1439.

TAXES AND TAXATION—LIMITATION IN SECTION 12075 G. C. DOES NOT APPLY TO REFUNDERS UNDER SECTION 2589 G. C.—WHERE BUILDINGS REMOVED TEN YEARS AGO ARE CARRIED ON TAX DUPLICATE—COUNTY AUDITOR MAY CORRECT ERROR UNDER SECTION 2588 G. C.—REFUNDER UNDER SECTION 2589 G. C. FOR FIVE YEARS NEXT PRIOR TO DISCOVERY OF MISTAKE BY AUDITOR.

The limitation found in section 12075 G. C. does not apply to refunders under section 2589 G. C. Where buildings were removed ten years ago from certain premises but have been erroneously carried on the duplicate ever since, a clerical error exists which may be corrected by the county auditor under section 2588 G. C., and may become the basis of a refunder under section 2589 G. C. of the taxes so erroneously charged and collected in the five years next prior to the discovery of the mistake by the auditor.

COLUMBUS, OHIO, July 19, 1920.

Tax Commission of Ohio, Columbus Ohio.

GENTLEMEN:—Receipt is acknowledged of your letter of recent date requesting the opinion of this department as follows:

> "The assistant general solicitor of the Baltimore & Ohio Railroad Company has submitted the following inquiry:
>
> In 1910 certain buildings were removed from off of premises in Mad River township, Montgomery county. However, assessments have continued to be levied upon a valuation of $1,500.00, so that a total of $149.40 has been paid. Application was made by the railroad for the return of this under favor of section 2589 of the General Code. The auditor acting under instructions from the county prosecutor refused to make any payment on account of section 12075. Please advise whether in your opinion the county authorities are correct."

The sections referred to in your communication are in part as follows:

> "Sec. 2589. * * * If at any time the auditor discovers that erroneous taxes or assessments have been charged and collected in previous years, he shall call the attention of the county commissioners thereto at a regular or special session of the board. If the 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 and collected. * * *"
>
> "Sec. 12075. Common pleas * * * courts may enjoin the illegal levy or collection of taxes * * * and entertain actions to recover them back when collected, * * * but no recovery shall be had unless the action be brought within one year after the taxes * * * are collected."

It is assumed that the ground on which the prosecutor's opinion was based was that the one year limitation found in section 12075 is applicable to the administrative relief known as a "refunder" under section 2589 of the General Code. If this is so the prosecutor is in error. The error sufficiently appears from the following quotation of a part of section 2590 of the General Code, which is found in the same context with section 2589:

"No taxes * * * shall be so refunded except as have been so erroneously charged or collected in the five years next prior to the discovery thereof by the auditor."

In other words the refunder sections contain their own limitation provision; and accordingly the limitation found in section 12075 must be held applicable only to the action to recover.

It may be added that there is a wide distinction between the nature of the recovery under section 12075 and that of the refunder under section 2589. Section 12075 has been quoted. It may be now pointed out that in order to lay the basis for action thereunder the tax must be *illegally* levied or its collection must be *illegal*. We turn now to section 2588 of the General Code and to section 2588-1 which is practically a repetition of the former section. These sections introduce the subject-matter which runs through section 2590, previously referred to, and includes section 2589. They show the kinds of errors which may form the basis of a refunder, as follows:

"Sec. 2588. 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 or when property exempt from taxation has been charged with tax, or in the amount of such taxes or assessment. If the correction is made after the duplicate is delivered to the treasurer, it shall be made on the margin of such list and duplicate without changing any name, description or figure in the duplicate as delivered, or in the original tax list, which shall always correspond exactly with each other."

"Sec. 2588-1. The county auditor from time to time shall correct any clerical errors which he discovers in the tax list, in the name of the person charged with taxes, the valuation, description or quantity of any tract, lot or parcel of land or improvements thereon, or minerals or mineral rights therein, or in the valuation of any personal property, or when property exempt from taxation has been listed therein, and enter such corrections upon the tax list and duplicate."

By repeated decisions of the supreme and other courts of this state the kinds of errors which may be corrected under these sections, and on account of which refunders may be made, must be (excepting as to exempt property) what are designated as "clerical" errors as distinguished from "fundamental" errors.

Humphreys vs. Safe Deposit Co., 29 O. S. 608,
Lewis vs. State, 59 O. S., 37;
Brooks vs. Lander, 13 O. D. (N. P.) 634;
State ex rel. vs. Brewster, 11 W. L. B. 39.

In short, the one section provides a judicial remedy for recovery of illegal taxes; while the other group provides an administrative remedy for the refunder of taxes charged and collected by mere mistake. The distinction is believed to be clear.

In the case under consideration a mere mistake has been committed. Not upon any theory could it be claimed that what is known as a "fundamental" error has been committed. This follows because land and buildings are required to be and are separately valued and listed for taxation (see section 5554 of the General Code.) If this were not so, and the value of the buildings merely entered into the value of the whole tract on which they were located, the exercise of judgment and discretion would be necessary in order to determine how much less valuable the tract was after the removal of the buildings. The carrying over of the original assessment from year to

year without allowance for such diminution in value would then be a fundamental error, and not a clerical one, and could not be corrected under sections 2588 et seq. of the General Code or be the basis of a refunder under section 2589 of the General Code. But because the buildings are separately listed it would seem clear that upon their removal the continued presence of their valuation on the duplicate is a mere clerical error. As authority for this the case of *Commissioners* vs. *Brashear*, 6 Dec. Rep., 1027, may be cited. In that case land which had no existence whatsoever was listed and valued for taxation. It was held that a clerical error had been committed. See also section 5571 of the General Code authorizing the correction of valuation by the county auditor. This conclusion seems to be justified by reading together the language of section 2588, wherein it refers to "the description of lands or other property" and "the amount of such taxes or assessments."

Had the question arisen entirely under the present statutes difficulty would have been encountered because of the peculiar condition of those statutes. The destruction of property between certain dates may, upon affidavit of the owner, become the basis of a correction of the duplicate (section 2591 General Code); but there does not seem to be any way to get buildings not destroyed or removed between the dates specified in the section cited off the duplicate. That is to say, it is not made the specific duty of any public officer to note the destruction or removal of such buildings, nor (otherwise than as a complainant before the board of revision) is the owner given any remedy other than that afforded by sections 2588 et seq. of the General Code for such purpose. Manifestly, however it would be erroneous to tax property which has no existence; and it would seem that the continued listing and assessment of non-existent property would constitute a clerical error in the duplicate, even though it would be difficult to say that any particular officer had made a mistake in leaving it there.

However, this difficulty disappears when it is considered that the initial error whereby the buildings in question were placed upon the first duplicate made up after their removal occurred in the year 1910. At that time the following sections of the General Code were in effect:

Section 5575 General Code of 1910:

> "At the time of making the lists of personal property, the assessor of personal property shall make a list of real property which has become subject to taxation, * * *. He shall also make and return a list of all new buildings or other structures over one hundred dollars in value, * * *."

Section 5578 General Code of 1910:

> "In case of the destruction by fire flood cyclone storm or otherwise of a new structure or of orchards, timber, ornamental trees or groves over one hundred dollars in value the value of which had been included in a former valuation of the tract on which they stood such assessor shall determine as near as practicable, how much less valuable such tract or lot is in consequence of such destruction and make return thereof. If the assessor fails or neglects so to do, the county or city board of equalization shall perform such duty and the auditor shall deduct the losses from the value of such property as it stands on the tax list."

Section 5571 of the General Code has been previously referred to. It was in the statutes in 1910, in company with section 5572, which then provided as follows:

> "A county auditor shall correct the valuation of any parcel of real property on which any new structure of over one hundred dollars in value has been erected, or on which any structure of like value has been destroyed, agree-

ably to the return thereof made in accordance with the provisions of this title by the assessor."

There is a slight discrepancy between sections 5572 and 5578 as above quoted, in that the latter refers only to a "new structure" whereas section 5572 spoke of "any structure." Quite obviously the word "new" is out of place in section 5578 and should be disregarded. The scheme, then, under these sections (which have since been repealed for reasons which need not now be discussed) was that the assessor of personal property should note the destruction of buildings and other improvements or natural enhancements of the value of real property, and that the auditor should correct the duplicate in accordance with the returns of the assessor. Literally, the assessor under section 5578 must exercise judgment and discretion "as to how much less valuable such tract * * * is in consequence of such destruction." But, as previously noted, where all the buildings on a tract are totally destroyed, as seems to be the case here, so that the tract becomes entirely vacant of buildings, there would be nothing for the assessor to do except to subtract the assessed value of the buildings, for to do otherwise would constitute a reappraisement of the land itself, which could not have been the intention of the general assembly. Therefore, in a case of this kind it would seem that the omission of officers charged by sections 5578 and 5572 would be a mere clerical error, for the correction of which ample warrant was found in the statutes providing for the correction of errors, which were then in force.

The repeal of these sections, together with the abolition and subsequent reinstatement of the office of personal property assessor under clearly modified statutes undoubtedly destroyed the exact machinery by which these corrections could have been made in 1910. Nevertheless, the substantial right which arose at that time by virtue of section 26 of the General Code was preserved, especially in view of the fact that the power of the auditor to correct errors has not been taken away.

It may be added that certain early Nisi Prius decisions seem to be out of harmony with the view which has been expressed, in holding in substance that a clerical error can not occur unless the evidence of it can be established by comparing one written record with another.

See, for example,

Brooks vs. Lander, 13 O. D. N. P. 634,
Mitchell vs. Commissioners, 10 Dec. Rep. 628;
Chatfield vs. Commissioners, 10 Dec. Rep. 511;
Sandheger vs. Commissioners, 8 Dec. Rep. 569.

This principle, however, was repudiated in *Lewis vs. State*, 59 O. S. 37, subsequently decided, which expressly holds that an error may exist on the tax list in the office of the county auditor and be susceptible to correction by him under the sections under discussion, even when the existence of the error must be partly established by parol evidence.

For the foregoing reasons, then, the commission is advised that it is the opinion of this department that the limitation found in section 12075 of the General Code does not apply to refunders under section 2589 of the General Code; and that where buildings were removed ten years ago from certain premises but have been erroneously carried on the duplicate ever since, a clerical error exists which may be corrected by the county auditor under section 2588 of the General Code, and may become the basis of a refunder under section 2589 of the General Code of the taxes so erroneously charged and collected in the five years next prior to the discovery of the mistake by the auditor. In this instance the auditor probably did not discover the mistake until his attention was called thereto by the company, which may have been in the year 1920. If this is

so then the entire amount of the erroneous taxes collected in the ten year period can not be refunded, but only such taxes as were collected in the five years next prior to the discovery.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1440.

APPROVAL, BONDS OF CITY OF MANSFIELD OHIO IN AMOUNT OF $3,200 FOR STREET IMPROVEMENTS.

COLUMBUS, OHIO, July 19, 1920.

Industrial Commission of Ohio, Columbus, Ohio.

1441.

APPROVAL— BONDS OF CITY OF WAPAKONETA, OHIO, IN AMOUNT OF $102,000 FOR STREET IMPROVEMENTS.

COLUMBUS, OHIO, July 19, 1920.

Industrial Commission of Ohio, Columbus, Ohio.

1442.

APPROVAL, BONDS OF CITY OF WAPAKONETA, OHIO, IN AMOUNT OF $41,000 FOR STREET IMPROVEMENTS.

COLUMBUS, OHIO, July 19, 1920.

Industrial Commission of Ohio, Columbus, Ohio.

1443.

APPROVAL, BONDS OF CITY OF WAPAKONETA, OHIO, IN AMOUNT OF $67,000 FOR SEWER AND STREET IMPROVEMENTS.

COLUMBUS, OHIO, July 19, 1920.

Industrial Commission of Ohio, Columbus, Ohio.