nature of an action for money

had and received, recover from the Clark Township District the amount which the Clark Township District had been enriched at the expense of the Crawford Township District. To determine this amount, it would be necessary to compute the school taxes in question at the rates that would have been levied by the Crawford Township district, provided these rates were less than the rate which was actually levied. If the amount of school taxes which would have been received from this territory if they had been levied at the Crawford Township District rates would have been greater in the aggregate than what was actually received at the rates levied, that is, the Clark Township District rates, of course no more could be recovered than the Clark Township District received.

It was held by the court of King's Bench, as early as 1725, in the case of *Attorney General* vs. *Parry,* 2 Com. 481, as follows:

> "Whenever a man receives money belonging to another without any reason, authority or consideration, an action lies against the receiver for money received to the other's use; and this as well where the money is received through mistake, under color and under an apprehension, though a mistaken apprehension, of having good authority to receive it, as where it is received by imposition, fraud or deceit in the receiver."

The principle of law established by the above case has been universally followed by the courts of this country. A long list of authorities, including the Supreme Court of the United States and the courts of last resort of almost every state in the United States except Ohio, in which this principle has been applied, are catalogued in Volume 2, Ruling Case Law, p. 778 and Volume 1, Ruling Case Law Supplement, p. 547.

It has been directly applied in cases involving the distribution of taxes. The sixth and eighth divisions of the headnotes of the case of *City of Norfolk* vs. *Norfolk Co.,* 120 Va., 356, 91 S. E., 820, are as follows:

> "6th: Where defendant in assumpsit has received money from a third person through some mistake or fraud, by law or authority, which but for the mistake or fraud, would have vested the right to the money in plaintiff, plaintiff may recover.
>
> 8th: Where territory formerly in a county, was annexed to a city of the same name, and railroad and terminal property was located in such territory but was erroneously assessed after the annexation as if in the county, and the error in assessment was not corrected in thirty days so that the assessment is final and the railroad and terminal companies were required by law to pay the taxes to the county, which they did, the receipt by the county being a complete acquitance, the county was liable to the city in an action of indebitatus assumpsit for the money received by the county."

In the case of *Town of Balkan, Respondent* vs. *Village of Buhl,* 197 N. W., 266 (Minn. 1924) it is held:

> "2. The action for money had and received is a remedy whereby one municipality may recover from another tax money which in equity and good conscience belongs to the former.
>
> 3. Where, pending the proceedings for the annulment of the attempted annexation, the county auditor spreads an annual tax levy of

the village against the property, erroneously assuming that it has ceased to be part of the adjoining township and has become a part of the village, and accordingly the owners of the property have voluntarily paid the tax so levied for municipal purposes, and it has been paid to the village rather than the town, the latter is entitled to the money, and may recover it. It is a case where the village has unlawfully enriched itself at the expense of the town. Accordingly, the latter's title to the money is clear, and it is entitled to judgment upon the quasi contractual obligation of the village to pay to the town money which in equity and good conscience belongs to it."

In the case of *Gilpatrick* vs. *City of Hartford,* 98 Conn. 471, 120 Atl. 317 (1923) it is held:

"Where the payor acts under a mistake of his rights and duties and is free from any moral or legal obligation to make the payment, and the payee in good conscience has no right to retain it, the money paid may be recovered whether it was paid under mistake of fact or law.

Taxes on stock belonging to the estate of a deceased person paid by the state treasurer by mistake to a city other than that of the decedent's residence at the time of his death cannot be retained by such city although expended.

The fact that a municipality waited two and a half years after taxes wrongfully belonging to it have been by mistake paid to another to institute suit, held not a bar to recovery."

In the case of *Eugene* vs. *Lane Co.,* 50 Oregon, 468, 93 Pac. 255 (1908) it was held:

"Where under a city charter, taxes on property within the city, for road purposes within the city should have been levied by the city, and the county collected them as required by B. & C. Compiled Statutes, 3094, and the taxes were voluntarily paid, the city was entitled to recover them from the county."

In the case of *Erie County* vs. *Town of Tonowanda,* 159 N. Y. S., 714, affirmed 162 N. Y. S. 994 (1916) it is held:

"Under tax law Section 24 imposing a tax on bank stock and requiring the city board of supervisors to ascertain the tax rate of each tax district in which the shares shall be taxable and apportion the tax accordingly, a county, which through mistake had erroneously paid to a town a share of money collected for bank taxes on the stock of a national bank located in a city, which was a taxing district and ultimately entitled to the money, had the legal capacity to maintain an action to recover from the town the amount so paid, as the county held the money collected in trust for the benefit of those to whom it should go under the law and as its failure to make proper distribution might render it liable to the districts having the right to claim the money."

In the case of *Lyon County* vs. *Storey Co.* (Nev.) 1911, it was held:

"In an action by one county against another county for taxes collected by defendant county on property claimed to be in plaintiff county, evidence held to sustain a finding for plaintiff."

In the case of *Village of Elmira Heights* vs. *Town of Horseheads,* 250 N. Y. S., 50, affirmed 254 N. Y. S., 418 (1932) it was held that a village could recover by action a portion of corporate franchise tax money erroneously paid to a town. See also *First National Bank* vs. *Town of York,* 249 N. W. 513 (1933 Wis.) See also *Putnam Co.* vs. *Smith Co.,* 129 Tenn. 394, 164 S. W. 1147 (1913). *City of Buffalo* vs. *Erie Co.,* 151 N. Y. S., 409, affirmed 220 N. Y. 620, 115 N. E. 1036 (1917); *Hobert Twp.* vs. *Town of Miller,* 54 Ind. App., 151, 102 N. E. 847 (1913); *City of Chicago* vs. *Cook Co.* 136 Ill. App. 120 (1907); *State* vs. *Village of St. Johnsburg,* 59 Vt. 332, 10 Atl. 531; *Strough* vs. *Board of Supervisors,* 119 N. Y. 212, 23 N. E. 553; *Bridges* vs. *Supervisors of Sullivan Co.,* 92 N. Y. 570; *Kilbourne* vs. *Board of Supervisors of Sullivan Co.* (N. Y.) 33 N. E. 159; *Colusa Co.* vs. *Glenn Co.,* 117 Calif. 434, 49 Pac. 457; *Humboldt Co.* vs. *Lander Co.,* 24 Nev. 461, 56 Pac. 228; *Logan Co. Supervisors* vs. *City of Lincoln,* 81 Ill. 156; *Ontanagon Co. Supervisors* vs. *Goebec,* 74 *Mich.,* 421, 42 N. W., 170.

A case in point is *Village of Mayfield Heights* vs. *Village of Gates Mills,* 39 O. L. R., 129, decided by the Court of Appeals of Cuyahoga County, October 9, 1933. In this case recovery was denied solely on the ground that the money had been paid under a mistake of law and not of fact, citing the case of *Baer* vs. *State ex rel. Stanton,* 111 O. S., 327. Whether or not a subdivision could not recover in any case of this character when money sought to be recovered had been wrongfully paid out under a mistake of law need not now be decided as unquestionably the wrongful distribution of the tax revenues with which we are here concerned, was done under a mistake of fact.

In an action of this kind the plaintiff would not be held to be estopped simply because no objection had been made to the wrongful distribution of the taxes. In the case of *City of Buffalo* vs. *Erie County,* 151 N. Y. S. 409, affirmed 220 N. Y. 620, it is held:

"When the whole amount of a bank stock tax collected by a county treasurer was payable to a city in which the banks were located, the city by making no objection to an illegal apportionment of the tax by the county board of supervisions, as between the city and county, for several years, and until June 1911, did not estop itself to recover the part of the tax so illegally withheld."

Nor will the defense of laches or acquiescence prevail in an action of this character unless the rights of third persons intervene. *People ex rel. Village of Cobleskill* vs. *Supervisors,* 126 N. Y. S. 259; *Strough* vs. *Board of Supervisors,* 119 N. Y. 212, 23 N. E. 552.

In an action by one political subdivision against another, for moneys rightfully belonging to the one but wrongfully paid to the other, being in the nature of an action ex contractu, the statute of limitations applicable to contracts not in writing will, in my opinion, apply. Section 11222, General Code, provides as follows:

"An action upon a contract not in writing, express or implied, or upon a liability created by statute other than a forfeiture or penalty, shall be brought within six years after the cause thereof accrued."

An action against an officer for money converted to his own use is barred in six years. *Mount* vs. *Lakeman,* 21 O. S. 643; *State* vs. *Blake,* 2 O. S. 147; *State* vs. *Conway,* 18 Oh. 234.

An action to recover money paid by mistake or wrongfully appropriated in the absence of concealed fraud, is barred in six years. *Ward* vs. *Ward,* 12 C. D. 59. In this connection a question arises as to when the statute begins to run. It has been generally held that an action against a public officer for not paying over to the proper person money in his hands required by law to be distributed or paid by him, accrues at the time it first became the duty of the officer to pay it. *Board of Commissioners of Cloud Co.* vs. *Hostetler,* 6 Kans. App. 286, 51 Pac. 62; *State* vs. *Davis,* 42 Oreg. 34, 71 Pac. 68; *Pierson* vs. *Board of Supervisors of Wayne County,* 155 N. Y. 105, 49 N. E. 766; *People* vs. *Weinke,* 122 Calif, 535, 55 Pac. 579.

I am of the opinion that this same rule would apply in cases of the character which we are here considering. A somewhat analogous proposition was decided in the case of *Lathrop* vs. *Snellbaker,* 6 O. S. 276. It was there held:

> "A justice of the peace having neglected to perform an act required by law, from which neglect plaintiff suffered a loss, and for which he brought his suit, the statute of limitations being pleaded, the time must be computed from the date of the negligence, and not from the time plaintiff first knew of it."

The rule here referred to was applied in the case of *City of Buffalo* vs. *Erie Co., supra,* where it was held:

> "Tax law, Section 24 provides that the board of supervisors shall issue their warrant or order to the county treasurer on or before December 15th in each year, commanding him to collect back taxes and to pay to the proper officer in each of the political subdivisions the proportion of such tax to which it is entitled under the provisions of the chapter. Held, that the neglect or refusal of the board to direct the county treasurer to pay over to a city the entire bank tax collected from banks located in the city was a violation of duty imposed by law, and gave the city a complete cause of action to recover the whole tax, which arose on the first day of January succeeding their payment, so that the statute of limitations began to run as against the city's right to recover on that date and barred the city's action unless commenced within six years."

Statutes of limitation do not confer a right of action and do not deal with matters of substantive right. They relate solely to the remedy and are available only as a defense. They do not extinguish the debt or affect its validity. They merely withhold the right to employ remedial process for the collection of a debt. They have sometimes been characterized as unconscionable defense. In one case it is stated: "Such a statute may be used as a shield but not as a sword." *Cherrington* vs. *South Brooklyn R. Co.,* 168 N. Y. S. 322, 325.

If the board of education of Clark Township District sees fit to do so, there is nothing to prevent it by proper action from paying to the Crawford Township the full amount of its unjust enrichment at the expense of the Crawford Township District regardless of the time within which that enrichment took place, and in that case the county auditor of Holmes County may in my opinion, lawfully upon proper authorization by the Clark Township Board of Education,

make distribution thereof to the Crawford Township District out of future school tax revenues due to the Clark Township District. If suit is brought by the Crawford Township District against the Clark Township District recovery will be limited in my opinion to what has been wrongfully distributed to the Clark Township District during the last six years, provided the statute of limitations is pleaded by the defendant.

I am advised by the Bureau of Accounting that similar situations have frequently arisen and it has been the practice to permit county auditors to handle the matter as I have suggested and to spread out the payments to the proper subdivisions so as not to make it unduly burdensome on the subdivision required to make restitution.

In conclusion, I am of the opinion:

(1) Where a political subdivision has been enriched at the expense of another subdivision, by reason of there having been distributed to it through a mistake of fact, tax revenues which should have been distributed to the other subdivision, the latter may recover from the former in an action in the nature of an action for money had and received, the amount which the former subdivision had been so unjustly enriched.

(2) In such an action recovery is limited to the amount of such unjust enrichment which has accrued to the defendant during the six years immediately preceding the filing of the action, provided the statute of limitations is pleaded by the defendant.

(3) In an action by a political subdivision against another subdivision on account of the loss to it of public revenues which had wrongfully been distributed to the defendant subdivision, the statute of limitations being pleaded, the time should be computed from the date when the officer whose duty it was to distribute the revenues should have distributed them to plaintiff and not from the time the plaintiff learned of the wrongful distribution.

(4) A county auditor is without authority to correct on his own initiative, errors in apportionments of real estate taxes at the next or any succeeding apportionment after an erroneous distribution has been made.

(5) By force of Section 2602, General Code, a county auditor is authorized, when settling with the treasurer on account of general personal and classified property taxes and when apportioning those taxes to the taxing districts entitled to the same, to correct any error which may have occurred in the apportionment of these taxes at any previous settlement.

(6) Where the proceeds of taxes have been erroneously distributed to a political subdivision not entitled to the same, restitution may lawfully be made by it to the subdivision to which apportionment and distribution should have been made in the first place, regardless of the time when the erroneous distribution took place, and in such case a county auditor as distributing officer, may be authorized by the proper subdivision to withhold future apportionments from one subdivision and make distribution thereof to another in such manner as may be agreed upon by the subdivisions interested.

(7) With specific reference to the question submitted, it is my opinion that Clark Township Rural School District in Holmes County and Crawford Township Rural School District in Coshocton County may by agreement, adjust their differences growing out of the erroneous distribution of school taxes made to the Clark Township District, and may, in so doing, authorize the auditor of Holmes County to withhold moneys from future distributions of school revenues to the Clark Township District and pay them to the Crawford Township District until the Crawford Township District has been repaid the full amount

which the Clark Township District has been unjustly enriched at the expense of the Crawford Township District, by reason of the said erroneous distribution. This may be done without regard to the statute of limitations. If the two districts cannot agree, the Crawford Township District may bring suit against the Clark Township District and would, in my opinion, recover under the facts as stated by you in your inquiry. This recovery, however, would be limited to the amount that the Clark Township District had been unjustly enriched during the six years immediately preceding the date of the bringing of the action, provided the statute of limitations is pleaded by the defendant.

Respectfully,
JOHN W. BRICKER,
Attorney General.

1857.

COUNTY RECORDER—DUTY TO RECORD CERTIFICATE OF TAX COMMISSION CREATING LIEN UPON REAL PROPERTY OF SURETIES ON BOND OF DEALER IN MOTOR VEHICLE FUEL IN MORTGAGE RECORD BOOK—METHOD OF RELEASING SUCH LIEN.

SYLLABUS:

1. *It is the duty of a county recorder to record a certificate presented by the secretary of the Tax Commission of Ohio creating a lien upon real property of sureties on the bond of a dealer in motor vehicle fuel, under authority of section* 5528-1, *General Code, in the mortgage record book, authorized to be kept by such recorder under the provisions of section* 2757, *General Code.*

2. *A certificate releasing such a lien, issued in the manner prescribed by section* 5528-1, *General Code, should be recorded by a county recorder in the same manner that releases of mortgages are recorded.*

COLUMBUS, OHIO, November 10, 1933.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—This will acknowledge receipt of your recent communication as follows:

> "You are respectfully requested to furnish this department your written opinion upon the following:
>
> Section 5528-1 of the General Code, as amended by Amended Senate Bill No. 149 of the 90th General Assembly, provides that the Tax Commission shall file in the office of the county recorder certain liens against the property of signers of the bond of a dealer in liquid fuel; it also provides for the filing of a certificate of release of such liens. In both instances, the law requires the recorder to record these instruments.
>
> Question: In what book kept by the county recorder should such instruments be recorded?"

Section 5528-1, General Code, in so far as pertinent to your communication, reads as follows: