2881.

DELINQUENT TAXES—DELINQUENT TAXPAYER MAY PAY TAXES WITHOUT PENALTY OR INTEREST WHEN—FILING OF COMPLAINT AGAINST PROPERTY VALUATION.

SYLLABUS:

1. *Amended Senate Bill No. 42 enacted by the 90th General Assembly, as amended by Amended Senate Bill No. 23, as enacted by such General Assembly, is an exception to the general laws of Ohio relating to the collection of taxes and as such is to be given a strict but reasonable construction.*

2. *By reason of the provisions of Amended Senate Bill No. 42, enacted by the 90th General Assembly, as amended in Amended Senate Bill No. 23 enacted by its Second Special Session, a taxpayer is not entitled to pay the taxes assessed against his real estate which became delinquent prior to the August, 1934, settlement, without penalty or interest or to enter into an agreement to pay the same in installments, unless prior to the first of September, 1934, he shall have made such election and paid the current taxes due and payable at the time of the election and all of the principal of such delinquencies or the first installment thereof, even though he may have filed a complaint from the valuation pursuant to the provisions of Section 5609, General Code.*

3. *If on April 5, 1933, the effective date of Amended Senate Bill No. 42 as enacted by the regular session of the 90th General Assembly, a complaint against a valuation of a property for taxation, pursuant to the provisions of Sections 5609, et seq., General Code, was pending, but undecided, either before the board of revision, tax commission of Ohio or the courts, the taxpayer may within sixty days after the final determination of such complaint, avail himself of the provisions of such Amended Senate Bill No. 42, as amended.*

COLUMBUS, OHIO, July 2, 1934.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your request for my opinion which reads:

"We request your opinion relative to the construction to be placed upon Am. S. B. No. 42, enacted at the regular session of the 90th General Assembly and the amendments thereto.

X. is the owner of certain real estate which is delinquent for the years 1931 and 1932. The taxpayer has complaints pending relative to the valuation of the real estate for the years 1931, 1932 and 1933. None of the complaints in question have been finally adjudicated. The taxpayer in the year 1931 made a tender to the county treasurer of the amount of taxes he deemed due and payable for that year. In 1932 no tender was made. In 1933 a tender was made by the taxpayer for the first half, of the amount that he deemed due at that time.

Before an election may be made under the Whittemore Bill to pay upon the installment plan, section one requires that the current taxes then due and payable (1933) be paid. Inasmuch as the taxpayer has an appeal pending for 1933, which is as yet unadjudicated, he does not desire to pay more with respect to that assessment than the amount he

claims to be due. The county treasurer has refused the taxpayer the privilege of entering into an installment agreement under the Whittemore Bill with respect to the delinquencies for the years 1931 and 1932, it being the treasurer's contention that the words 'due and payable' as contained in section one of the Whittemore Bill mean all the taxes assessed for that year as then due, and not the amount which the taxpayer claims to be due and owing.

We expressly request your opinion relative to the right of a taxpayer to take advantage of the Whittemore Act installment agreement, where the taxpayer has tendered all the current taxes to the treasurer which he claims to be due and owing."

Amended Senate Bill No. 42, enacted by the 90th General Assembly, to which you refer (115 O. L., 161) as applicable to the facts set forth in your inquiry in effect provided that the owner prior to the February 1934 settlement between the county auditor and the county treasurer might:

1. Pay his current taxes together with a sum equal to the principal amount of the delinquencies for the years prior to the tax year 1932, and the taxes, penalties and interest for the tax year 1933, and thereupon receive a receipt in full of his taxes assessed, the penalties remaining unpaid being remitted;

2. Pay his current tax and 1932 tax if unpaid, and enter into a written agreement to pay such delinquencies in six annual installments plus interest at 4%, as provided in Section 3 of such act, with like effect.

Such act was amended in Amended Senate Bill No. 23, enacted by the Second Special Session of such General Assembly. In so far as concerns your inquiry, such Amended Senate Bill No. 23 merely (1) extends the time within which the election or payment may be made until September 1, 1934, and (2) extends the provisions of the act to the 1932 delinquencies.

Does a tender amount to a payment within the meaning of such act?

As such term is ordinarily used, a tender does not constitute the payment of a debt. If the tender is sufficient in form and amount, and is kept alive, it operates as an estoppel from further accumulation of interest and may prevent the plaintiff from recovering his costs. *Fuller* vs. *Pelton,* 16 O. S., 547; *Dustin* vs. *Newcomber,* 8 Oh. 50; *Dudley* vs. *Chicago M. & St. P. R. R. Co.,* 58 W. Va. 604; *Huntington* vs. *Ziegler,* 2 Oh. 10. Section 5609, General Code, makes a distinction between "payment" and "tender". The second paragraph of such section reads in part:

"* * 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. * *"

By reason of the provisions of Section 5609, General Code, the county treasurer may, when the taxpayer proffers payment of that amount which he concedes to be due, either accept such payment without any effect on his right to make further collection of additional tax, in the event that the board of revision or Tax Commission finds that the tax valuation is greater than that conceded by the taxpayer; or, the county treasurer may refuse such tendered payment. In either event, the penalty on such current tax would be computed only on the excess over the amount tendered.

Section 2655, General Code, if construed without reference to other provisions of the General Code, would prevent the county treasurer from collecting any portion of an item of tax, without at the same time receiving all portions, the collection of which is not specifically enjoined.

Section 2672, General Code, provides that the county treasurer may receive delinquent taxes in five consecutive semi-annual installments *"with the full amount of current taxes then payable and not otherwise."*

Each of such sections was enacted prior to Amended Senate Bill No. 42 and Amended Senate Bill No. 23 above referred to, (114 O. L., 826). To the extent that such sections are inconsistent with the provisions of the later acts, the provisions of the later acts will control. *Goff* vs. *Gates,* 87 O. S., 142; In re. Hesse, 93 O. S., 230. I therefore would have little difficulty in arriving at a conclusion concerning the conflict in language of such Sections 2655 and 2672 and such Amended Senate Bill No. 42 as amended by such Amended Senate Bill No. 23. Section 5609, General Code, authorizes the payment of taxes "otherwise" than as set forth in Sections 2655 and 2672, General Code. That is, it purports to authorize the payment of a portion of the current taxes charged upon the tax list and duplicate when the remainder has not been specifically enjoined by a court. Sections 5609, 2655 and 2672, General Code, were all amended by the 89th General Assembly. As held in the first syllabus of the case of *State ex rel.* vs. *Building Commission,* 123 O. S., 70:

> "The presumption against repeal by implication is stronger when the provisions claimed to be in conflict were enacted at nearly the same time."

Such provisions were enacted within two weeks of each other (114 O. L., 767; 114 O. L., 730). It is necessary to construe such sections in harmony with each other if such can be done by any mode of construction. In re. Hesse, 93 O. S., 230, 234; *State* vs. *Building Commission, supra.*

Were it not for the provisions of such Senate Bills Nos. 42 and 23, it would appear that the county treasurer must:

(a) Collect from the taxpayer at one and the same time all real estate taxes appearing on his duplicate and not specifically enjoined (Section 2655, G. C.), unless:

(b) The taxpayer has filed a complaint concerning the valuation of his real estate for the purposes of taxation, and with such purpose in view, has tendered or paid that amount of the current tax which he concedes to be due and delinquent.

I believe that only in such manner can effect be given to the provisions of each of such sections. It is hardly to be presumed that the legislature created a remedy for the taxpayer from an excessive or illegal valuation and within the next few days deprived the taxpayer of such remedy without having repealed the

law creating the remedy which it had so recently enacted. One of my predecessors held, and I believe logically so, that if the taxpayer files a complaint against the valuation of his property for taxation and thereafter pays the tax in full, his appeal was thereby abated. (1926 Opinions of the Attorney General, p. 36). The reasoning of this opinion is that when the taxpayer voluntarily pays his tax, even though illegal or excessive, he may not recover such illegal or excessive payment. *Wilson* vs. *Pelton,* 40 O. S., 305; *Whitbeck, Treas.,* vs. *Minch,* 48 O. S., 210 If the tax based upon the excessive valuation has been paid, the question is moot since the board of revision then has no power to grant the taxpayer any relief even though it find the facts to be in favor of the taxpayer. If it reduced the tax valuation for the year, it would avail the appellant nothing, for the excess tax could not be rebated.

Section 5609, General Code, makes no specific reference to the payment or tender of payment of delinquent taxes against a parcel of real estate. Such section has reference to a particular tax concerning which an appeal is being prosecuted. Since the appeal must be filed prior to the expiration of the time of the payment of the first half it is evident that such section refers to taxes for the current year.

Your inquiry arises by reason of the proviso contained in Section 1 of such Amended Senate Bill No. 42 as amended:

> "Provided, however, that no such person shall be entitled to make such election unless all taxes, assessments and penalties for the year 1933 then due and payable *have been paid.*" (Italics, the writer's.)

The election referred to in such proviso is to pay the principal amount of the taxes delinquent prior to the August 1933 settlement without penalty or interest. It would appear that all of the 1933 taxes due and payable at the time of the election must have been paid as a condition precedent to the making of the election. Such payment would be impossible by reason of the provisions of Sections 2655 and 2672, General Code. Since the county treasurer has no authority to receive them without payment of the delinquencies, it would appear that the legislature intended that payment of the taxes due and payable for the year 1933, must be made concurrently with the making of the election and the payment of the delinquent taxes without penalty or interest.

Was it the intent of the legislature to require a taxpayer who felt aggrieved at the assessment of the county auditor of his property to pay the current tax in full in order to become entitled to abatement of such penalties? If such be the intent of the legislature, then the taxpayer would have to elect whether he would pay the current tax in full, even though erroneously excessive, and thus secure for himself the financial advantages afforded by such Amended Senate Bill, or he could prosecute his appeal and lose whatever financial advantages he might have been entitled to avail himself of under the provisions of such senate bill. It must be remembered that Amended Senate Bill No. 42, as so amended, does not take away any right which already existed; it merely grants an additional right under certain circumstances.

I am not overlooking that rule of interpretation of laws, "that it is the duty of the courts in the interpretation of statutes, unless restrained by the letter, to adopt that view which will avoid absurd consequences, injustice, or great inconvenience, as none of these can be presumed to have been within the legislative intent". *Hill* vs. *Micham,* 116 O. S., 549, 553; *Moore* vs. *Given,* 39 O. S., 661.

It should be remembered, however, that such Amended Senate Bill No. 42 and Amended Senate Bill No. 23 are exceptions to the general tax laws with reference to real estate. Exceptions to the operation of laws are always to be strictly construed. *State ex rel. Kelley* vs. *Forney,* 108 O. S., 463, 467; *Jones* vs. *Crosswell,* 60 Fed., 2nd, 827. There is a natural presumption that the sovereign power, in levying a general tax, intends the burdens of such tax to be borne ratably by all its subjects, except those specifically exempted therefrom. The penalty for delinquency in the payment of taxes is placed generally on all taxpayers who do not pay the tax within the time required by law. When the general assembly came to enact Amended Senate Bill No. 42, it is self-evident that it found a condition to exist where many taxpayers had not paid taxes for the tax years 1932 and prior thereto, against which penalties had been assessed and interest accumulated. It is reasonable to assume that many of these delinquent taxes had been paid prior to the enactment of such Amended Senate Bill No. 42 (April 5, 1933). The purpose of the general assembly is stated in the title to the act:

"AN ACT

Providing for the collection of delinquent real estate taxes and assessments for years prior to 1932 by installments and for a discount for prompt payment of such taxes, and declaring an emergency."

And in Section 10 of such act:

"This act is hereby declared to be an emergency law immediately necessary for the preservation of the public peace, health and safety. The reason therefor lies in the fact that general economic conditions have made it impossible for many taxpayers to accumulate sufficient money to pay taxes and assessments charged on the real estate duplicate in semi-annual installments, as heretofore provided by law, whereby the amount and proportion of delinquent taxes and assessments have greatly increased in substantially all the counties in this state, and the taxing districts entitled to share in the proceeds of such taxes and assessments have thereby suffered substantial failure in revenue, and have been curtailed and impaired in the performance of their necessary functions of government; so that it is immediately necessary to provide an inducement for the prompt payment of such taxes and assessments and a means whereby taxpayers can more conveniently discharge their public obligations with respect to the payment of such taxes and assessments, to the end that the amount of such delinquency may be quickly reduced."

Such act and the amendment thereto do not provide for the imposition of a penalty or interest. The penalties and interest have accrued by reason of the provisions of statutes existing prior to the accrual of the tax. (§§5678, 5679 and 5704, G. C.) If the question presented were whether the penalties and interest should be assessed against the items of tax in question the law is well settled that the penalty and interest did not attach unless the tax items in question came strictly within the provisions of Sections 5678, 5679 and 5704, General Code, which authorize the imposition of the penalty and collection of interest. Such principle is so well established that I am not troubling you with a citation of authorities. However, your question presumes that the penalties and interest were lawfully

imposed. Amended Senate Bill No. 42 as so amended is not a law imposing a penalty but is rather a law providing for exceptions from the provisions of another law providing certain events occur. As stated by Wanamaker, J., in *State ex rel. Keller* vs. *Forney,* 108 O. S., 463 at 465:

> "The rule is well and wisely settled that exceptions to a general law must be strictly construed. They are not favored in the law, and the presumption is that what is not clearly excluded from the law is clearly included in the operation of the law."

Such statement is amply supported by the decisions of the courts. *Jones* vs. *Crosswell,* 60 Fed., 2nd, 327; *United States* vs. *Colorado & N. W. R. Co.,* 157 Fed., 321; *Harvey Coal & Coke Co.* vs. *Dillon,* 59 W. Va. 605; *Mengel Box Co.* vs. *Sea,* 167 Ky., 193; 2 Lewis' Sutherland Statutory Construction, Sec. 351.

Reason and justice would appear to require such type of interpretation. Thus, if by reason of the provisions of Sections 5678 and 5679, General Code, a penalty was attached to a tax, it is reasonable to assume that many taxpayers after the date such penalty attached but before the effective date of such S. B. 42 as amended, paid such taxes and penalties, yet no provision is made for the return of the penalties so paid by those not so delinquent as those taxpayers referred to in your inquiry. Is it reasonable to infer that the legislature intended to grant such delinquent taxpayers any greater advantage than the language of the statute expressly states? Since there is no provision of law authorizing the refund of penalties for the nonpayment of taxes for the same years when paid prior to the enactment of the acts in question, it would appear to me that not only the requirement of law but justice and reason require a literal or strict construction to be placed on the provisions of such Amended Senate Bill No. 42 as so amended.

A strict interpretation would not permit the payment of the delinquencies without penalties and interest unless at the time the taxpayer made his election so to do he was willing, and did pay the current tax then due and payable, as distinguished from that portion thereof which he contended was legal and equitably assessed.

In Section 9 of such Amended Senate Bill No. 42, specific provision is made for certain taxpayers who had complaints pending on the effective date of such act (April 5, 1933). Such section reads:

> "In the event a complaint concerning the valuation of any parcel or parcels of land and/or buildings and structures thereon is pending on the effective date of this act, whether before a county board of revision or on appeal to the tax commission of Ohio, or to the courts, then any person entitled to the benefits of this act with respect to taxes and assessments levied on such land and buildings and structures may avail himself of any election provided for by this act at any time within sixty days after any decision of such complaint or proceedings which has become final, notwithstanding the limitation expressed in section I of this act."

Specifically answering your inquiry, it is my opinion that:

1. Amended Senate Bill No. 42 enacted by the 90th General Assembly, as amended by Amended Senate Bill No. 23, as enacted by such General Assembly,

is an exception to the general laws of Ohio relating to the collection of taxes and as such is to be given a strict but reasonable construction.

2. By reason of the provisions of Amended Senate Bill No. 42, enacted by the 90th General Assembly, as amended in Amended Senate Bill No. 23 enacted by its Second Special Session, a taxpayer is not entitled to pay the taxes assessed against his real estate which became delinquent prior to the August, 1934, settlement, without penalty or interest or to enter into an agreement to pay the same in installments, unless prior to the first of September, 1934, he shall have made such election and paid the current taxes due and payable at the time of the election and all of the principal of such delinquencies or the first installment thereof, even though he may have filed a complaint from the valuation pursuant to the provisions of Section 5609, General Code.

3. If on April 5, 1933, the effective date of Amended Senate Bill No. 42 as enacted by the regular session of the 90th General Assembly, a complaint against a valuation of a property for taxation, pursuant to the provisions of Sections 5609, et seq., General Code, was pending, but undecided, either before the board of revision, tax commission of Ohio or the courts, the taxpayer may within sixty days after the final determination of such complaint, avail himself of the provisions of such Amended Senate Bill No. 42, as amended.

Respectfully,
JOHN W. BRICKER,
Attorney General.

2882.

CIVIL SERVICE—NOT APPLICABLE TO EMPLOYES OF PARK DISTRICT CREATED UNDER SECTIONS 2976-1 ET SEQ., GENERAL CODE.

SYLLABUS:

The civil service laws of the State of Ohio are not applicable to persons employed by a board of park commissioners of a park district created under section 2976-1, et seq., General Code.

COLUMBUS, OHIO, July 2, 1934.

The Civil Service Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—This will acknowledge your letter requesting my opinion which reads in part as follows:

> "The Hamilton County Park District was created in accordance with Section 2976-1 et seq. of the General Code. Section 2976-6 authorizes such Board to 'employ a secretary and such other employes as may be necessary.'
>
> The limits of the Park District so created coincide with the boundaries of Hamilton County and include no territory other than that