tute the first charge against the fund, after which the balance is to be applied on the claim for taxes, penalties and interest. Whether such proceedings discharge the state's claim for taxes, penalties and interest, or whether a personal liability still exists for the balance, and if so, how it may be enforced, are questions which are not decided.

Respectfully,
JOHN G. PRICE,
Attorney-General.

3375.

CORPORATIONS—EXCESSIVE VALUATION OF PERSONAL PROPERTY BY CORPORATION OR COUNTY AUDITOR—RECEIVER APPOINTED FOR COMPANY—HOW VALUATION CHANGED—AUTHORITY OF BOARD OF REVISION.

Where a corporation makes an excessive return of its property for taxation, or on the basis of a return made by such a corporation, the county auditor makes an excessive valuation of the personal property of the corporation, and subsequently after the assessment has been made and entered on the tax list and duplicate, a receiver is appointed for the company, who is able to show that the valuation is excessive, the county auditor is without authority under sections 5406, 2588, 2588-1 *and* 2589 *or any other section of the General Code, to change the valuation as it appears on the duplicate. The remedy of the receiver is to apply to the board of revision under section* 5609 *of the General Code.*

COLUMBUS, OHIO, July 21, 1922.

HON. JOHN R. KING, *Prosecuting Attorney, Columbus, Ohio.*

DEAR SIR:—You have requested the opinion of this department on the following questions:

> "The M. Company, a manufacturing concern for the year 1921 returned for taxation property valued at $206,210. Although this return was under the oath of the officers of said company, it was apparently excessive and prior to the last day for the payment of taxes for the first half of the year 1921, a receiver was appointed for the company, who thereupon filed a written verified application with the county auditor asking for a reduction in the amount for which the company was assessed for taxation. All the property so returned was personal and consisted of raw materials on hand, together with tools, machinery, etc. On April 24, 1922, the county auditor reduced said valuation to $155,920.
>
> The C. Company, a manufacturing concern, filed a return, supported by the affidavit of its officers, showing raw materials, tools, furniture, etc., on hand of a valuation of $66,710. The county auditor later increased this return to $136,120. Receivers were appointed for the company, who prior to the last day for the payment of taxes for the first half of the year 1921, filed an application for correction, and the auditor thereafter reduced said valuation to $87,050.
>
> The question presented in each case is the authority of the auditor to reduce such valuations."

Attached to your letter is a memorandum in behalf of the county auditor. You

refer to opinion No. 2378 for the year 1921, which is found in Vol. I, Opinions of the Attorney-General for that year, page 787.

This opinion construed sections 2588, 2588-1 and 2589 of the General Code, and applies fully to both of the cases submitted by you. The auditor claims authority under these sections, and also under section 5406 of the General Code.

The former opinion is adhered to; but in passing, it may not be inappropriate to elaborate slightly upon the reasoning on which that opinion was founded, and to consider 5406 of the General Code.

First, section 5406 may be quoted. It provides as follows:

> "The auditor of each county, on or before the first Monday of May, annually, shall furnish the president, secretary, principal accounting officer, or agent as provided in the next two preceding sections, the necessary blanks for the purpose of making such returns, but neglect or failure on the part of the county auditor to furnish such blanks shall not excuse such president, secretary, accountant, or agent, from making the returns within the time specified herein. If the county auditor to whom returns are made is of the opinion that false or incorrect valuations have been made, that the property of the corporation or association has not been listed at its full value, or that it has not been listed in the location where it properly belongs, or if no return has been made to the county auditor, he must have the property valued and assessed. This section and the next preceding section shall not tax any stock or interest held by the state in a joint stock company."

Undoubtedly the auditor has authority under this section either to increase or reduce the amount shown by the return of the proper officers of the corporation. This is because the auditor is acting in this instance as an original assessing officer. The return of the corporation does not constitute the assessment, which is incomplete until the auditor has acted and has placed his valuation upon the property exhibited in the return.

But in the cases submitted by you this original assessment has been made. Such assessment in each instance has been entered on the duplicate. At this point in the machinery of the assessment the power of the auditor under section 5406 is *functus officio*. He has no revisory power; if any change is to be made in the assessment an appeal must be made to the board of revision under section 5609 of the General Code. That section provides as follows:

> "Complaint against any valuation or assessment *as the same appears upon the tax duplicate for the then current year*, may be filed on or before the time limited for payment of taxes for the first half year. Any taxpayer may file such complaint as to the valuation or assessment of his own or another's property, and the county commissioners, the prosecuting attorney, county treasurer, or any board of township trustees, any board of education, mayor or council of any municipal corporation, in the county shall have the right to file such complaint. The county auditor shall lay before the county board of revision all complaints filed with him. The determination of any such complaint shall relate back to the date when the lien for taxes for the current year attached, or as of which liability for such year was determined, and liability for taxes, and for any penalty for non-payment thereof within the time required by law, shall be based upon the valuation or assessment as finally determined. Each complaint shall state the amount of over-valuation, under-valuation, or illegal valuation, complained of; and the treasurer may accept any amount tendered as taxes upon property concerning which a complaint is then pending, and if such tender is not accepted no penalty

> shall be assessed because of the non-payment thereof. The acceptance of such tender, however, shall be without prejudice to the claim for taxes upon the balance of the valuation or assessment. A like tender may be made, with like effect, in case of the pendency of any proceeding in court based upon an illegal excessive or illegal valuation."

In both these cases the desire of the applicant was to have the valuation or assessment *as it appeared on the duplicate* changed.

The power of the auditor himself to change an assessment on the duplicate is that which he possesses under sections 2588, 2588-1 and 2589 of the General Code. These were the sections considered in the former opinion. It is not necessary to repeat their quotation. It has been repeatedly held by the Supreme Court of this state that this power is limited to the correction of clerical errors as distinguished from fundamental errors.

> State vs. Commissioners, 31 O. S. 271;
> State vs. Raine, 47 O. S. 447;
> Insurance Co. vs. Capeller, 30 O. S. 560;
> Lewis vs. State, 59 O. S. 37.

To be sure, it has been also held that an error may be "clerical" though it does not appear on the face of the tax list and duplicate itself. Thus, in Insurance Co. vs. Capeller, supra, the error—an error of law in deducting certain items from "credits" appeared on the face of the return made by the corporation. As said by McIlvaine, J. at page 574:

> "No fact is to be inquired into. Every necessary fact appears on the face of the return."

Again, in Lewis vs. State, supra, the error clearly appeared on the face of the returns of the annual assessors with respect to new buildings. The courts have, however, never gone further than to hold that the power of the auditor under these sections extends to the correction of any error in the valuation of property which can be shown by inspection of official documents on file in his office. True, it was said in Lewis vs. State, supra, that:

> "It is true that some of the facts necessary in this case to show the error must be ascertained from other sources. This objection, however, we do not regard as conclusive. * * *. The statute itself does not require the correction to be made founded on facts of record in the auditor's office, * * * and we perceive no sufficient reason for restricting their operation in such cases by a construction that would deny relief except on record evidence."

However, in the case in which these remarks are found, the only fact *dehors* the record which was considered by the court was the fact that no new building had been erected on a certain lot after the year 1890. The official papers themselves clearly showed that if that was the case there had been a duplication and a mistake, in that the property had been twice assessed on account of one new building, the building having been listed by the decennial, or real estate appraiser, and by the annual, or real estate assessor. This is but a slight deviation from the principle suggested in this opinion, and it is not believed that that case can be used to justify action in the instances mentioned in your request for opinion.

Perhaps the best discussion of the distinction between a clerical and a fundamental error is found in State ex rel. vs. Raine, supra, in which Judge Bradbury used the following language:

> "Errors by which property escapes its lawful share of taxation must of necessity be either fundamental, and thus beyond the power of a county auditor to correct, or clerical merely, and therefore within that power. The difficulty, however, lies in the attempt to distinguish them. While we are not required in this case to lay down rules, if that were possible, by which, in all cases, the character of these errors—as being fundamental or merely clerical—may be determined, yet, certainly, those only are to be deemed fundamental that pertain to the very foundation upon which a tax rests; this of course includes defects and imperfections in the law itself, and errors of judgment committed by public boards acting within the scope of their authority. But can an error be said to be fundamental and thereby placed beyond the power of a county auditor to correct, where it has been committed by a board of equalization, or by any other board or officer while acting without authority of law, or in excess thereof? We think not; and if, when we come to examine the acts of the boards of equalization which are under cons deration in this action, it shall appear that they acted without warrant of law or exceeded their authority, their errors, so committed, are not in any proper sense of the term fundamental, and may therefore be corrected by the ccunty auditor."

The following statement is made in the memorandum submitted by the auditor:

> "Without reference to the cases under consideration, it has been found in a number of cases, that officers of a company, feeling themselves insecure financially, have sought to bolster their credit by placing a fictitious value upon their assets. Other instances have occured where property has been improperly valued by ignorance of the person making the return, or property has been returned which was really non-existent. In other cases there has simply been an error in making out the return."

Apparently the specific cases submitted by you come within the first class. It occurs to this department that certain distinctions may be drawn in the light of the cases. In the opinion of this department, where the alleged "error" consists of a mere over-valuation of property no correction can be made by the auditor whether the over-valuation was due to a desire on the part of the officers of a failing company to bolster up its credit or not. This is true because valuation is a matter of judgment. When the auditor places a valuation upon property returned to him, acting as has previously been observed, under section 5406 of the General Code, he has exercised his judgment. If any relief after his exercise of judgment is to be obtained, it must be from the board of revision. If, however, there has simply been an error in making out the return and this error is of a clerical character, and especially where property has been returned which is really non-existent, it may be that on the authority of Lewis vs. State, supra, the auditor may act.

It is also suggested in the memorandum prepared for the auditor that a court would surely direct a correction of such an error if appealed tc, so that the auditor could be said to have the right to do what a court would order him to do. This department, however, is of opinion that a court wculd not so act unless all administrative remedies had been exhausted, and that the taxpayer cannot complain in a court of an excessive valuation without first attempting to secure relief from the board of revision.

This statement also disposes of the contention made by the auditor to the effect that grave injustice will be perpetrated unless the auditor acts. A statement of the same character is found in the case of Lewis vs. State. Whether this statement was true with respect to real estate at the time Lewis vs. State was decided, it is certainly not true now; for a clear and complete remedy is given to the aggrieved taxpayer—in this instance, the receiver of the corporation acting in the interest of the creditors and stockholders—by an appeal to the board of revision under section 5609. This remedy is both expeditious and adequate, and no injustice will result from denying the power of the auditor to act.

Respectfully,
JOHN G. PRICE,
Attorney-General.

3376.

ROADS AND HIGHWAYS—WHERE VILLAGE STREET CONSTITUTING PART OF LINE OF INTER-COUNTY HIGHWAY OR MAIN MARKET ROAD COMES WITHIN PURVIEW OF SECTION 1198, G. C. IN MATTER OF IMPROVING HIGHWAY TO GREATER WIDTH THAN CONTEMPLATED BY HIGHWAY DEPARTMENT WHEN REQUESTED BY ABUTTING OWNERS—PROCEDURE TO BE FOLLOWED.

A village street constituting part of the line of an intercounty highway or main market road comes within the purview of section 1198 *G. C. in the matter of improving a highway to a greater width than that contemplated by the plans of the Department of Highways and Public Works, when such greater width is requested by abutting owners to be provided at their expense. Accordingly, the county commissioners making application for the improvement, may grant a petition of property owners for the additional width, and may assess abutting property owners for the additional width, and may assess abutting property on account of the cost of the additional width. Section* 1193-2 *G. C., providing for assessment of cost by the village, is not exclusive of section* 1198 *G. C. when the village itself is not sharing in the cost of the additional width.*

COLUMBUS, OHIO, July 21, 1922.

HON. EUGENE T. LIPPINCOTT, *Prosecuting Attorney, Lima, Ohio.*

DEAR SIR:—You have recently submitted the following for the consideration of this office:

"FACTS.

Bluffton is a village in Allen county. The Dixie Highway runs through the main street thereof. The village is bonded up to its limit. The state and federal government are paving the Dixie Highway. The village is anxious to have the improvement also go through the village and pave the street to the curb instead of only the regulation 18 feet. The abutting property owners have all filed a petition with the county commissioners agreeing to pay for the improvement to the additional width, provided the special assessment is in the usual 10 annual installments. The village has also filed its consent with the county commissioners and the State Highway Department to go through with the improvement.