issued under these proceedings constitute a valid and legal obligation of said city.

Respectfully,
HERBERT S. DUFFY,
Attorney General.

951.

COUNTY AUDITOR MAY ISSUE CERTIFICATE DEDUCTING PART OF ASSESSMENT, WHEN—ERRONEOUS CHARGES —COUNTY TREASURER—ADDITION OF CHARGES OMITTED THROUGH CLERICAL ERROR.

SYLLABUS:

1. *If the county auditor is satisfied that any tax or assessment or any part thereof, included in the duplicate furnished to the county treasurer for collection, has been erroneously charged, such county auditor, under the authority of Section* 2589 *of the General Code, may give to the person so charged a certificate to that effect, which certificate, upon presentation to the county treasurer, shall authorize the county treasurer to deduct the amount of such tax or assessment erroneously charged from such tax or assessment entered upon the tax duplicate.*

2. *The county auditor is authorized under Section* 2593 *and* 5573 *of the General Code, to charge or add the correct amount of tax, omitted through clerical error, against a particular lot or parcel of land, in question, on the tax list or duplicate, when he is satisfied that such charge should have been made; provided, however, that no omitted taxes for the preceding years shall be chargeable for a period exceeding five years, and further that if there has been a change of ownership of said lot or parcel of land at any time within the immediately preceding five year period that only the taxes chargeable since the last change of ownership shall be properly chargeable against said premises.*

COLUMBUS, OHIO, August 2, 1937.

HON. D. H. JACKMAN, *Prosecuting Attorney, Madison County, London,* OHIO.

DEAR SIR: This will acknowledge receipt of your letter of recent date, which reads as follows:

> "We desire your official opinion in connection with the following problem:

In the incorporated village of South Solon, in Stokes Township, Madison County, Ohio, are two tracts of land containing 16/100 of an acre. One of these is improved with a building and carries approximately $700.00. The other tract is unimproved and carries a value of approximately $90.00. Each of these tracts is in the same military survey and except for the buildings on the one tract, bore the same general description on the auditor's records of Madison County.

The tract without buildings has been owned by B. C. E., since 1930 to the present date. The tract with buildings was actually owned by C. G. H., during the years 1930, 1931 and 1932; C. G. H. is now deceased and his estate was settled February 27, 1935, and the administrator discharged; the years 1933, 1934, 1935 and 1936 the tract with buildings has been owned by C. C. R. When C. G. H. purchased the land in 1930, and the transfer was made on the auditor's records the transfer was made applicable to the 16/100 of an acre without buildings, whereas Mr. H. actually owned the 16/100 of an acre with buildings. As a result, C. G. H. was billed for a total of $1.85 in taxes which were paid. C. C. R. has been billed for a total of $1.04 in taxes which have been paid.

In the meantime, B. C. E., who actually owned the 16/100 of an acre without buildings, has been billed for a total of $65.61 in taxes which she has refused to pay. The mistake made by the transfer clerk in the auditor's office in 1930 is apparent and can be corrected, under G. C. 2588.

When Mr. R. purchased the property from Mr. H., of course he was entitled to rely upon the tax duplicate as it then stood according to the case of *The Cleveland Trust Company* versus *John J. Boyle,* decided December 21, 1936, and found in Volume 7 of Ohio Opinions.

However, the question that we are particularly interested in is whether or not it is within the power of the county auditor, under General Code Section 2589 to give to B. C. E. a certificate covering all the taxes erroneously assessed against her through this clerical mistake and accept her payment for the taxes now due amounting to approximately $1.85 instead of $65.61. If the auditor gives such a certificate may he then under General Code Section 2593, charge the correct amount of tax against C. C. R. for the years 1933 and following? If this is done, what shall become of the $37.61 in taxes which should have been charged against the estate of C. G. H.

Your assistance will be greatly appreciated."

Section 2589 of the General Code covers the procedure for the deduction or refund of taxes erroneously charged or collected. It reads:

> "After having delivered a duplicate to the county treasurer for collection, if the 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. 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. The county treasurer shall pay such warrant from the general revenue fund of the county."

Section 2593, General Code, covers the procedure for the charging of omitted taxes on the tax list or duplicate by the county auditor. It reads as follows:

> "When the county auditor is satisfied that lots or land on the tax list or duplicate have not been charged with either the county, township, village, city, or school district tax, he shall charge against it all such omitted tax for the preceding years, not exceeding five years unless in the meantime such lands or lots have changed ownership, in which case only the taxes chargeable since the last change of ownership shall be so charged."

In your communication you state:

> "The question that we are particularly interested in is whether or not it is within the power of the county auditor, under General Code Section 2589 to give to B. C. E. a certificate covering all the taxes erroneously assessed against her through this clerical mistake and accept her payment for the taxes now due amounting to approximately $1.85 instead of $65.61."

It would seem that the clerical mistake set forth in your communication relative to the charging of tax on wrong parcels of real estate could be easily corrected by the county auditor under authority of Section 2589, General Code, so long as he is satisfied that the same has been erroneously charged. When he is so satisfied, he may give to the person so charged with such erroneous tax, a certificate setting forth such finding, directed to the county treasurer, and upon receipt of which the county treasurer "shall deduct" the amount found to be erroneous, from such tax or assessment.

Therefore, in specific answer to your first question it is my opinion that if the county auditor is satisfied that any tax or assessment, or any part thereof, included in the duplicate furnished to the county treasurer for collection, has been erroneously charged, such county auditor under authority of Section 2589 of the General Code, may give to the person so charged a certificate to that effect, which certificate upon presentation to the county treasurer shall authorize the county treasurer to deduct the amount of such tax or assessment erroneously charged from such tax or assessment entered upon the tax duplicate.

In your communication you also ask:

> "If the auditor gives such a certificate may he then under General Code Section 2593, charge the correct amount of tax against C. C. R. for the years 1933 and following? If this is done, what shall become of the $37.61 in taxes which should have been charged against the estate of C. G. H?"

A review of Section 2593, General Code, shows that it specifically authorizes the county auditor, when he is satisfied that lots or land on the tax list or duplicate have not been charged with the proper tax, to charge such omitted tax against the same. However, in addition to the above, Section 5573, General Code, provides how taxes on omitted property shall be added to the tax list by the county auditor. It reads:

> "If the county auditor discovers that any building or structure, tract of land, or any lot or part of either, has been omitted, he shall add it to the list of real property, with the name of the owner, and ascertain the value thereof and place it opposite such property. In such case he shall add to the taxes of the current year the simple taxes of each and every preceding year in which such property has escaped taxation, not exceeding, however, five years, unless in the meantime the property has changed ownership, in which case only the taxes chargeable since the last change of ownership shall be added; or the owner thereof,

if he desires, may pay the amount of such taxes into the county treasury, on the order of the auditor."

Your question fundamentally settles down to the proposition of what are omitted taxes and when and how they may be added to the tax duplicate and charged back against the landowner. In the case of *Houck, County Auditor, et al.* vs. *The Cincinnati Model Homes Company,* 130 O. S., 378, the syllabus reads as follows:

"1. Statutory provisions which do not relate to the creation of tax obligations, but merely to the instrumentalities by which tax valuations may be determined, clerical errors rectified or omissions supplied, or to the enforcement of tax obligations, are remedial in character and should be liberally construed.

2. The omission of an undivided fractional part of a building, as a result of unintentionally omitting a cipher from the base measurement of the structure in calculating the tax valuation thereof according to an accepted universal formula employed with reference to buildings of a designated class, constitutes an error, clerical in nature, and not fundamental, involving judgment and discretion, and by statute a duty rests upon the county auditor to correct the list of real property for the current and each and every preceding year, not exceeding five, by adding the omitted part of the building."

The opinion of the Court in this case is so pertinent toward answering the questions which you have raised in your communication that I have deemed it advisable to quote therefrom as follows:

"Section 5571, General Code, provides that the auditor shall correct any 'clerical errors' which he finds in the valuation, description or quantity of any 'tract or lot' in the real property list.

Section 5573, General Code, provides that if the auditor 'discovers that any building or structure, tract of land, or any lot or part of either, has been omitted, he shall add it to the list of real property,' and requires further that in such case he shall add to the taxes of the current year the simple taxes of each and every preceding year in which such property has escaped taxation, not exceeding five years.

Section 5576, General Code, provides that the '* * county auditor, if he ascertains that a mistake was made in the value of an improvement or betterment of real property, or that the true value thereof was omitted, shall return the correct value, having first given notice to the owner or agent thereof, of his intention so to do.'

Sections 2589 and 2590, General Code, provide for deductions of taxes erroneously charged, and for their refunder when paid, but limit the refunder to a period of five years prior to the discovery by the auditor.

Section 2593, General Code, provides for the charging of omitted taxes. It reads as follows: 'When the county auditor is satisfied that lots or lands on the tax list or duplicate have not been charged with either the county, township, village, city, or school district tax, he shall charge against it all such omitted tax for the preceding years, not exceeding five years unless in the meantime such lands or lots have changed ownership in which case only the taxes chargeable since the last change of ownership shall be so charged.'

The laws do not relate to the imposition and creation of tax obligations but wholly to the mechanics of tax valuation and enforcement. They are therefore remedial in their nature and require a liberal construction to the end that taxable real estate shall not escape just taxation. State, ex rel Poe. *vs.* Raine, 47 Ohio St., 447, 454, 25 N.E., 54; Gager, Treas., vs. Prout, 48 Ohio St., 89, 108, 26 N.E., 1013.

Counsel for the defendant in error contend that there was no omission of the building or any part of it within the meaning of Section 5573, General Code, during the five years involved, but merely an under-valuation or mistake in valuation within the meaning of Section 5576, General Code, and that the auditor has no authority to assess a 'back tax' for an under-valuation or a mistake in valuation. Their argument is that the entire building was in fact listed on the tax duplicate and valued and assessed thereon, and that the mistake made in 1925 was in the valuation itself and had nothing to do with the inclusion of the building on the tax list or its subjection to the tax.

If this meaning can be derived from these two sections at all, it is by a strict and narrow construction of them taken apart from all other related sections. These various sections cover both tax additions and refunders. It would be but logical to expect the legislature to treat the correction of an undercharge and overcharge in a similar manner. Obviously to take

a few sentences literally and apart may mislead as to the spirit and intent of the law. *While, by a broad construction of Section* 5573, *General Code, taken alone, it would seem that the omission of part of a building may be cured by adding the omitted part; yet all the sections referred to are in pari materia and must be construed together.* When this course is pursued it is evident that a curable omission in valuation of a building is one which results from an error which is clerical and not fundamental; if fundamental there is no omitted property which may be supplied. *In the latter case the valuation is in the exact amount that the taxing authorities intended.* A change of valuation wrong fundamentally, would result, not in a corrected valuation, but in a new one. *State, ex rel. Sisters of Notre Dame* vs. *Commissioners of Montgomery County,* 31 Ohio St., 271; *State ex rel. Poe,* vs. *Raine, supra; State, ex rel. Pulskamp,* vs. *Commissioners of Mercer County,* 119 Ohio St., 504, 164 N.E., 755; 38 Ohio Jurisprudence, 1035, Section 253. Where a clerical error in computation results in a wrong or mistaken valuation which is not in accord with the universal class formula adopted for its determination, there is an omission of part of a building from the tax list and duplicate and the omitted part may be added. Any other construction would not be in accord with the policy of our law that *no taxable real property should escape just taxation.*

The error involved in the instant case was the omission of a cipher on the right of the number of square feet in the building at its base in the process of calculation so that the valuation arrived at was reduced accordingly in applying the formula. The result was that nine-tenths of the building escaped taxation through omission from the tax list and duplicate. It thus appears that the error was not fundamental, involving judgment and discretion, but was merely clerical in character. If the kindred statutory provisions are construed liberally to ascertain the intent of the legislature the logical conclusion is that it is the duty of the auditor to add to the list of real property a part of a building omitted through a clerical error of the kind involved here." (Italics, the writer's.)

A review of the above decision of the Supreme Court shows that the county auditor has authority to charge omitted taxes against a property and the procedure he is to follow in collecting them. Both Sections 2593 and 5573, General Code, are applicable to this procedure. It should

be noted, however, that omitted taxes cannot be charged against such lots or parcels of land for a period exceeding five years. There is a further limitation which restricts a county auditor in charging such omitted taxes, wherein it provides that if such lots or parcels of land have changed ownership at any time within this five year period just mentioned that only the taxes chargeable since the last change of ownership shall be so charged against the premises.

Your communication shows that C. C. R. is now the owner of the particular parcel or lot of land, which includes the buildings, with the largest valuation thereon. Your communication further shows that C. G. H., the former owner of this particular lot or parcel of land, now owned by C. C. R. is deceased and that his estate was settled February 27, 1935, and the administrator discharged. Apparently, C. C. R. became the owner of this particular lot or parcel of real estate in about the year 1933 or at least within the period which would make him chargeable for the 1933, 1934, 1935 and 1936 taxes.

There is no question in my mind but that C. C. R. is chargeable with any omitted tax property assessable by the county auditor, against said premises, since his period of ownership does not exceed the five year limitation period set forth in Sections 2593 and 5573 of the General Code. However, I do not see where the estate of C. G. H., the administration of which has now been closed, would be liable for any omitted tax chargeable against these premises under any existing state statute, and especially when both Sections 2593 and 5573, supra, specifically provide that, "only the taxes chargeable since the last change of ownership shall be so charged (added)." (Parenthesis the writer's.)

Therefore, in specific answer to your second question it is my opinion that, the county auditor is authorized under Sections 2593 and 5573, supra, to charge or add the correct amount of tax, omitted through clerical error, against a particular lot or parcel of land, in question, on the tax list or duplicate, when he is satisfied that such charge should have been made; provided, however, that no omitted taxes for the preceding years shall be chargeable for a period exceeding five years, and further that if there has been a change of ownership of said lot or parcel of land at any time within the immediately preceding five year period that only the taxes chargeable since the last change of ownership shall be properly chargeable against said premises.

Respectfully,

HERBERT S. DUFFY,

Attorney General.