

*OK to  
Substitute  
BFS*

Stubbs  
Bond  
Cantor  
Pickrell

September 29, 1953  
Letter Opinion No. 53-117-L

The Honorable Clay Simer and  
The Honorable Alfred Paul, Jr.  
State Senators  
State Capitol  
Phoenix, Arizona

# LAW LIBRARY ARIZONA ATTORNEY GENERAL

Gentlemen:

In answer to your inquiry concerning the effect of Section 73-701, A.C.A. 1939, our Opinion No. 53-57 which was written by this office on March 13, 1953 is enclosed. It is still the decision of this Department that the conclusion reached in the enclosed copy of opinion is correct.

Two further matters might be mentioned at this time which will serve to reinforce the decision of Opinion No. 53-57. Superior Court Judge Henry C. Kelly, of the County of Yuma, in a judgment rendered in the case of LOFTUS v. ARIZONA GAME AND FISH COMMISSION, on July 30, 1953, had this to say concerning the problem about which you have inquired:

"The Notice of Application for Treasurer's deed is attacked upon at least three grounds, -- that the Certificates of Sale each incorporated into the total amount calculated to be due a 4% addition to principal, besides interest; that the Notice stated an incorrect figure as the total for which the land was sold; and that several parcels were grouped together instead of being separately listed. Kitchel v. Gadsden Hotel Co., 42 Ariz. 226 and Christmas Copper Corp. v. Kennedy, 58 Ariz. 216, with other authorities are cited to support the contention of invalidity of the sale. The Kitchel case definitely holds that the 4% of costs upon collection was not properly charged to the taxpayer, and that Sec. 3128 (1928 Code) had been repealed by implication or superseded by the later enactment of new provisions for the collection of delinquent taxes. Nothing was said of the 4% penalty provided by Sec. 3110 of the same code to be added to the principal of the tax for the default in payment prior to

the delinquent date. The penalty, to encourage the timely payment of taxes, is entirely distinct from costs of collection. From the case itself it can only be supposed, and then only because the two percentages are the same, to wit: 4%, that any question of the penalty 4% was presented to the Court. That percentage may, for aught the case shows to the contrary, have been merged into the tax which the taxpayer attempted to pay the Treasurer. The deduction that this is true is more reasonable than the contrary one, for surely if the penalty of Sec. 3110 had been in controversy, or the subject of decision, the Court would not have confined its statement to Sec. 3128 nor so carefully have referred to its 4% as costs. The reasoning of the opinion is wholly based upon this item falling into the category of costs. The same judge who wrote the Kitchel opinion for the Court holding Sec. 3228 had been superseded less than five years later wrote another opinion. Homeowners etc. vs. City of Phoenix, 51 Ariz. 455, specially mentioned Sec. 3110 and quoting a part of it in support of his conclusions, and this he certainly would not have done if that Section had been repealed or superseded within his knowledge."

Thus judgment has been rendered by the Superior Court in and for the County of Yuma holding that Section 73-701, A.C.A. 1939, is still the law.

Section 3128, Revised Code of Arizona, 1928, was held to have been repealed in the case of KITCHEL v. GADSDEN HOTEL CO., (1933) 42 Ariz. 226. The question here presented is whether Section 3110, Revised Code of Arizona, 1928, which has been carried down into the 1939 Code as Section 73-701, was also repealed by implication under the holding of the Kitchel case, supra.

Under Section 3128, supra, a fee of four percent was to be levied on all taxes collected after the second Monday of December. It should be emphasized that Section 3128, supra, refers specifically to a fee which was to be levied as a cost for the collection of delinquent taxes.

In analyzing Section 3110 (Section 73-701, A.C.A. 1939), it is evident that one half of the taxes on all personal property secured by real property, and one half of the taxes on all real property were due and payable on the first Monday in September and were delinquent on the second Monday in November. This section further

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provides that if taxes are paid after the delinquent date a four percent penalty would also be levied. It should be stressed that Section 3110, supra, refers specifically to a penalty for the failure to pay taxes before the first Monday in November of each year, while Section 3128, supra, refers to a four percent charge which was to be levied as a fee to cover collection costs. This points to the conclusion that the four percent mentioned in Section 3128, supra, and the four percent mentioned in Section 3110, supra, are not the same items -- one four percent is a fee, the other a penalty.

In discussing the two sections above mentioned, it is pointed out that the date mentioned in Section 3128, supra, was the second Monday of December, while the two delinquent dates mentioned in Section 3110, supra, were the first Monday in November of each year and the first Monday in March of the following year. The fact that we have different dates upon which the levy of the four percents are based also indicates that the four percent mentioned in Section 3110, supra, and the four percent mentioned in Section 3128, supra, are not the same four percents. In the Revised Statute of Arizona, 1913, the two Sections 4895 and 4924, which are the forerunners of Sections 3110 and 3128 of the 1928 Revised Code of Arizona, contained identical dates of levy, the second Monday of December of each year. However, the Arizona Legislature, in Section 2, Chapter 22 of the Regular Session of 1915 and in Section 2, Chapter 9 of the Second Special Session of 1915, specifically brought the changes in the dates which appear in the two sections in the 1928 Code. Here we have the Legislature specifically changing the delinquent date in Section 3110 of the 1928 Code, while no change at all was made in the delinquent date found in Section 3128 of the 1928 Code.

In view of the above analysis, it is the opinion of this Department that the Supreme Court in the Kitchel case, supra, held that only the four percent under Section 3128, supra, had been repealed. It is believed Section 73-701, supra, was not affected.

We trust that this letter will answer all your questions concerning the subject matter. If you have any other questions concerning this or any other matter please feel free to call on us.

Very sincerely yours,

IRWIN CANTOR  
Assistant to the  
Attorney General

RCS:IC:PO  
enclosure

cc: The Honorable Joseph L. Petersen  
Treasurer of Navajo County  
Courthouse  
Holbrook, Arizona

JULES KLEGG

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