

to be used for slaughter houses and the killing of animals, or the use of said premises for the sale of intoxicating liquors or malt beverages.

Taxes for the year 1923 are paid.

It is suggested that the proper execution of a general warranty deed by Henry O. Wood and wife, if married, will be sufficient to convey the title of said premises to the State of Ohio when properly delivered.

Attention is also directed to the necessity of the proper certificate of the Director of Finance to the effect that there are unincumbered balances legally appropriated sufficient to cover the purchase price before the purchase can be consummated.

The abstract submitted is herewith returned.

Respectfully,

C. C. CRABBE,
Attorney General.

1314.

TAXATION—NO LEGALLY CONSTITUTED COUNTY BOARD OF ASSESSORS—AUTHORITY OF COUNTY AUDITOR UNDER SECTIONS 5639, 5398, 5399 AND 5400 G. C.

SYLLABUS:

Amended section 5398, General Code, repealed no other section or part of section except original section 5398.

There is no legally constituted county board of assessors.

A county auditor acting alone has no power to do any of the things authorized in section 5398 G. C. as amended.

The county auditor may exercise the same powers as formerly under sections 5369, 5399 and 5400, General Code.

Penalties under the provisions of section 5369 G. C. may be applied as therein provided.

COLUMBUS, OHIO, March 31, 1924.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Acknowledgment is hereby made of the Commission's recent communication, which reads as follows:

"Since House Bill No. 330, known as the Albaugh Bill, failed to be ratified at the last election, several questions have arisen concerning the force and effect of House Bill No. 355, known as the Robinson Bill. We respectfully request you to advise the Commission as follows:

1. What sections, or parts of sections, of the General Code, in addition to original section 5398, are repealed by section 2 of amending section contained in 110 O. L., 248?

2. Is there any legally constituted county board of assessors?

3. Has a county auditor, acting alone, any power to proceed to do any of the things authorized in section 5398 as amended?

4. If he can proceed under the new section may he place omitted amounts on the duplicate and add the penalty for the years prior to 1924?

5. If, in your opinion, there is no legally constituted board of assessors, and if the auditor cannot proceed under section 5398 as amended, what are the powers yet remaining which he may exercise under sections 5369, 5399 and 5400?

6. What penalty, if any, can be applied after January 1st, 1924, for (a) a false return; (b) the evasion of making a return. If any penalties may be imposed, please outline the procedure in each case."

House Bill No. 330, known as the Albaugh Bill, was originally passed March 30, 1923, and passed—notwithstanding the objections of the Governor—April 28, 1923. It was submitted to a referendum vote at the regular November election, but failed of ratification.

This bill by its terms amended sections 5366, 5366-1, 5369, 5375-3, 5548, 5624 and 12924-4 of the General Code, and enacted supplemental sections 5366-2, 5366-3, 5366-4, 5366-5 and 12924-4a of the General Code.

Proposed amended section 5366 G. C., 110 O. L., page 386, read as follows:

"There is hereby created a county board of assessors which shall be composed of the county auditor, prosecuting attorney and president of the board of county commissioners. The president of the board of county commissioners shall be chairman of the board and the county auditor shall act as secretary. The members of the county board of assessors shall not be required to give additional bond. The county board of assessors shall list and value for taxation all real and personal property within their respective counties except as may be otherwise provided by law, and for such purposes the county is hereby made the unit."

This section as amended gave to the newly created "county board of assessors composed of the county auditor, prosecuting attorney and president of the board of county commissioners," certain powers and imposed certain duties formerly performed by the county auditor alone.

Section 5398 of the General Code provided a penalty for failure to list taxable chattel property for taxation with the local assessor or the county auditor.

After enacting House Bill No. 330, known as the Albaugh Bill, the legislature proceeded to enact House Bill No. 355, known as the Robinson Bill. The above named Robinson Bill, 110 O. L., page 248, amended section 5398, General Code, and substituted "county board of assessors" for "county auditor." It repealed original section 5398, General Code.

This action of the legislature was taken upon the presumption that the Albaugh Bill was and would remain the law of Ohio, and said section was framed in conformity with the provisions of said Albaugh Bill, 110 O. L., page 248.

Section 2 of amended section 5398, General Code, expressly repealed original section 5398, which provided a penalty for failure to list taxable chattel property for taxation with the local assessor or county auditor.

Amended section 5398, General Code, provides a penalty for failure to list said property; but also provides that the penalty shall be imposed for failure to list such property with the "county board of assessors."

In answer to the first question, section 2 of the act to amend section 5398 G. C., 110 O. L., page 248, reads as follows:

"Sec. 2. That original section 5398 and any other section or part of section of the General Code, in conflict with the provisions of this act, be and the same are hereby repealed. * * *"

There is no section or part of section of the General Code, in addition to original section 5398 repealed by section 2 of the act to amend section 5398, 110 O. L.,

page 248. Original section 5398 contained the only provision for adding a penalty in case of a "false return or the evasion of making a return."

The penalty provided was that:

To the amount so ascertained as omitted for each year, there should be added fifty per cent and the omitted sum or sums, as increased by said penalty, was to be multiplied by the rate of taxation belonging to the said year or years, and the amount entered on the tax lists in the auditor's office.

Section 5369, General Code, adopted this penalty by reference; but the provisions of said section 5369 are not in conflict with section 5398 as amended, 110 O. L., page 248, and said section 5369 is, therefore, not repealed.

Section 5399 G. C. also refers to section 5398 G. C. as follows:

*"The inquiries and corrections provided for in this section and in the next preceding * * * sections."*

But said section is not in conflict with amended section 5398.

"Section 5399 allows the auditor to correct the returns so as to include all omitted property for the past five years or to give the property returned its true value in money, as the case may require. It does not apply in the case of a false return or where the making of a return has been evaded, but rather in cases of honest mistake or innocent neglect, and no penalty is provided."

Marietta Chair Co. v. Scott, Auditor, Washington County, Ohio, Common Pleas, August 8, 1922.

Considering the second question, the county board of assessors was provided for in the proposed amended section 5366 G. C., and was composed of the county auditor, prosecuting attorney and president of the board of county commissioners. It was provided also that:

*"The county board of assessors shall list and value for taxation all real and personal property within their respective counties, except as may be otherwise provided by law. * * *"*

This being the only provision creating and establishing the county board of assessors, it necessarily follows that upon the failure of said section to be ratified by the people upon the referendum of said act, that there is no legally constituted board of assessors.

Where a statute grants a power or right, the power or right originates with the statute, and exists only to the extent plainly granted. The right and power cease, if the statute be repealed.

Sutherland Statutory Construction, Vol. II, section 491.

The third question has reference to the present authority of the county auditor. Section 5398 G. C. formerly provided as follows:

"If a person required to list property or make a return thereof for taxation, either to the assessor or the county auditor, in the year 1911 or in any year thereafter makes a false return or statement, or evades making a return or statement, the county auditor for each year shall ascertain as near as practicable, the true amount of personal property, moneys, credits,

and investments that such person ought to have returned or listed for the year 1911 or for any year thereafter for which the inquiries and corrections provided for in this chapter are made. To the amount so ascertained as omitted for each year he shall add fifty per cent., multiply the omitted sum or sums, as increased by said penalty by the rate of taxation belonging to said year or years, and accordingly enter the amount on the tax lists in his office, giving a certificate therefor to the county treasurer who shall collect it as other taxes."

This section had reference to listing property "either to the assessor or the county auditor," and the county auditor was authorized to enforce a penalty against a person who made a false return or statement, or evaded making a return or statement.

Section 5398 G. C., as amended in 110 O. L., page 248, reads as follows :

"If a person required by law to list personal property or make a return thereof for taxation, to the county board of assessors, intentionally evades making a return or statement, or makes a false tax return or statement, omitting any taxable chattel property therefrom, or knowingly or intentionally withholds from such tax list any taxable chattel property, either tangible or intangible, required by law to be listed, the county board of assessors shall call such person before them for examination, if living, if he be dead his legal representative, by written notice given, either by personal service, or by registered letter, directed and mailed to his last known postoffice address, containing such written notice, giving such person an opportunity to be heard. If, upon such hearing, or examination, it be found by the county board of assessors that any person so required by law to list personal property, or make a return thereof for taxation, has intentionally evaded making such a return, or statement, or has made a false tax return, or statement, omitting any taxable chattel property therefrom, or knowingly or intentionally withholds from such tax list any taxable chattel property, either tangible or intangible, the county board of assessors, for each year, shall ascertain as near as practicable, the true amount of personal property, moneys, credits and investments, that such person should have returned, or listed for the year 1924, or for any year or years thereafter, for which the inquiries and corrections provided for in this chapter are made. To the regular tax on the true value of such property so ascertained to have been falsely returned or knowingly or intentionally omitted, the county board of assessors shall add as a penalty ten per cent of the true value of such omitted property in money, or of the deficiency in value thereof as returned, for the current year and two per cent of the true value of such omitted property for each of the preceding years in which such property was not returned for taxation, and shall certify the same to the county auditor who shall enter the amount of tax on such omitted taxable chattels, together with the said ten per cent penalty additional thereon for the current year, and two per cent penalty for each preceding year, on the tax lists and duplicate of his office, against the owner thereof if living, or against his estate if he be dead, and give a certificate therefor to the county treasurer for collection as other taxes as provided by law."

This amended section refers to listing personal property or making a return thereof for taxation "to the county board of assessors," and the penalty for making a false return or statement for omitting any taxable chattel property therefrom, or knowingly, or intentionally withholding from such tax list any taxable chattel prop-

erty, was to be imposed by the "county board of assessors." The "county board of assessors" was empowered to hear and determine questions pertaining thereto and to impose the penalty and enforce the same.

This authority and jurisdiction is expressly given to the "county board of assessors," and the county auditor alone therefore, does not possess the authority or jurisdiction to hear and determine the questions and perform the duties herein named, or to impose the penalty provided in amended section 5398 G. C.

As your fourth question is predicated upon an affirmative answer to the third question, and as that question is answered in the negative, no answer is made to your fourth question herein.

Your fifth question is in effect: There being no legally constituted "county board of assessors" and the auditor being unauthorized to proceed under section 5398 G. C., what powers yet remain which the auditor may exercise under sections 5369, 5399 and 5400 G. C.?

Section 5369 G. C. reads as follows:

"Each person required to list property for taxation shall take and subscribe an oath or affirmation that all the statements in such list are true, and that such list contains a full disclosure of all property required by law to be listed for taxation, and the true value in money of all such property; and when any person required by law to list and make return of property to the county auditor, shall wilfully fail or refuse to make such list or return within the time fixed by law, or shall refuse to take and subscribe an oath or affirmation to such list or return, or shall wilfully omit to make a full and complete list and return of all taxable property, or shall wilfully fail to give the true value of any property in such list or return, or shall wilfully fail or refuse to answer all questions contained in the blanks for listing such property, the county auditor shall cause all such property to be listed and assessed and shall add to the amount thereof the penalty provided in section 5398 of the General Code; and in case of a false oath to any such list, he shall certify the facts to the prosecuting attorney, who shall proceed as in other cases of perjury. This section shall be printed in plain type upon all blanks for the listing of any property."

The county auditor possesses the same powers under section 5369 G. C. that he had before the amendment and repeal of original section 5398 G. C.

Section 5369 G. C. provides:

"* * * the county auditor shall cause all such property to be listed and assessed and shall add to the amount thereof the penalty provided in section 5398 of the General Code; * * *"

This section was passed in 1917 and the penalty in section 5398 G. C. referred to reads as follows:

"To the amount so ascertained as omitted for each year he shall add fifty per cent., multiply the omitted sum or sums, as increased by said penalty by the rate of taxation belonging to said year or years, and accordingly enter the amount on the tax lists in his office, giving a certificate therefor to the county treasurer who shall collect it as other taxes."

Section 5369 by referring to and adopting this penalty in original section 5398 made said penalty a part of its own provisions.

"Where one statute adopts the particular provisions of another by specific and descriptive reference to the statute or provisions adopted, the effect is the same as though the statute or provisions adopted had been incorporated bodily into the adopting statute."

Sec. 257 Sutherland Stat. Cons. (Citing Phoenix Assur. Co. vs. Fire Dept. 117 Ala. 631).

To the same effect is Johnson vs. Ludlow, 3-0-553.

"When so adopted, only such portion is in force as relates to the particular subject of the adopting act, and is applicable and appropriate thereto."

Sec. 405 Sutherland Stat. Cons. (Citing Matthew vs. Sands, 29 Ala. 136).

The subsequent amendment of section 5398 and the modifying of the penalty, did not affect the penalty adopted by reference in section 5369 G. C.

"Such adoption takes the statute as it exists at the time of the adoption and does not include subsequent additions or modifications of the statute so taken, unless it does so by express intent."

Darmstetter vs. Moloney, 45 Mich. 621.

Schlandecker vs. Marshall, 72 Pa. St., 200.

Postal Cable Co. vs. Southern Ry., 89 Fed., 190.

"In referring to section 2864 for a statement of parties to whom a cause of action might inure and for rules of procedure, section 2866 adopted the statute to which it referred in its then existing state and, by failing to declare that subsequent amendments or modifications of that statute should apply also to the referring statute, such amendments or modifications should not be held to have been intended to extend to the referring statute in the absence of an expressed declaration to that effect."

Crohn vs. Telephone Co., 131 No. App. 313.

"As a rule the adoption of a statute by reference is construed as an adoption of the law as it existed at the time the adopting statute was passed, and therefore is not affected by any subsequent modification or repeal of the statute adopted."

Culver vs. The People ex rel, etc., 161 Ill., page 89.

It is clear from the foregoing authorities that the penalty provided in former section 5398 G. C. became by reference and adoption, a part of section 5369 G. C., when said last named section was passed in 1917; and that the subsequent amendment and modification of said section 5398 G. C., 110 O. L., page 248, did not affect said penalty as theretofore adopted.

It is evident that the county auditor under section 5369 G. C., has power to impose the penalty prescribed in original section 5398, unless said section 5369 G. C. was repealed by section 2 of the act amending section 5398, 110 O. L., page 248.

Said section 2 of said amendatory act reads as follows:

"That original section 5398 and any other section or part of section of the General Code, in conflict with the provisions of this act, be and the same are hereby repealed. * * *"

Amended section 5398 provides a penalty for making a false return or the evasion of making a return to the "county board of assessors." It is also provided in said section that the falsity of said return and the fact of the evasion are

to be determined by the "county board of assessors" after notice and hearing by said "county board of assessors." Said board of assessors are then to impose the penalty provided in amended section 5398 and certify same to the county auditor. Said provision to apply to the year 1924 or for any year thereafter.

There being no "county board of assessors" the provisions of said amended section 5398 as hereinbefore stated, are inoperative and unenforceable. There is no person or board authorized to issue notice, hold a hearing, determine the facts, impose the penalty and issue certificate to the county auditor as therein provided.

However, section 5398 as amended and section 5369 are not in conflict. Amended section 5398 will also apply to other years than the current listing year, as did original section 5398, while section 5369 applies only to the current year.

This construction was given these sections in an opinion of this department rendered November 10, 1917, Opinions of Attorney-General, 1917, Volume III, page 2062.

In answer to the questions as to whether section 5369 G. C. as amended March 21, 1917 (107 O. L., 31), in any way affected section 5398 G. C., and also as to whether a county auditor could proceed under section 5398 G. C., to correct false returns made in previous years prior to 1917, and subject the same to the fifty per cent penalty provided therein, the following excerpts are taken from said opinion:

"It is claimed that section 5369 G. C. now states the only grounds upon which tax returns may be corrected and penalties added, and that inasmuch as under it there is no authority to add the penalty unless the misconduct of the tax payer is 'wilful' it is in conflict with section 5398 G. C. which does not employ this term.

It does not seem to me that, on the face of the statutes, it can be claimed that the legislature intended to repeal section 5398 G. C. when it enacted section 5369. No matter to what extent two statutes may cover the same subject-matter, the latter is not potent to repeal the earlier, if the latter by appropriate recital recognizes the continuing force and effect of the earlier.

In this case section 5369 refers expressly to the penalty provided by section 5398. In so far as the penalty provisions of section 5398 are concerned, therefore, that section is in force if for no other reason than because of the express recognition of its force by section 5369.

Section 5369 does not purport to authorize any corrections of returns for previous years. It is a part of an act providing for the assessment and collection of taxes generally. All of its provisions are apt only as referring to the machinery of taxation for the current year. Section 5399 provides as follows: * * *

Reading these two sections (5398 and 5399) together, it is clear that the repeated use of the phrase "year or years" does contemplate corrections for years other than the one for which the assessment is being made and corrections affecting the duplicates of more than a single year. Such is not the case in section 5369 G. C. as I have pointed out."

The county auditor therefore has authority under section 5369 to enforce the penalty prescribed under original section 5398.

The county auditor may exercise the same powers under section 5399 G. C. as before the amendment of section 5398 G. C. As was said in the answer to the first question herein, section 5399 G. C. provides no penalty and therefore is not in conflict with amended section 5398 G. C. Under the provisions of section 5399 G. C., if the return is not "false" by which is meant either wilfully false or culpably

negligent (*Ratterman vs. Ingalls*, 48 O. S., 468), the penalty may not be imposed. But the action to be taken will be referable to section 5399 G. C. which authorized no penalty. Opinions of Attorney-General, 1917, Volume III, page 2065.

Section 5399 G. C. deals with a bona fide but incorrect return, while section 5398 G. C. deals with a false and fraudulent return. Opinions of Attorney-General, 1922, Volume I, page 731.

Section 2781a, Revised Statutes, was divided and carried into the General Code as sections 5399 and 5400.

Section 5399 G. C. composed the first paragraph of said section 2781a, Revised Statutes, under the heading "action of auditor upon omission of tax return."

Section 5400 G. C. composed the second paragraph of said section 2781a R. S., and was under the heading "exceptions."

Section 5400 G. C. was therefore enacted as an exception to section 5399 G. C., and such is its only function at present. It reads as follows:

"The power and duty of the county auditor under the provisions of the next preceding section, shall extend to all cases where property, taxable within his county, has for any reasons not been assessed and taxed according to its true value in money, as provided by law, except that where provision is made by law for the appraisal and assessment of property by a board composed of officers of more than one county, and such property or part thereof has escaped taxation, the duties provided in such section shall be performed by such board. The board, at any subsequent meeting, may appraise and assess such omitted property for the year or years so omitted, and certify its assessment to the proper officer or officers to be placed upon the tax lists of the proper county or counties for the collection of omitted taxes thereon in a like manner as current assessments are certified by said board, and such officer or officers shall give a certificate therefor to the county treasurer, as in other cases."

It seems clear that the amendment of section 5398 G. C. in no way affects the above section.

In construing this section this department held (*Opinions of Attorney-General*, 1914, Volume I, page 413) that:

"This section makes it clear that the county auditor has no power under the group of sections of which it is a part when the property in question is such as for which 'provision is made by law for the appraisal and assessment (thereof) by a board composed of officers of more than one county.'

"Railroad property, of course, is property such as is described by the phrase above quoted."

The amendment of section 5398 G. C. does not affect the powers exercised by the county auditor under section 5400 G. C.

In your sixth question you inquire concerning penalties after January 1, 1924. As stated in the answer to your fifth question, the county auditor may after January 1, 1924, apply the penalties provided under the provisions of section 5369 G. C.

Summarizing, amended section 5398, General Code, repealed no other section or part of section, except original section 5398.

There is no legally constituted county board of assessors.

A county auditor acting alone has no power to do any of the things authorized in section 5398 G. C. as amended.

The county auditor may exercise the same powers as formerly under sections 5369, 5399, 5400, General Code.

Penalties under the provisions of section 5369 G. C. may be applied as therein provided.

Respectfully,
C. C. CRABBE,
Attorney General.

1315.

APPROVAL, FINAL RESOLUTIONS, ROAD IMPROVEMENTS IN WOOD,
MIAMI AND ATHENS COUNTIES.

COLUMBUS, OHIO, April 1, 1924.

*Department of Highways and Public Works, Division of Highways, Columbus,
Ohio.*

1316.

APPROVAL, THREE LEASES, TO STATE LANDS AT PIQUA, DAWSON
AND MASSILLON.

COLUMBUS, OHIO, April 1, 1924.

*Department of Highways and Public Works, Division of Public Works, Columbus,
Ohio.*

GENTLEMEN:—I have your letter of April 1, 1924, in which you enclose the following leases, in triplicate, for my approval:

MIAMI AND ERIE CANAL

	Valuation
The Sherer-Bell Co., M. & E. Canal Property at Piqua, Ohio, for business purposes	\$8,000 00
C. C. C. & St. L. Railway Co., Canal Property at Dawson, Shelby Co., Ohio, for railway purposes.....	500 00

OHIO CANAL LAND

	Valuation.
The Brown Lumber Co., Ohio Canal Land at Massillon, Ohio, for building, storage and lumber yard.....	\$8,333 33

I have carefully examined said leases, find them correct in form and legal, and am therefore returning the same with my approval endorsed thereon.

Respectfully,
C. C. CRABBE,
Attorney General.