5841

1. COUNTY AUDITOR—REQUIRED TO LIST EACH TRACT, LOT OR PARCEL OF REAL PROPERTY ON GENERAL TAX LIST OF REAL AND PUBLIC UTILITY PROPERTY—NAME OF OWNER—SUCH REQUIREMENT IF PROPERTY ACTUALLY OCCUPIED BY LESSEE—TO DETERMINE VALUE, AUDITOR SHOULD INCLUDE ALL BUILDINGS, STRUCTURES AND FIXTURES.

2. WHERE BUILDINGS OMITTED OVER PERIOD OF YEARS FROM ASSESSMENTS IN NAME OF OWNER OR REALTY AND ERRONEOUSLY ASSESSED IN NAME OF LESSEE, DUTY OF COUNTY AUDITOR, UPON DISCOVERY OF ERROR, TO ADD BUILDINGS TO LISTING OF REAL PROPERTY IN NAME OF OWNER ON CURRENT DUPLICATE—WHERE NO CHANGE OF OWNERSHIP, DUTY TO ADD TO TAXES OF CURRENT YEAR, SIMPLE TAXES ON OMITTED PROPERTY FOR EACH OF PRECEDING FIVE YEARS.

3. REAL PROPERTY TAXES—LEVIED AGAINST PROPERTY ITSELF—PAYMENT CANNOT BE ENFORCED AS PERSONAL OBLIGATION AGAINST OWNER OR LESSEE.

SYLLABUS:

1. The county auditor is required to list each tract, lot or parcel of real property on the general tax list of real and public utility property in the name of the owner thereof, even though such property is actually occupied by a lessee and in determining its value the auditor should include all buildings, structures and fixtures located thereon.

2. Where the buildings on real estate have been omitted over a period of years from the assessments made in the name of the owner of the realty, during which period these buildings were erroneously assessed in the name of a lessee, on discovering such error it is the duty of the county auditor to add these buildings to the listing of the real property in the name of the owner on the current duplicate and, in addition thereto, where there has been no change of ownership, to add to the taxes of the current year the simple taxes on such omitted property for each of the preceding five years.

3. Real property taxes are levied against the property itself and payment thereof can not be enforced as a personal obligation against the owner or a lessee of such property.

Columbus, Ohio, February 20, 1943.

Hon. Ralph Finley, Prosecuting Attorney,
New Philadelphia, Ohio.

Dear Sir:

This will acknowledge receipt of your request for my opinion, which reads as follows:

> "Your opinion is respectfully requested concerning the following facts and legal questions:
>
> A owns a tract of real estate in this county which is rich in coal. By some arrangement, the nature and extent of which are unknown to the auditor of this county, B Company, not a corporation, began mining operations thereon about 1927. A tipple and approximately a dozen homes for miners were erected. The county auditor has taxed these structures and certain mine equipment of the nature of fixtures on the real estate duplicate of this county under a heading 'Buildings on Leased Ground'. The B Company ceased to exist in December, 1939, as its assets were seized by reason of default of the B Company in the payment of a note and mortgage to X Bank on said buildings and equipment. The mortgagee thereafter sold said buildings and equipment to the same individuals who had formerly constituted B Company. The business since 1939 has been carried on under the name of C Company, not a corporation. The records in the office of the Recorder of this county do not reveal the interest

and rights of the B or C Company on the premises in question, but it is understood to be a lease.

You are respectfully referred to 1921 Opinion of the Attorney General, Volume I, page 124. Also 1938 Attorney General Opinion, Volume III, page 2349. The case of The Sandusky Bay Bridge Company v. Fall, Treasurer, et al., in 41 O. App., page 355, seems inconsistent therewith.

Your opinion on the following questions is respectfully requested:

First: Should structures and buildings on leased land be carried on the tax books in the name of the lessor or lessee?

Second: In the event such buildings on leased land have been carried in the name of the lessee, is there any method whereby those taxes may be placed against the land itself, in a case where the taxes on said buildings have not been paid by the lessee over a period of fifteen years, and steps taken to collect the same by foreclosure on the land?

Third: In the event that your answer to No. 2 above is in the negative, what, if any, steps toward collection of these taxes can be taken against the lessee under the facts set forth above, particularly as regarding those taxes prior to the change of name of the company in 1939?"

In his preparation of the general tax list of real and public utility property the county auditor is guided entirely by statutory provisions. Section 5548, General Code, makes him the assessor of real property in his county. Every six years it is his duty to assess all real property situated therein. In other years he is authorized by Section 5548-1, General Code, to revalue and assess any real property which he finds is not on the duplicate at its true value in money. Real property is defined in Section 5322, General Code, as follows:

"The terms 'real property' and 'land' as so used, include not only land itself, whether laid out in town lots or otherwise, and all growing crops, including deciduous and evergreen trees, plants and shrubs, with all things contained therein but also, unless otherwise specified, all buildings, structures, improvements, and fixtures of whatever kind thereon, and all rights and privileges belonging or appertaining thereto."

In making his appraisal the county auditor is controlled by Section 5560, General Code, which provides in part that:

> "Each separate parcel of real property shall be valued at its true value in money, excluding the value of the crops, deciduous and evergreen trees, plants and shrubs growing thereon. * * *"

From the specific exclusion of such crops, trees and shrubs it may be inferred that the Legislature intended that "all buildings, structures, improvements, and fixtures of whatever kind thereon" should be included in the appraisal and assessment. This conclusion is confirmed by Section 5554, General Code, which provides in part:

> "The county auditor, in all cases, from the best sources of information within his reach, shall determine, as near as practicable, the true value of each separate tract and lot of real property in each and every district, according to the rules prescribed by this chapter for valuing real property. He shall note in his platbook, separately, the value of all dwelling houses, mills and other buildings, which exceed one hundred dollars in value, on any tract or plat of land not incorporated, or on any land or lot of land included in a municipal corporation, which shall be carried out as a part of the value of such tract. * * *"

To assist the county auditor in maintaining a correct duplicate, Section 5564, General Code, provides in part:

> "For the purpose of enabling the county auditor to determine the value and location of buildings and other improvements every individual, partnership, incorporated company, or otherwise, * * * who shall erect or construct any building or other improvement costing over two hundred ($200.00) dollars upon any lot or land within any of the various townships, villages or municipalities not having and requiring a system of building registration and inspection shall within sixty days after said building or other improvement shall have been commenced, notify the auditor of the county within which such land or lot is located, that said building or improvement has been completed or is in process of construction. Said notice shall be in writing and contain an estimate of the cost of said building or improvement and such description of the lot or land and ownership thereof as will identify the lot or tract of land on said auditor's duplicate. * * *"

It should be noted that the person erecting or constructing a building is the one charged with the duty of informing the auditor of the improvement but the notice to the auditor for purposes of identification must contain a description of the property and the ownership thereof thereby recognizing that the person erecting the building is not necessarily the owner whose name appears on the duplicate.

On the second Monday of June annually the county auditor is required, by Section 5605, General Code, to lay before the county board

of revision the returns of his assessment of real property for the current year for correction and revision. The duplicates are thereafter prepared pursuant to Section 2583, General Code, which is in part as follows:

> "On or before the first Monday of August annually, the county auditor shall compile and make up, in tabular form and alphabetical order, separate lists of the names of the several persons, companies, firms, partnerships, associations and corporations in whose names real property has been listed in each township, city, village, special district, or separate school district or part of either in his county, placing separately, in appropriate columns opposite each name, the description of each tract, lot or parcel of real estate, the value of each tract, lot or parcel, and the value of the improvements thereon, if any, * * *. Such lists shall be prepared in duplicate. On or before the first Monday of September in each year, the county auditor shall correct such lists in accordance with the additions and deductions ordered by the tax commission of Ohio, and by the county board of revision, and shall certify and on the first day of October deliver one copy thereof to the county treasurer. The copies prepared by the county auditor shall constitute the auditor's general tax list and treasurer's general duplicate of real and public utility property for the current year. In making up such tax lists, the county auditor may place each town lot in its numerical order, and each separate parcel of land in each township according to the numerical order of the section."

When proper evidence of the transfer or conveyance of real property is presented to the auditor, it becomes his duty to transfer such lands on the tax list into the name of the owner as provided in Section 2573, General Code, which section reads:

> "On application and presentation of title, with the affidavits required by law, or the proper order of a court, the county auditor shall transfer any land or town lot or part thereof or minerals therein or mineral rights thereto, charged with taxes on the tax list from the name in which it stands *into the name of the owner,* when rendered necessary by a conveyance, partition, devise, descent or otherwise. If by reason of the conveyance or otherwise, a part only of a tract or lot, or minerals therein or mineral rights thereto, as charged in the tax list is to be transferred, the person desiring the transfer shall make satisfactory proof of the value of such part compared with the value of the whole, as charged on the tax list, before the transfer is made. The auditor shall indorse on the deed or other evidences of title presented to him that the proper transfer of the real estate therein described has been made in his office or that it is not entered for taxation, and sign his name thereto." (Emphasis mine.)

The owner of real property is the owner of the fee or life estate therein. One holding a lease at common law was not regarded as owner

of the property. His interest was known as a chattel real. The length of the term of the lease was immaterial. Even if the term of the lease was renewable forever and the lease perpetual, the interest of the lessee did not ripen into an ownership of the lands.

In this respect it was said in Taylor v. DeBus, 31 O. S., 468, at page 472:

> "By the common law, leasehold estates were regarded as chattels—chattels real to be sure, but nevertheless subject to the rules relating to chattel property; but by statute, as early as 1821, leaseholds renewable forever were made subject to judgments and executions 'as real estate,' and in 1837 they were subjected to the same laws of descent and distribution 'as estates in fee,' and such has continued to be the state of our statute laws ever since. Now, it is contended that, by force of this legislation, such estates are no longer chattels; that the creation of such an estate in lands is equivalent to an absolute transfer of the fee, and, therefore, the common law incidents of leasehold estates are abrogated. Such results do not follow such legislation. To the extent that leasehold estates have, by statute, been subject to the rules which govern estates in fee, of course the rules of the common law, in respect thereto, have been abrogated, but beyond this, the common law continues to furnish the only rules for the guidance of courts in determining the rights of parties in relation to leasehold estates. And it is quite clear to our minds that there is nothing expressed in these statutes, and nothing implied, that modifies the common law in respect to the rights or liabilities of the parties to this record.* * *"

The same conclusion was reached in Rawson et al. v. Brown, 104 O. S., 537, wherein the first branch of the syllabus reads:

> "A permanent leasehold estate renewable forever is not a fee simple although under the Ohio statutes it has many of the incidents thereof. The fee simple remains in the lessor, his heirs, devisees or assigns."

Since the statutes require real property to be listed in the name of the owner, it appears immaterial as to whether or not the property is leased for the lessor continues to be the owner.

While the commission appointed by the Governor in 1876 to relieve the congested docket of the Supreme Court pursuant to the provisions of Section 22 of Article IV of the Constitution reached a different conclusion (one member dissenting) in Cincinnati College v. Yeatman, 30 O. S., 276, the statutes have since been materially changed. The commission placed considerable emphasis upon the fact that the statutes then in force

made the tax a personal obligation of the person holding the lands. It also held that title to land might be divided horizontally, as well as vertically.

In Sandusky Bay Bridge Co. v. Fall, Treasurer, 41 O. App., 355, mentioned in your inquiry, the court followed the Cincinnati College case in holding that the bridge company owned the bridge itself and its approaches which were realty and were subject to taxation as real property. No question was raised therein respecting the rights of lessees for the bridge company had "a perpetual easement on the land underlying the waters of the bay". Since the decision in the Cincinnati College case, the Legislature has changed the statutes dealing with the taxation of real property. The tax is no longer levied against the owner, but is now levied against the property itself. The name of the owner, like the description of the property, now seems to be used primarily as a means of identification. In one of the Attorney General's opinions mentioned in your inquiry and reported in Opinions of the Attorney General for the year 1921, at page 124, it is said:

> "* * * In this state the taxation of real property under existing statutes is, with very few exceptions, *in rem*. The land is taxed as such, regardless of the different estates or interests therein. That is to say, A may have the ultimate fee in a tract of land, B a life estate therein, C a leasehold, D a mortgage, etc.; yet for purposes of taxation there is but a single thing to be listed, viz.: the tract. * * *"

In Teaff v. Hewitt, 1 O. S., 511, it was held as shown in the first branch of the syllabus that:

> "A fixture is an article which was a chattel, but which, by being affixed to the realty, became accessory to it, and parcel of it."

This decision has been consistently followed in Ohio, as well as in other states.

> Fortman v. Goepper, 14 O. S., 558
> Case Manufacturing Co. v. Garven, 45 O. S., 289
> Holland Furnace Company v. Trumbull Savings and Loan Co., 135 O. S., 48.

In the latter case it was held that:

> "1. A fixture is an item of property which was a chattel but which has been so affixed to realty for a combined functional use that it has become a part and parcel of it.

2. A fixture is to be determined by the consideration of a combination of the following tests: (1) To become a fixture it is essential that the chattel in question be annexed to some extent to realty. (2) The chattel must have an appropriate application to the use or purpose to which the realty to which it is attached is devoted. (3) There must be an actual or apparent intention upon the part of the owner of the chattel in affixing it to realty to make such chattel a permanent part of such realty. (*Teaff* v. *Hewitt*, 1 Ohio St., 511, approved and followed.)"

In the body of the opinion favorable reference was made to Case Manufacturing Co. v. Garvin, supra, wherein it was said:

"* * * whilst by the agreement of the parties, the property may be made to preserve the character of personalty, yet, when it is so attached, that, but for the agreement, it would be a fixture, such agreement would be of no avail against a subsequent mortgagee of the realty without notice of it; * * *."

The same reasoning should be applied in considering tax liens for a secret agreement between A, the owner, and B Company or C Company, the lessee, would be of no avail against the levying of taxes. Under the third rule of the second branch of the syllabus in the Holland Furnace Company case it was apparently the intention of the owner and lessee to make the tipple and miners' homes permanent parts of the realty.

This question was also considered in the 1938 Attorney General's opinion mentioned by you and reported in Opinions of the Attorney General for the year 1938, at page 2349, wherein the first and second branches of the syllabus read:

"1. Where land is leased for filling station purposes for a term of years and the lease contains a stipulation that the building erected by the lessee shall not become a part of the realty, is binding as between the lessor and lessee, it does not bind the taxing authorities of the State of Ohio.

2. The land and building should be carried on the real estate duplicate as 'real estate' or 'land', as provided by Section 5322, General Code."

In considering the facts you have related, the controlling features appear to be the manner of annexation of the tipple and homes in question and the appropriateness of the application to the use or purpose to which the realty to which they are attached is devoted. Secret agreements must give way to the apparent intentions. On June 29, 1939, the Tax Commissioner of Ohio adopted Rule No. 3 for the purpose of having a uniform

classification of property used in the coal mining industry. So far as pertinent, such rule reads:

"COAL MINING EQUIPMENT

This day the Department of Taxation, acting by and through the Tax Commissioner, came on to consider the matter of the classification of certain of the tangible property used in the coal mining industry into that real and that personal, and being fully advised in the premises, adopts the following classification:

REAL PROPERTY

* * *

2. Buildings and improvements to buildings, including foundations, floors, frames, permanent partitions, walls, roofs, stairways, loading and unloading platforms, and canopies; built-in systems for heating, air-conditioning, ventilating, sanitation, fixed fire protection, lighting, plumbing, and drinking water; awnings and shades; built-in inter-communicating system including private telephone, telegraph, and auto-call equipment; building elevators (freight and passenger). * * *

11. Tipple structure. * * *"

Thus it is seen that the Tax Commissioner's rule, the decisions of the Supreme Court and the statutes providing that the term "real property" shall include all buildings, structures, improvements and fixtures of whatever kind are in complete harmony.

In specific answer to your first question, it is my opinion that the county auditor is required to list each tract, lot or parcel of real property on the general tax list of real and public utility property in the name of the owner thereof, even though such property is actually occupied by a lessee and in determining its value the auditor should include all buildings, structures and fixtures located thereon.

Now coming to a consideration of your second question, it appears that for the past fifteen years the county auditor has listed the real property in question in the name of the owner but has omitted therefrom the tipple and several miners' homes located thereon which he has separately listed in the name of the lessee instead of in the name of the owner. Provisions for the correction of such situations are found in Sections 2588 and 5573, General Code, which are as follows:

Section 2588, General Code:

"From time to time the county auditor shall correct all clerical errors which he discovers in the tax lists and duplicates

either in the name of the person charged with taxes or assessments, the description of lands or other property, the valuation or assessment thereof or when the property exempt from taxation has been charged with tax, or in the amount of such taxes or assessment, and shall correct the valuations or assessments on the tax lists and duplicates agreeably to amended, supplementary or final assessment certificates issued pursuant to law. If the correction is made after a duplicate is delivered to the treasurer, it shall be made on the margin of such list and duplicate without changing any name, description or figure in the duplicate as delivered, or in the original tax list, which shall always correspond exactly with each other."

Section 5573, General Code:

"If the county auditor discovers that any building or structure, tract of land, or any lot or part of either, has been omitted, he shall add it to the list of real property, with the name of the owner, and ascertain the value thereof and place it opposite such property. In such case he shall add to the taxes of the current year the simple taxes of each and every preceding year in which such property has escaped taxation, not exceeding, however, five years, unless in the meantime the property has changed ownership, in which case only the taxes chargeable since the last change of ownership shall be added; or the owner thereof, if he desires, may pay the amount of such taxes into the county treasury, on the order of the auditor."

The auditor, having now discovered that the tipple and miners' homes were omitted from the listing made in the name of the owner, he should correct the error by adding these improvements to the duplicate and, in addition, there having been no change of ownership, he should also add to the current taxes the simple taxes for the past five years. In the absence of any enabling legislation, it appears that the auditor is without authority to make any assessments for years prior to the five-year period covered by Section 5573, supra. The taxes thus added to the taxes for the current year are to be collected in the same manner as any other real property taxes. In general, the methods of collecting taxes are set forth in Part Second, Title I, Chapters 13, 14 and 15 of the General Code. I assume that you are familiar with these provisions and that no useful purpose would be served by outlining their provisions herein.

Since the real property taxes are now levied against the property rather than the owner, it follows that there could be no levy made against a lessee whose interest is inferior to that of ownership and is derived from the owner. The Attorney General, in his 1921 opinion, supra, held:

"An ordinary lease for a term of years is not a separately

taxable interest in land under the property taxation laws of this state."

Real property taxes must be collected from the property itself without resort to the collateral responsibility of its owner or his lessee.

In specific answer to your second and third questions, it is my opinion that:

Where the buildings on real estate have been omitted over a period of years from the assessments made in the name of the owner of the realty, during which period these buildings were erroneously assessed in the name of a lessee, on discovering such error it is the duty of the county auditor to add these buildings to the listing of the real property in the name of the owner on the current duplicate and, in addition thereto, where there has been no change of ownership, to add to the taxes of the current year the simple taxes on such omitted property for each of the preceding five years.

Real property taxes are levied against the property itself and payment thereof can not be enforced as a personal obligation against the owner or a lessee of such property.

Respectfully,

THOMAS J. HERBERT,
Attorney General.