(1) That the fifteen per cent penalty on delinquent real estate taxes does not attach as to the first half tax until after the February settlement.

(2) The five per cent penalty for the collection of delinquent taxes, both real and personal, does not attach automatically as of a given date, but only when the time for the voluntary payment of taxes has expired and the process of collection commences.

(3) The county treasurer himself is without authority to prescribe any time for the cessation of the receipt of the payment of taxes other than that prescribed in the statute; but the power of the county commissioners to extend the time for the payment of taxes is not limited to the dates mentioned in section 2657 of the General Code, and in case the latest date mentioned therein for the payment of the first half of the taxes will make it physically impossible for the treasurer to receive payment of such half taxes, having regard to the date of the delivery of the duplicate to the treasurer (but not under other circumstances), the commissioners may lawfully extend the time for the payment of taxes beyond such date to any date short of the February settlement, the time provisions of said section 2657 of the General Code being regarded as in this sense directory.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1777.

ELECTION—WHERE RESOLUTION OF BOARD OF EDUCATION PROVIDED FOR THREE MILL LEVY FOR TWO YEARS TO BE SUBMITTED TO ELECTORS OF SCHOOL DISTRICT—BALLOTS READ THREE MILLS FOR FIVE YEARS—RESOLUTION OF BOARD CONTROLS IN ABSENCE OF FRAUD OR ATTEMPT TO DECEIVE OR MISLEAD.

1. *Where there is no showing that the result of the vote would have been in any way changed, the occurrence of mere irregularities that do not go to the foundation of an election, will not invalidate such election, although the provisions of the statute have been technically violated, if it appears that there has been a fair election and a comparatively full vote and no fraud or attempt to deceive or mislead.*

2. *Where the electors of a school district voted upon the question of a levy for taxes, under the provisions of section* 5649-5 *and* 5649-5a, *the amount to be three mills for two years, and a mistake was made in printing the ballots, providing for a levy of three mills for five years, the proceeding is not invalid and the board of education is authorized to levy three mills for school purposes during a period of two years, the period appearing in the resolution of the board of education.*

COLUMBUS, OHIO, December 31, 1920.

HON. VERNON M. RIEGEL, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your request for an opinion upon the following statement of facts:

> "The board of education of Union Township, Miami County, submitted the question of a school levy under the provisions of the new revenue law for *three mills for two years* as is shown by a resolution recorded in the minutes of the clerk of the school board.

"The county election board submitted the ballots to read *three mills for five years.* The levy carried by 81 majority. Some voters noticed the mistake while others did not.

"Your opinion is asked on the legality of the action, that is, will the clerk's minutes or the vote of the people prevail?"

Under the statement of facts submitted by you, it will be noted that the *number of mills* provided for in the resolution of the board of education, submitted to the deputy state supervisors of elections in the county, is *the same number of mills* which appeared on the ballots prepared by the state board of deputy state supervisors and later used by the electors in the township in question.

The discrepancy in the main between the resolution of the board of education and the ballots handed to the voters by the election officials was in the *number of years* "during which such increased rate may be continued to be levied." Thus the resolution of the board of education provided that the levy should be for two years, while the board of elections submitted a ballot upon which appeared five years and the electors thereafter voted affirmatively that the levy of three mills appearing both in the resolution of the board of education and upon the ballots might be levied for five years.

Pertinent sections of the statutes are:

Sec. 5649-4: "For the emergencies mentioned in sections forty-four hundred and fifty, forty-four hundred and fifty-one, and fifty-six hundred and twenty-nine, and 7630-1 of the General Code, and for local school purposes authorized by a vote of the electors under the provisions of sections 5649-5 and 5649-5a of the General Code, to the extent of three mills for such school purposes, the taxing authorities of any district may levy a tax sufficient to provide therefor irrespective of any of the limitations of this chapter."

Sec. 5649-5: "The county commissioners of any county, the council of any municipal corporation, the trustee of any township, or any board of education may, at any time, by a majority vote of all the members elected or appointed thereto, declare by resolution that the amount of taxes that may be raised by the levy of taxes at the maximum rate authorized by sections 5649-2 and 5649-3 of the General Code as herein enacted within its taxing district, will be insufficient and that it is expedient to levy taxes at a rate, in excess of such rate and cause a copy of such resolution to be certified to the deputy state supervisors of the proper county. Such resolution shall specify the amount of such proposed increase of rate above the maximum rate of taxation and the number of years not exceeding five during which such increased rate may be continued to be levied."

Sec. 5649-5*a*: "Such proposition shall be submitted to the electors of such taxing district at the November election that occurs more than twenty days after the adoption of such resolution. The deputy state supervisors shall prepare the ballots and make the necessary arrangements for the submission of such question to the electors of such taxing district, and the election shall be conducted, canvassed and certified in like manner, except as otherwise provided by law, as regular elections in such taxing district for the election of officers thereof. Twenty days' notice of the election shall be given in one or more newspapers printed in the taxing district once a week for four consecutive weeks prior thereto, stating the amount of the additional rate to be levied, the purpose for which it is to be levied, and the number of years during which such increased rate may be continued to be levied, and the time and place of holding the election. If no newspaper is

printed therein, the notice shall be posted in a conspicuous place and published once a week for four consecutive weeks in a newspaper of general circulation in such taxing district.

The form of the ballots cast at such election shall be:

'For an additional levy of taxes for the purpose of ———— not exceeding ———— mills, for not to exceed ———— years, Yes.'

'For an additional levy of taxes for the purpose of ———— not exceeding ———— mills, for not to exceed ———— years, No.'"

The ballot used by the electors (as per copy furnished by the board of deputy state supervisors) reads as follows:

		For an additional levy of 3 mills for a period of 5 years for school purposes.
——	——	————————————
		Against an additional levy of 3 mills for a period of 5 years for school purposes.

It will be noted that this ballot does not conform to the exact wording of the statute (5649-5a) but does conform in *substance.* That is, each elector had a fair opportunity to register his vote on the question of the additional levy of "three mills for school purposes" in that school district.

To prevent unnecessary resubmission, if the "substance" appears, the law says:

Sec. 5123: "No election shall be set aside for want of form in the poll books, provided they contain the substance." (R. S., 2962.)

The question here is one of an error made in printing the ballots used in the election, and whether thereafter the mandate given by the voters as to authority conferred should take precedent over the resolution appearing upon the minutes of the board of education.

"* * * the effect of the election was merely to authorize the board of education to go beyond the fifteen mill limitation of the Smith one per cent law for any lawful purpose. *The election itself did not constitute the levy. After the election it was incumbent* upon the board of education submitting the question *to act under the authority of the favorable vote of the electors.* * * *" (Opinion 1138, April 9, 1920.)

Your attention is invited to a prior opinion of this department issued in 1913, bearing upon a question largely similar, where an error had been made in printing the ballots used by electors, the distinction in that case as compared with the one now being considered being that in the former the ballots bore a different number of mills from that appearing in the resolution, while the years appearing in the resolution and the years appearing on the ballot were the same. In the question before us the number of mills in the resolution and the number of mills appearing upon the ballot are the same, but the difference occurs in the number of years appearing on the ballot as compared with the number of years appearing in the

resolution. In the opinion referred to, appearing on page 1442, Vol. 2, Annual Report of the Attorney-General, the syllabus was as follows:

> "Where the electors of a certain village voted to levy taxes in excess of the Smith law, the amount of five mills for three years, and a mistake was made in printing the ballots, providing for the levy of two mills for a period of three years, the proceeding is not invalid, and the taxing authorities are authorized to levy two additional mills for municipal purposes during a period of three years."

This was a case in which a village, acting under section 5649-5 submitted to the electors a proposition to authorize the levying of taxes in excess of the limits of the Smith law, the number of mills specified being five and the number of years during which the additional levy "was to be permitted" being three. The resolution was properly certified to the board of deputy state supervisors of elections and proper notice of submission of the question was given according to law. In all proceedings preliminary to the election itself, including publication of notice, the number of mills and the number of years appearing in the resolution were correctly stated. In arriving at his conclusion appearing in the above syllabus, upon the question submitted at that time, the then attorney-general said:

> "The ballots printed under the direction of the deputy state supervisors of elections erroneously stated the proposition as being the authorization of an additional levy of two mills for a period of three years. The ballots so prepared were used at the election, no one observing the discrepancy and a majority of the electors voted affirmatively upon the question so submitted * * *.
>
> "There is nothing in sections 5649-5 et seq., General Code, which throws any light upon the solution of the question which you submit. They merely provide for the requisite steps in the submission of the question as to increasing the tax levy, all of which were complied with fully by the authorities required to act in the premises for the village in question, except for the unfortunate error which crept into the ballots. * * *
>
> " * * * As between the proposition actually voted upon by the electors and that submitted by the resolution and published in the notice, I am of the opinion that the former controls. It certainly cannot be said, in law, that the electors have approved a proposition to authorize a levy of five additional mills by depositing affirmative ballots calling for the authorization of a levy of two additional mills only.
>
> "I am therefore of the opinion that as a result of the election aforesaid, the taxing authorities are authorized to levy two additional mills for municipal purposes during the period of three years.
>
> "The question is not free from difficulty, and in such search as I have made I have been unable to find any authorities upon it. I believe, however, that the general principles above outlined are correct and that they lead to the conclusion expressed."

In the question being considered at this time, it will be noted that the electors authorized by their ballots *exactly the same number of mills* which the resolution provided for. No additional authority was conferred by the electors upon the board of education as to the amount of the levy, nor was any lesser number of mills voted upon than that asked by the board of education. The question then is upon the number of years during which the levy appearing in the resolution and voted in the election "may be continued" by the board of education.

In considering a question of this kind, it must be remembered that the electors

themselves by their ballots in an election do not levy a tax. What they do perform is, granting an authorization to the levying body, in this instance the board of education. Where a vote of the electors is required for a levy as in the case at hand, the levying body has no authority to make such levy until after authorization has been secured from the electors. In the case before us the electors by their ballots have authorized a three mill levy as requested by the board of education, and in addition by a decisive affirmative vote in a township, attempted to give the board of education authority that this tax rate may be continued as a levy by the board of education for a term of years thereafter.

But the question as exactly submitted by the board of education in its resolution and notices was not voted on by the electors because of an error in the ballot. The ballot read five years as a permissive period for the levy and the official resolution, providing for the election, read but for two years. The presumption of law is that every voter reads his ballot and the contents thereon before marking it, and if it was desired to defeat this tax levy, all that was necessary was to vote "no" upon the ballots used by the voters. On the contrary a majority of the voters voted "yes," thus carrying the proposition generally that the board of education could levy a tax for school purposes in that district. To complete the proposition provided for in section 5649-5 G. C., there must be a resolution by the board followed by a vote of the electors. One requires the other and neither accomplishes anything standing alone. To what extent then, in the case before us, was there harmony in the number of mills and the number of years? The number of mills is the same on the ballot as in the resolution; there is a request for authorization for the first year and this was voted; similarly for the second year, and it was voted.

At this point there is no further unity of action, for the board did not pass a resolution containing any third, fourth or fifth year, hence a levy for those years was not properly submitted.

It must be presumed that the election was legal in every other way and this opinion is prepared upon that basis, that is, that the form of the ballots used in the election contained the substance of the form specified in section 5649-5a, supra, and that the deviation therefrom was minor, except in the error of inserting the number of years. But the first and second years do appear in both resolution and the ballots, and the submission would be complete for that period.

Where an election has been held and authority granted by the electors for the levy mentioned in section 5649-4, *there must follow thereafter the levy itself by the board of education,* that is, a resolution from the board of education making such levy, which resolution shall be sent forthwith to the county auditor. This feature is covered in a letter from this department, dated August 20, 1920, to you in response to your request for a form of resolution to be used by boards of education in notifying county auditors, as to an increased tax levy in a school district. In the case at hand all that is necessary at this time is for the board of education to fill out the form furnished to you by this department, and place the same in the hands of the county auditor, who will thereupon make the proper levy of three mills for the next year. Should the board of education desire thereafter to continue this levy, the board should take proper action during the period authorized, which in this case is authority for two years during which such levy of three mills *may be continued to be levied in this school district.*

> "But if any irregularities occur in an official ballot due to the error or mistake of an election officer, it is the rule that they do not vitiate the vote of an elector innocent of any wrong in the matter."
>
> Allen v. Glynn, 17 Colo.
> State v. Henry, 62 Conn., 260.

Peabody v. Burch, 75 Kans., 543.
Bowers v. Smith, 111 Mo., 45.
Kierman v. Portland, 57 Ore., 454.

Speaking of minor irregularities that might occur in an election, Brinkerhoff, C. J., at page 537, in the case of State ex rel. v. Taylor (Scarff v. Foster), 15 O. S., 137, uses the following language:

> "We do not intend to hold, nor are we of the opinion, that the notice by proclamation as prescribed by law, is *per se* and in all supposable cases, necessary to the validity of an election. If such were the law, *it would be in the power of a ministerial officer, by his misfeasance,* always to prevent a legal election. We have no doubt that where an election is held in other respects as prescribed by law, and notice in fact of the election is brought home to the great body of the electors, though derived through means other than the proclamation which the law prescribes, such election would be valid."

In Fike v. State, 4 C. C. (n. s.) 81, the circuit court had before it a question arising under the municipal local option law and in the fifth paragraph of the syllabus adopts the well recognized principle that election laws are to be construed liberally so as to preserve, if possible, and not defeat, the choice of the people as expressed at an election.

Hull, J., at p. 84, says:

> "The general doctrine is that mere irregularities, that do not go to the foundation of the election, will not invalidate the election, although the provisions of the statute have been technically violated, if it appears that there has been a fair election and a comparatively full vote and no fraud or attempt to deceive or mislead.
>
> " * * * the people are not to be disfranchised, to be deprived of their voice, by the omission of some duty by an officer, if an election has in fact been held at the proper time; and that such penalty ought not to be visited upon them for the negligence or willfulness of one charged with similar duties. Upon considerations like these the courts have held that the voice of the people is not to be rejected for a defect, or even a want of notice, if they have in truth been called upon and have spoken. In the present case * * * there was an election and the people * * * voted and it is not alleged that any portion of them failed in knowledge of the pendency of the question, or to exercise their franchise." (Dishon vs. Smith, 10 Ia., 212.)
>
> "In this case the will of the people was clearly and decisively expressed at the polls and it should not be thwarted by the courts. Rather is it the duty of the courts to sustain the will of the people on all occasions, unless that will plainly undertakes to over-ride some provision of the constitution or laws duly enacted by the people's representatives." (Libby vs. Paul, 17 N. P. (n. s.) 433.)
>
> "1. Failure to publish notice of an election for boards of education as required by section 4839 G. C., will be treated as an irregularity only, where there is no showing that the result of the vote would have been in any way changed had publication been made as provided by law." (Syl. Opinion 810, Vol. 3, Opinions of the Attorney-General, 1917, p. 2182.)

In the statement of facts submitted on the case at hand, there is no showing that the result of the vote in this district would have been in any way changed, had

the ballots properly read "two years," that is, a lesser number of years during which the levy might be permitted. The board of education asked for authority from the voters to make a three mill levy (H. B. 613) for school purposes; the ballot submitted said as much. The affirmative majority was substantial for a township school election. Calling a special election to secure authority for two years, when already covered in a vote for five years by the electors, would be a useless public expense and delay not to be favored.

Based upon the statement of facts furnished and the citations and discussion appearing above, it is the opinion of this department that:

1. Where there is no showing that the result of the vote would have been in any way changed, the occurrence of mere irregularities that do not go to the foundation of an election, will not invalidate such election, although the provisions of the statute have been technically violated, if it appears that there has been a fair election and a comparatively full vote and no fraud or attempt to deceive or mislead.

2. Where the electors of a school district voted upon the question of a levy for taxes, under the provisions of section 5649-5 and 5649-5a, the amount to be three mills for two years, and a mistake was made in printing the ballots, providing for a levy of three mills for five years, the proceeding is not invalid and the board of education is authorized to levy three mills for school purposes during a period of two years, the period appearing in the resolution of the board of education.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1778.

OFFICES INCOMPATIBLE—COUNTY AUDITOR—CLERK OF BOARD OF DEPUTY STATE SUPERVISORS OF ELECTIONS.

1. *The office of county auditor is incompatible with any and all offices or employments which receive or pay out funds of the county, or where such offices or employments make a certificate to the county auditor for the payment of claims, and the county auditor cannot fill a second position when the duties of said second position or office require the incumbent to account for, receive or expend moneys or funds of the county, or to certify claims to the county auditor for payment.*

2. *The offices of county auditor and clerk of the board of deputy state supervisors of elections are incompatible and may not be held by one and the same person at the same time.*

COLUMBUS, OHIO, December 31, 1920.

HON. GEORGE S. MAY, *Prosecuting Attorney, Napoleon, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your recent request for an opinion on the following statement of facts:

> "S. H. B. is auditor of Henry County, Ohio, and is now serving his second term and does not contemplate being a candidate for re-election to said office. A vacancy is about to occur in the position of clerk of the board of deputy state supervisors of elections of Henry County, and Mr. B. has been solicited to accept the position."

You desire to know whether the county auditor can at the same time hold the