

Opinion No. 17-2043 1/2

August 10, 1917

BY: C. A. HATCH,

TO: Mr. John Baron Burg, Attorney, Albuquerque, New Mexico.

The Five Per Cent Attorney Fee Cannot Be Collected Where Delinquent Taxes Are Paid Subsequent to Filing Suit, But Prior to Rendition of Judgment.

OPINION

Replying to your favor of recent date, wherein you ask our opinion as to whether or not the five per cent. attorneys' fees provided for in Section 6, Chapter 80, Laws of 1917, can be collected in a case where the delinquent taxes are paid subsequent to filing suit, but prior to the rendition of judgment, we advise as follows:

Section 6, Chapter 80, provides that in entering judgment the clerk shall add to the amount of tax penalties and costs as shown by such delinquent tax list five per centum of the total amount due from each person. In this section we find the only provision for adding the five per cent. additional, therefore, if the five per cent. can be collected where the full amount is paid prior to judgment, the authority to make such collection must be conferred by this section. According to the exact language of Section 6, the authority conferred is to add five per cent. when **rendering judgment**. Does it follow therefrom that the five per cent. may be collected where judgment is not rendered, as would necessarily be the case in the event of payment before the rendition of judgment? We think not. Statutes allowing fees for the collection of taxes are penal in the nature and must be strictly construed. *Kane v. Union Pacific Ry. Co.* 5 Neb. 109. The court cannot extend the operation of such statute without direct authority. *Id.* This being the rule in construing such statutes, it must follow that only in the cases expressly provided for by the statute, can the five per cent. be charged and collected. By the terms of Section six, the addition of the five per cent, is restricted or limited to when the judgment is rendered or entered. Therefore, if judgment has not been entered, we necessarily conclude that the five per cent additional, provided for in the statutes, cannot be charged or collected. In arriving at this conclusion, we have been assisted by the following authorities:

27 Cyc. 1783;

Lammon v. Austin, 6 Wash. 199, 33 Pac. 355;

In the case of *Jennings v. McKay*, 19 Kas. 120, where a mortgage provided that an attorneys' fees of \$ 50.00 should be allowed for foreclosure, the court, through Mr. Justice Brewer, held that where payment of the debt was made after filing suit, but before final decree was entered, the \$ 50.00 attorney fee provided for in the mortgage

could not be collected, as there had been no foreclosure of the mortgage, and could be no foreclosure until final judgment and sale.