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AUDITOR, COUNTY—MAY LAWFULLY REFUSE TO ISSUE WARRANT ON COUNTY TREASURER TO PAY CLAIM FOR OVERPAYMENT OF REAL ESTATE TAXES—PAID INTO GENERAL FUND OF COUNTY—CLAIM PRESENTED TO COUNTY COMMISSIONERS—ALLOWED MORE THAN TWENTY YEARS AFTER OVERPAYMENT MADE.

SYLLABUS:

A county auditor may lawfully refuse to issue his warrant on the county treasurer in payment of a claim for overpayment of real estate taxes paid into the general fund of the county when such claim was presented to the county commissioners and allowed by them more than twenty years after the overpayment was made.

Columbus, Ohio, March 29, 1947

Hon. Frank T. Cullitan, Prosecuting Attorney, Cuyahoga County
Cleveland, Ohio

Dear Sir:

I have before me your request for my opinion, which request is as follows:

“On September 30, 1946, The Mathias Realty Company, an Ohio corporation, presented to the Board of County Commission-

ers of this County a claim for the repayment of an over or double payment of real estate taxes made by said Company in the sum of \$1266.01. Said overpayment was made on February 15, 1926, on property listed in the 1925 tax duplicate, book 19, page 125, lines 14 and 15, in the name of the Mathias Realty Company. Such property has ever since been and is still listed in the name of that company. Both payments of said taxes were made by said company. The amount of the overpayment was paid into the general fund after the lapse of the five year period provided for in Section 286, General Code.

The Board of County Commissioners allowed this claim on October 23, 1946, and ordered the County Auditor to draw a warrant in favor of The Mathias Realty Company for the repayment of such sum of \$1266.01 from the general fund of the county.

The County Auditor is in doubt as to his duty to comply with such order of the Commissioners. May we, therefore, ask for your opinion on the question presented?"

Section 2570, General Code, dealing with the drawing of warrants by the auditor on the county treasurer provides in part as follows:

"* * * the county auditor shall issue warrants on the county treasurer for all moneys payable from such treasury, upon presentation of the *proper* order or voucher therefor * * *."
(Emphasis supplied.)

Since the statute requires honoring only proper orders of the commissioners, the first thing to consider in passing on the auditor's duty to issue his warrant in favor of this claimant is whether the claimant has a right against the county which is enforceable at law. Such a right might arise in one of three ways:

Section 2589, General Code, provides for refunding of taxes erroneously charged or collected. Assuming that this section applies to this claimant we are immediately faced with the limitation set out in Section 2590, General Code, which provides in part:

"* * * No taxes or assessments 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. * * *."

Since the overpayment in question was made over twenty years before the claim was presented, it is obvious that Section 2589 affords no basis for a claim.

Section 12075, General Code, provides that Common Pleas Courts may enjoin the illegal collection of taxes and entertain actions to recover them back when collected. However, it goes on to say:

“* * * but no recovery shall be had unless the action be brought within one year after the taxes or assessments are collected.”

Again the clearly expressed limitation prevents the claimant from having any actionable right against the county under this section.

The claimant might be able to maintain an action against the county on the authority of *Wooley v. Staley*, 39 O. S. 354 which held that taxes on real estate paid under a mistake of fact can be recovered because of the mistake without involving the question of whether or not payment was made voluntarily. Such an action, however, must comply with the provisions of Section 11222, General Code, which provides:

“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.”

There is no evidence of fraud or concealment on the part of the county officials, so the claimant's cause of action arose at the time the money was paid by mistake and had been barred for over fourteen years at the time he presented his claim.

From the foregoing discussion it seems clear that the claimant has no enforceable right against the county.

There still remains the question of the moral obligation of the county to repay money to which it is not entitled. This question was exhaustively discussed in Opinion No. 1330, Opinions of the Attorney General for 1939, page 1966, which opinion was approved in Opinion No. 3199, Opinions of the Attorney General for 1940, page 1177. These two opinions and the cases discussed therein hold that county officials are not liable for payments made in discharge of moral obligations of the county, and that the county cannot recover back payments so made. They are not dispositive of your question, however, since this claim has not been paid and the auditor questions his duty to issue his warrant for it.

The use of the word “duty” in your request connotes action which is incumbent on the auditor and which could be enforced by a writ of man-

damus if he refused to act. The general rule as to the issuance of writs of mandamus against public officials was stated in *State, ex rel. McKey v. Cooper*, 99 O. S. 258, 124 N. E. 192, a case which involved an auditor's refusal to issue a warrant. The court said at page 262:

“While a writ of mandamus will issue against a public officer to compel the performance of an official duty enjoined upon him by law, yet such writ will not be granted unless the relator's right is clear and the act to be enforced is one of absolute obligation.”

This general rule has been adhered to by the courts in cases involving applications for writs of mandamus to compel auditors to issue their warrants. In every case in which the writ has been granted there has been a clear statutory duty on the part of the auditor, *Flack v. Humphreys*, 24 O. S. 330; *State, ex rel. King v. Sherman*, 104 O. S. 317, 135 N. E. 625; *State, ex rel. Hall v. Goubeaux*, 110 O. S. 287, 144 N. E. 251; *State, ex rel. Crabbe v. Wead*, 113 O. S. 692, 150 N. E. 80; *State, ex rel. Dempsey v. Zangerle*, 114 O. S. 435, 151 N. E. 194; or there has been a binding contractual obligation of the commissioners to the claimant, *State, ex rel. Manix v. Auditor*, 43 O. S. 311, 1 N. E. 209; *State, ex rel. Jewett v. Sayre*, 91 O. S. 85, 109 N. E. 636. As was pointed out above neither of these elements is present in this case. For that reason it is my opinion that a writ of mandamus would not be issued to compel the auditor to issue his warrant in favor of this claimant.

No clear rule has been laid down defining the limits of the auditor's discretion in refusing to issue his warrant for claims allowed by the commissioners. It is clear that he must have some such discretion in view of the consistent holdings in the opinions of my predecessors that Section 5526-37, General Code, makes the auditor liable for loss or damage sustained by the county because of his allowance of improper claims. Opinion No. 1001, Opinions of the Attorney General for 1927, page 1747; Opinion No. 2016, Opinions of the Attorney General for 1928, page 1005; Opinion No. 930, Opinions of the Attorney General for 1937, page 1652; Opinion No. 918, Opinions of the Attorney General for 1939, page 1257; Opinion No. 3199, Opinions of the Attorney General for 1940, page 1177. I realize that the auditor undergoes some conceivable risk of this liability in every claim which he pays, but it is particularly liable to arise from the payment of stale claims. For that reason I am of the opinion that it is

within the discretion of the auditor to refuse to issue a warrant in favor of this claimant.

In writing this opinion I am aware of Opinion No. 1399, Opinions of the Attorney General for 1916, page 517, and Opinion No. 4785, Opinions of the Attorney General for 1932, page 1326, dealing with the liability of the county treasurer for overpayment of taxes and the disposition that should be made of such funds. Your request does not raise the question of the liability of the treasurer who originally received this overpayment, or the question of claimant's right to recover from the county when a special fund of such overpayments has been created, and consideration of such questions is beyond the scope of this opinion.

In direct answer to your question, therefore, it is my opinion that a county auditor may lawfully refuse to issue his warrant on the county treasurer in payment of a claim for overpayment of real estate taxes paid into the general fund of the county when such claim was presented to the county commissioners and allowed by them more than twenty years after the overpayment was made.

Respectfully,

HUGH S. JENKINS,
Attorney General.