

"The ballots shall be printed and prepared as follows: the whole number of ballots to be printed for the election of persons to fill each of said offices respectively shall be divided by the number of candidates for each of said offices respectively, and the quotient so obtained shall be the number of ballots in each series of ballots to be printed as follows: the names of candidates shall be arranged in alphabetical order and the first series of ballots printed; then the first name shall be placed last and the next series printed, and so shall the process be repeated until each name shall have been first. These ballots shall then be combined in tablets with no two of the same order of names together, except when there is but one candidate for any of said offices. The names of candidates for the same office but for different terms of service therein, shall be arranged in groups according to the length of their respective terms. Blank spaces shall be left at the end of the list of candidates for each office equal to the number to be elected thereto, in which the voter may insert the name of any person not printed on the ballot for whom he desires to vote for such office. The ballots shall be so printed as to give each elector a clear opportunity to designate by a cross mark in a blank enclosed space on the left and before the name of each candidate his choice of particular candidate."

It also seems pertinent in connection with your inquiry to advise you the names of candidates for member of boards of education of a school district rotate on the ballot, under the provisions of Section 5033, General Code, which reads:

"The ballots for members of the board of education shall be prepared and printed as follows: The whole number of ballots to be printed for the school district shall be divided by the number of candidates for member of board of education of the district, and the quotient so obtained shall be the number of ballots in each series of ballots to be printed. The names of candidates shall be arranged in alphabetical order and the first series of ballots printed. Then the first name shall be placed last and the next series printed, and so shall the process be repeated until each name shall have been first. These ballots shall then be combined in tablets with no two of the same order of names together, except when there is but one candidate."

I believe that the above answers your inquiry.

Respectfully,
 GILBERT BETTMAN,
Attorney General.

1018.

TAXES—PAID BY GUARDIAN ON WORLD WAR VETERANS' PENSION
 MONEY—PROCEDURE FOR REFUND.

SYLLABUS:

Taxes paid by the guardian of a disabled world war veteran on moneys received as payments under the World War Veterans Act of 1924, and which moneys are ex-

empt from taxation under the provisions of Section 22 of said Act, may be refunded to such guardian under the provisions of Section 2589, General Code.

COLUMBUS, OHIO, October 11, 1929.

HON. CHARLES O. CHAPMAN, *Prosecuting Attorney, McArthur, Ohio.*

DEAR SIR:—This is to acknowledge the receipt of your recent communication which reads as follows:

“In May, 1928, a guardian of a totally disabled World War veteran listed for taxation in Vinton County, Ohio, certain funds belonging to his ward and held by him in trust as such guardian, and by him deposited in The McArthur Savings and Loan Company's endowment certificates and certificates of deposit. These funds were solely derived from compensation and war risk insurance paid to the said guardian for the use and benefit of his said ward under the World War Veterans' Act, and from interest thereon.

On January 8, 1929, the said guardian paid to the treasurer of said county \$29.58, being the first half tax on the funds of his ward so listed, and, on June 15, 1929, he also paid to the said county treasurer \$29.58, being the second half of said taxes, and making a total of \$59.16 so paid by him as such taxes.

The said guardian now seeks a refunder of the full amount of such taxes so paid, as taxes erroneously paid through mistake.

Are such taxes refundable upon an application to the county auditor for a warrant therefor?”

In an opinion directed to the Tax Commission of Ohio under date of December 10, 1928, Opinions of the Attorney General, 1928, Vol. IV, page 2822, this department following the case of *Tax Commission of Ohio vs. Rife*, 119 O. S. 83, and other cases therein cited, held that estates that have been built up by guardians out of money received as payments under the World War Veterans' Act of 1924, are exempt from taxation under the provisions of Section 22 of said Act (38 USCA, Sec. 454), as long as said funds are in their original form in the hands of the beneficiary or are on deposit to the credit of his estate. It is quite clear therefore, that funds in the hands of the guardian of the World War veteran referred to in your communication and deposited by such guardian with said Savings and Loan Company on certificate of deposit, are exempt from taxation.

The question presented in your communication is whether taxes paid by said guardian on such funds for the year 1928, may now be refunded on application therefor made to the county auditor. The question here presented calls for a consideration of the provisions of Sections 2588, 2588-1, 2589 and 2590 of the General Code.

Section 2588, which together with Sections 2589 and 2590, General Code, was formerly a part of Section 1038, Revised Statutes, provides that 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 assessments.

Section 2589, General Code, provides that if after the county auditor has delivered the duplicate to the county treasurer for collection, the county auditor is satisfied that any tax or assessment thereof, 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; and that if at any time the county 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, and 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, and the county treasurer shall pay such warrant from any surplus or any unexpended funds in the county treasury.

Section 2590, General Code, provides that at the next semi-annual settlement with the Auditor of State after the refunding of such taxes, the county auditor shall deduct from the amount of taxes due the state at such settlement the amount of such taxes that have been paid into the state treasury. This section further provides that no taxes or assessments shall be so refunded except such as have been so erroneously charged or collected in the five years next prior to the discovery thereof by the county auditor.

Section 2588-1, General Code, provides that:

"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."

The answer to the question submitted by you depends upon whether the taxes paid by the guardian as stated in your communication, comes within the meaning of "taxes * * * charged and collected" as those terms are used in Section 2589, General Code. Aside from the question as to the effect of the provisions of Section 2588, General Code, requiring the county auditor to correct errors in the tax list and duplicate "when property exempt from taxation has been charged with tax," when read in connection with the provisions of Section 2589, General Code, it has been uniformly held that the provisions of Sections 2588 and 2589, General Code, authorize corrections of the tax duplicate and, when paid, a refund thereof only as to taxes assessed or extended on the duplicate by reason of clerical errors as distinguished from fundamental errors, in the levy and assessment of taxes. *State ex rel. vs. Commissioners*, 31 O. S. 271, 273; *Insurance Company vs. Cappellar*, 38 O. S. 560, 574; *Butler vs. Commissioners*, 39 O. S. 168; *State vs. Raine*, 47 O. S. 447, 456; *Commissioners vs. Rosche*, 50 O. S. 103, 112; *Christ vs. Commissioners*, 13 N. P. (N. S.) 457.

In the case of *State ex rel. vs. Commissioners*, *supra*, the court was called upon to consider the provisions of Sections 2588, 2589 and 2590, General Code, as enacted by an act passed January 16, 1873 (70 O. L. 10) amending Section 20 of an act prescribing the duties of county auditors passed April 4, 1859, which act did not then contain the provision now found in Section 2588, General Code, requiring the county auditor to correct errors in the tax list and duplicate "when property exempt from taxation has been charged with tax."

The case of *State ex rel. vs. Commissioners*, above cited, arose out of an application for a refund of taxes paid on property, which as a purely public charity was not subject to taxation under the statute providing for the exemption of property of this kind. The court in this case held that under Section 20 of the act prescribing the duties of county auditors, as amended by the act of January 16, 1873, above referred to, the duty of the board of county commissioners to refund taxes erroneously charged and collected, was imposed only where the error was in the name of the person charged, in the description of the property, or in the amount of the tax; and it was further held that the question, whether the property upon which the taxes were paid was

within the description of property exempt from taxation, was not, under said section, submitted to the judgment of the county auditor or of the board of county commissioners, as the error in the assessment and collection of taxes on such property was a fundamental error and not a clerical error, such as the statute was designed to correct.

Section 20 of the earlier act above referred to, prescribing the duties of county auditors as the same was amended by the act of January 16, 1873, was carried into the Revised Statutes of 1880 as Section 1038, and by said revision the section was amended so as to require the county auditor to correct all errors in the tax list and duplicate "when property exempt from taxation has been charged with tax," in language identical with that now found in Section 2588, General Code.

After the enactment of said Section 1038 as a part of the Revised Statutes of 1880, the provisions of said section were before the Supreme Court for consideration in the case of *Butler vs. Commissioners*, 39 O. S. 168. That case arose out of an application for a refunder of taxes on the ground that the property taxed had been entered on the tax list and duplicate of the wrong county. The court denied the right of the tax payer to a refunder on this ground and held that "under Section 1038, R. S., the power granted to the auditor and commissioners in addition to that conferred by the act of January 16, 1873, (70 O. L. 10) as construed in *State vs. Commissioners*, 31 O. S. 271, is limited to cases where property exempt from taxation has been charged with taxes, and does not extend to cases where taxes have been paid upon property subject to taxation, but returned in the wrong county." The court in its opinion in this case says:

"In *State vs. Commissioners*, 31 Ohio St. 271, an effort was made to require the commissioners to order the auditor to draw his warrant in favor of the relators, for taxes paid by them upon property, which, as a pure public charity, was exempt from taxation. This court then held, that the statute of 1873, providing for the correction of errors by the auditor and commissioners (70 Ohio L. 10, 11), did not authorize the commissioners to make such order, except where the error was clerical merely, and did not cover a case of taxes paid upon exempt property.

The act referred to was changed in the Revised Statutes, Section 1038, by adding the words 'or when property exempt from taxation has been charged with tax, or in the amount of such taxes or assessments.'

The claim of plaintiff is not that the property of the estate was exempt from taxation, but that the executors, not residing in Hamilton County, were not compelled to return it for taxation in that county. The change in the statute was for the purpose of enabling the commissioners to order the repayment of taxes, erroneously collected upon property embraced in Section 2732, R. S., and similar provisions, as exempt from taxation, and does not cover a case like the one at bar, where the property is subject to taxation, but returned or charged in the wrong county."

The case of *State ex rel. vs. Hess, Auditor*, 113 O. S. 52, arose out of an application for a refunder of taxes on the ground, as claimed, that the property upon which such taxes were paid was exempt from taxation under the provisions of Section 5349, General Code. The court in this case denied the right to the refunder for the reason that the property in question was not exempt from taxation and that the provisions of Section 5349, General Code, granting the exemption claimed, were unconstitutional. The court in its opinion, however, indicated quite clearly that if the property was exempt from taxation, the taxes charged and collected on the property were erroneously charged and collected within the meaning of Section 2589, General Code.

The court in its opinion after quoting the provisions of Section 2589, General Code, said:

"It is conceded by the respondent that if the provisions of Section 5349, General Code, are in conflict with the constitution, the taxes charged and collected on the property in question were erroneously charged and erroneously collected."

Upon consideration of the provisions of Sections 2588 and 2589, General Code above noted, and the decisions of the Supreme Court construing the same, I am of the opinion that the taxes referred to in your communication may be refunded by appropriate proceedings by the county commissioners and the county auditor of Vinton County under the provisions of Section 2589, General Code, and in the manner therein prescribed.

Although it was probably not so intended, the decision and opinion of the Supreme Court in the case of *State ex rel. vs. Board of County Commissioners of Mercer County, et al.*, 119 O. S. 504, suggests the question whether any refunder of taxes can be required under the provisions of Section 2589, General Code, if it appears that the taxes in question were voluntarily paid. The Supreme Court case here referred to was one on error from a judgment of the Court of Appeals of Mercer County rendered in an action in mandamus filed in said court against the county commissioners and the county auditor of said county to compel the refunder of a road assessment on the ground that the county commissioners had no jurisdiction or authority to levy said assessment, the action of the relator being based upon the provisions of Sections 2588, 2588-1 and 2589, General Code, above referred to.

The Court of Appeals sustained a demurrer to the amended petition filed in the case and upon such ruling dismissed said amended petition. The Supreme Court in the case above referred to, held that the demurrer to the amended petition was rightfully sustained for the reason that the provisions of Sections 2588, 2588-1 and 2589, General Code, had no application, it appearing that the error, if any, in the levy of said assessment, was a fundamental rather than a clerical error. The Supreme Court in its opinion said that the demurrer was rightfully sustained for the further reason that it did not appear from the amended petition that said assessment was not voluntarily paid.

The opinion of the Supreme Court in this case apparently lends some color to the view that the right to a refunder of taxes under the provisions of Sections 2588 and 2589, General Code, is conditioned upon the fact that the payment of such taxes was involuntarily made. However, the Supreme Court did not expressly decide this question, and in the absence of an express decision of the Supreme Court upon this point, I am inclined to the view that under the provisions of Sections 2588 and 2589, General Code, taxes erroneously charged and paid as therein provided for may be refunded under the authority of such sections although such taxes were voluntarily paid.

In the case of *Hagerty, Auditor, vs. State ex rel.*, 14 C. C. 95, decided by the Circuit Court of Hamilton County in 1897, it was held that a party who has erroneously paid taxes might, under Section 1038, Revised Statutes (now Sections 2588, 2589 and 2590, G. C.), by proceedings in mandamus, require the county auditor on discovering that taxes have been erroneously collected within the five years last past, to call the attention of the county commissioners to that fact, who may order a refunder of such taxes erroneously collected, and the fact that such taxes were voluntarily paid would not be a defense in such action.

This is the view that has prevailed generally with respect to this question, and I am of the opinion that the taxes referred to in your communication may be refunded,

