

Note from the Attorney General's Office:

1928 Op. Att'y Gen. No. 28-1664 was rendered
obsolete by 1974 Op. Att'y Gen. No. 74-068.

1663.

APPROVAL, FINAL RESOLUTIONS ON ROAD IMPROVEMENTS IN
CUYAHOGA AND FAYETTE COUNTIES.

COLUMBUS, OHIO, February 2, 1928.

HON. GEORGE F. SCHLESINGER, *Director, Department of Highways and Public Works,*
Columbus, Ohio.

1664.

TAX AND TAXATION—DELINQUENT REAL ESTATE—ACCRUAL DATE
OF 10% PENALTY UNDER SECTION 5678, GENERAL CODE.

SYLLABUS:

Under the provisions of Section 5678, General Code, the ten per cent penalty upon delinquent real estate taxes does not accrue until the February settlement between the county auditor and county treasurer.

COLUMBUS, OHIO, February 3, 1928.

HON. CHARLES P. TAFT, *2nd, Prosecuting Attorney, Cincinnati, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication which reads:

“The question has arisen in this county as to the penalty for delinquent real estate taxes. Your predecessor, Mr. Price, in interpreting an earlier statute (Op. Atty. Gen. 1920, Vol. 2, p. 1269) held that while the statute fixed the time by which real estate taxes must be paid, the penalty did not accrue until the February settlement. We have serious doubts as to the soundness of this opinion and logically there seems no basis at all for saying that taxes must be paid by a certain date, but that no penalty accrues until a month or more later. The holding in this opinion was obiter dicta.

In view of this situation, your opinion is requested as to whether under the amendment of Section 5678, General Code, to be found in 110 O. L. at page 152, the 10 per cent penalty upon delinquent real estate taxes accrues upon the last date for payment fixed by the county commissioners, or upon the completion of the February settlement.”

The syllabus of the former opinion of this department to which you refer (Op. Atty. Gen., 1920, Vol. II, p. 1269) reads as follows:

“1. 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 on the dates mentioned in Section 2657, G. C., 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, G. C., being regarded as in this sense directory."

Section 5678, General Code, as amended 110 Ohio Laws, page 152, reads as follows:

"If one-half the taxes charged against an entry of real estate is not paid on or before the twentieth day of December, in that year, or collected by distress or otherwise prior to the February settlement, a penalty of ten per cent thereon shall be added to such half of said taxes on the duplicate. If such taxes and penalty, including the remaining half thereof, are not paid on or before the twentieth of June next thereafter, or collected by distress or otherwise prior to the next August settlement, a like penalty shall be charged on the last half of such taxes. The total of such amounts shall constitute the delinquent taxes on such real estate to be collected in the manner prescribed by law."

The only change in said section effected by amendment was that the penalty was changed from fifteen per cent to ten per cent. Your question possibly grows out of the erroneous statements in said opinion in regard to the construction of the word "collection" and the phrase "receipt of payment of taxes". It was incorrectly stated in said opinion that "in contemplation of law the tax is not *being paid after the last day* limited for the payment of taxes; it is rather being *collected* by the treasurer." This statement, however, was corrected in an opinion of this department, viz., No. 1855, rendered February 11, 1921, to the Prosecuting Attorney, Ravenna, Ohio, and reported in Opinions, Attorney General, 1921, Vol. 1, p. 135, in which it was stated that:

"The thanks of this department are due to you for your courteous letter of February 1, quoting a letter from the tax commission of Ohio, which raises a question as to certain features of the holding in Opinion No. 1776 of this department, rendered December 31, 1920.

The commission refers to the case of *Hunter vs. Borck*, 51 O. S. 320, which was overlooked in consideration of Opinion No. 1776. The case holds, among other things, that a county treasurer is not entitled to collect the penalty of five per cent provided for by several of the sections referred to in said Opinion No. 1776 in case he merely receives delinquent taxes over the counter after the last date limited for the payment of taxes.

The case draws the general distinction that was pointed out in Opinion No. 1776 between the function known as 'receipt of payment of taxes' by the county treasurer and that known as 'collection'; but it forces a modification of some of the language in said Opinion No. 1776 by holding that some 'special effort in person or through agent' must be made by the county treasurer in order to constitute a 'collection' which may be used as the predicate of the penalty. The only direct statement on this point in Opinion No. 1776 which needs express modification is embodied in the following sentence:

'in contemplation of law the tax is not being *paid* after the last day limited for the payment of taxes; it is rather being *collected* by the treasurer.'

This statement is incorrect.

Another statement in Opinion No. 1776 requires some qualification; that is the statement that

'the treasurer can not of his own motion hold open his books for the payment of taxes beyond January 20 under authority of a resolution of the commissioners extending the time until January 20.'

This statement is literally incorrect. It would be more exact to say that the treasurer can of his own motion receive payment of taxes after the last date to which the time for payment has been extended, but that he cannot be compelled to do so. In other words, without action by the commissioners in the manner suggested in Opinion No. 1776, the receipt of taxes without penalty by the treasurer after the last date to which the commissioners have extended the time for the payment of taxes would be entirely optional with him; he would be perfectly authorized to close his books and proceed to make some 'special effort in person or through agent' to collect the delinquent taxes. Nothing in the case cited is inconsistent with this view and the statutes all bear it out.

While, therefore, it is true that the precise question answered in Opinion No. 1776 might have been answered by the statement that the treasurer was authorized to hold his books open under the circumstances, if he so desired—but not, of course, beyond the settlement period; yet the general conclusions arrived at in the former opinion are adhered to; it being the opinion of this department that without action by the county commissioners the collection process on the part of the county treasurer cannot be stayed beyond the dates named in the statute, but that by action of the county commissioners in the manner therein mentioned this can be done. It would, of course, seem advisable to have the commissioners act in order that there might be a definite date fixed for the payment of taxes."

In said case of *Hunter, Treasurer vs. Borck*, 51 O. S. 320, the Supreme Court of Ohio said as follows:

"It will be seen, that Section 2844, regulating the penalty on non-payment of real estate taxes, contemplates an effort to collect by distress or otherwise, prior to the February settlement and the August settlement, not only the first and second half of the yearly taxes, but also a penalty of fifteen per cent. Section 1094, directs that the treasurer shall proceed to

collect the delinquent taxes by distress or otherwise, with a penalty of five per centum on the amount thereof, for his own use, as a compensation for such collection.

* * * * *

* * * But to entitle the treasurer to the compensation allowed under Section 1094, he must render the prescribed service. He must proceed to collect, *and collect* the delinquent taxes by distress or otherwise, together with the penalty of five per centum on the amount of taxes so delinquent.

It is conceded that the treasurer cannot earn his commission by merely standing behind the counter and receiving the tax the next day after the twentieth of December. If he would proceed to collect, *and collect* the delinquent tax otherwise than by distress, he may collect by procuring a rule of court, as provided by Section 1097 of Revised Statutes; or, by attachment and garnishee process as described in Section 1102 of the Revised Statutes; or, by action as provided in Section 1104 of the Revised Statutes; or, by special effort in person or through agent, and not by simply holding himself out as ready to receive the taxes due, or making a formal request of the taxpayer, or giving notice to taxpayers generally to pay their delinquent taxes.

In the case at bar, the efforts made by the treasurer to collect the taxes and assessments were not such as would meet the requirement of the statute. No suit was begun; no attempt was made to collect by distress; and there was no resort to any other summary mode of procedure."

In the 1920 opinion, *supra*, it was stated that:

"So far as real property taxes are concerned, it is clear from Section 5678, General Code, that the fifteen per cent penalty prescribed thereby is not chargeable until after the February settlement. The language of the section is:

'If one-half the taxes charged against an entry of real estate is not paid on or before the twentieth day of December, in that year, or collected by distress or otherwise prior to the February settlement' the penalty shall be added.'

The two parts of this clause are not alternatives. The theory of the section is that until 'the twentieth day of December' the taxes are to be 'paid'—that is, tendered to the treasurer by the taxpayer; and that between the twentieth day of December and the time of making the February settlement they are to be 'collected by distress or otherwise,' that is, through the efforts of the county treasurer acting under such sections as Section 2658 authorizing the distraint of goods and chattels for the payment of any tax, or Sections 2667 et seq., authorizing the foreclosure of the lien for real property taxes due and unpaid. Of course, it is not meant to imply that the only action that the treasurer can take between these dates is action of the kind described. It is perfectly lawful for him to receive the money when tendered by the taxpayer, but in contemplation of law the tax is not being *paid* after the last day limited for the payment of taxes; it is rather being *collected* by the treasurer. As to real estate, however, the treasurer can not lawfully *collect* the fifteen per cent penalty on the tax between

these dates. Section 5678 implies as much when it prescribes, in part, that 'if one-half the taxes charged against an entry of real estate is not * * * collected by distress or otherwise prior to the February settlement,' a penalty shall accrue. So that so far as the question of penalty on real estate is concerned your general question is answered by the statement that this penalty is not chargeable on account of such taxes paid to or collected by the county treasurer prior to the February settlement, though received after the time limited for the 'payment' of taxes."

I agree with these conclusions and with said 1920 opinion as modified in the opinion of this department, reported in Opinions, Attorney General, 1921, p. 135, and you are therefore advised that the ten per cent penalty upon delinquent real estate taxes, provided for in Section 5678, General Code, does not accrue until the February settlement between the county auditor and county treasurer.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1665.

STARK COUNTY—JUSTICE OF THE PEACE—JURISDICTION.

SYLLABUS:

1. *Any justice of the peace duly elected in any township of Stark County, Ohio, has jurisdiction in criminal cases throughout the county in which he is elected and where he resides, and his authority to hear and determine a criminal case in the manner prescribed by law, is not limited to the township for which he is elected and where he resides.*

2. *An affidavit in a criminal case may be made and filed before any justice of the peace duly elected in any township of Stark County, Ohio, in any township, in such county, and such justice may issue a warrant in such township, regardless of whether or not it be the township in which such justice of the peace was elected and where he resides.*

COLUMBUS, OHIO, February 3, 1928.

HON. HENRY W. HARTER, JR., *Prosecuting Attorney, Canton, Ohio.*

DEAR SIR:—This will acknowledge your letter dated January 30, 1928, which reads:

"Your opinion is desired in regard to the following set of facts:

By special act of Legislature the office of justice of the peace has been abolished in Canton and Plain Townships in Stark County; likewise in Lexington, Washington, Perry and Tuscarawas Townships, and the jurisdiction of justice of the peace lodged in municipal courts in Canton, Alliance and Massillon.

There are at present two justices of the peace maintaining offices in the City of Canton who are exercising the criminal jurisdiction of their offices, one of them being elected for Lake Township and the other being elected for Lawrence Township, neither of which townships is affected