

brance estimate covering available moneys to pay the rent provided for in this lease appropriated by the last General Assembly.

By the provisions of said lease there is granted to the State of Ohio option and privilege of purchasing the above described property at a purchase price of \$10,000.00, if said option and privilege is exercised before August 1, 1930. If this option and privilege is exercised and said property is purchased, the abstract should be brought down to date and again submitted to this Department for approval before the transaction relating to the purchase of said property is closed.

I am herewith returning to you said abstract of title and lease.

Respectfully,

GILBERT BETTMAN,
Attorney General.

705.

CORPORATION—DOMESTIC AND FOREIGN—PROVISIONS OF AMENDED SECTION 5506, GENERAL CODE, 88TH GENERAL ASSEMBLY IN-APPLICABLE TO 1929 FRANCHISE TAX.

SYLLABUS:

Provisions of Section 5506, as contained in House Bill Number 264 of the 88th General Assembly are not applicable to the 1929 franchise tax.

COLUMBUS, OHIO, August 3, 1929.

HON. H. ROSS AKE, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge your communication of recent date, which reads as follows:

“House Bill No. 264 entitled ‘An act to amend Sections Nos. 5506, 5509, 5511, 5512 and 5513 of the General Code of Ohio’ relating to the franchise tax on domestic and foreign corporations, we are advised, becomes effective July 28, 1929.

This act, in Section 5506, contains the following provision:

Upon failure of such public utility or corporation to pay such tax on the day fixed for payment, the treasurer of state shall thereupon notify the tax commission and the tax commission shall file in the office of the recorder of the county in which the principal place of business of the public utility or corporation in this state is located (for which filing no fee shall be charged), notice of such lien and such lien shall not be valid as against any mortgagee, pledgee, purchaser or judgment creditor whose rights have attached prior to the time such notice is so filed.

The ‘day fixed for payment’ is apparently set forth in Section 5499 of the General Code which reads as follows:

‘Such fee shall be payable to the treasurer of state on or before the 15th day of the following July.’

The matter concerning which we will be pleased to have your opinion is:

Does the provision of this act, requiring the certification of delinquent list to the tax commission which in turn shall be certified by such commission to the recorders of the various counties, apply to the 1929 tax, the statutory

payment period of which expires July 15, 1929, or prior to July 28th, the date on which the act above referred to, becomes effective?"

Section 5506, referred to in your letter, as amended by the 88th General Assembly and contained in House Bill Number 264, became effective July 28, 1929, and provides as follows:

"Annually on the * * * day * * * fixed for the * * * payment of * * * any excise or franchise * * * tax required to be paid by law, such tax, together with any penalties subsequently accruing thereon, shall become * * * a lien on all property in this state of a public utility or corporation, whether such property is employed by the public utility or corporation in the prosecution of its business or is in the hands of an assignee, trustee or receiver for the benefit of the creditors and stockholders thereof. Such lien shall continue until such * * * taxes, * * * together with any penalties subsequently accruing thereon, are paid. Upon failure of such public utility or corporation to pay such tax on the day fixed for payment, the treasurer of state shall thereupon notify the tax commission and the tax commission shall file in the office of the recorder of the county in which the principal place of business of the public utility or corporation in this state is located (for which filing no fee shall be charged), notice of such lien and such lien shall not be valid as against any mortgagee, pledgee, purchaser or judgment creditor whose rights have attached prior to the time such notice is so filed. When such tax, together with any penalties subsequently accruing thereon, has been paid, the public utility or corporation may record with the recorder of the county in which their principal place of business is located, notice of such payment, for which recording the recorder shall charge and receive a fee of one dollar. Such notice shall be recorded in a book kept by the county recorder, called the corporation record, and indexed under the name of the corporation."

Prior to this amendment, Section 5506 read as follows:

"Annually on the last day of the month fixed for the filing of its excise or franchise report with the tax commission of Ohio the fees, taxes and penalties, required to be paid by * * * law, shall become the first and best lien on all property of a public utility or corporation, whether such property is employed by the public utility or corporation in the prosecution of its business or is in the hands of an assignee, trustee or receiver for the benefit of the creditors and stockholders thereof. Such lien shall continue until such fees, taxes and penalties are paid."

A comparative study of the changes made by the last legislature, clearly indicates that it was the intention of the Legislature to change the provision relative to the time when the lien for franchise and excise taxes attaches. You will note that under the old Section 5506 the lien attached on all the property of a public utility or corporation on the last day of the month fixed for the filing of its excise or franchise report with the Tax Commission of Ohio, while, under the amended section referred to in your letter, the lien for excise and franchise taxes does not attach until the last day fixed for the payment of any excise or franchise tax required by law, subject also to steps necessary to perfect a lien by the filing of a notice with the recorder of the county wherein is located the proper place of business of the public utility or corporation. It therefore becomes important to determine "the last day fixed for the payment of

any excise or franchise tax." Section 5491 as amended by the last session of the Legislature reads as follows:

"All excise or franchise fees or taxes received by the treasurer of state, under the provisions of this act, shall be credited to the general revenue fund. If any public utility fails or refuses to pay, on or before the fifteenth day of December, the tax assessed against it, or if any corporation fails or refuses to pay, on or before the dates or within the time fixed by law, the fee charged against it, the treasurer of state shall certify the list of such utilities or corporations, so delinquent, to the auditor of state, who shall add to the tax or fee due, a penalty of fifteen per cent thereon. The auditor of state shall thereupon forthwith prepare proper duplicates and reports of such taxes and fees and penalties thereon and certify them to the * * * attorney general, for collection.

Thirty days after he receives such duplicates of delinquent taxes and fees and penalties thereon from the auditor of state, the * * * attorney general shall certify to the commission a list of such public utilities and corporations as have failed to pay such taxes or fees and penalties thereon."

The above section, you will note, provides December fifteenth as "the day fixed for the payment of the excise tax."

Section 5499, found in 112 O. L. 413 and relating to franchise fees, provides, among other things, as follows:

"* * * such fee shall be payable to the treasurer of state on or before the fifteenth day of the following July * * * "

You request my opinion relative "to the 1929 tax, statutory payment period of which expires July 15, 1929." I assume therefore that you are concerned primarily with the 1929 franchise tax.

The question then presents itself as to whether the provisions of Section 5506, as contained in House Bill Number 264, are operative upon the 1929 franchise taxes, the last day for the payment of which as provided in Section 5499 was July fifteenth, while House Bill Number 264 did not become effective until July twenty-eighth.

Section 26 of the General Code relating to the effect of an amendment or repeal of legislation on pending actions, proceedings, etc., provides as follows:

"Whenever a statute is repealed or amended, such repeal or amendment shall in no manner affect pending actions, prosecutions, or proceedings, civil or criminal, and when the repeal or amendment relates to the remedy, it shall not affect pending actions, prosecutions, or proceedings, unless so expressed, nor shall any repeal or amendment affect causes of such action, prosecution, or proceeding, existing at the time of such amendment or repeal, unless otherwise expressly provided in the amending or repealing act."

This section is a limitation upon the power of the Legislature in passing laws which may affect pending actions and vested rights. Under Section 5506, before the present amendment to that section, the State acquired a vested right by virtue of a first and best lien which attached upon the last day for the filing of the annual reports with the Tax Commission. The right to enforce a lien was termed as a cause of action in the case of *Stickney vs. Isaac*, 24 App. 527, where the court said:

"The right to enforce the lien arising out of the assessment was a cause of action existing at the time of the second amendment of Section 6212-33,

General Code, and, if there is no language in the amended act which expressly provides that it shall apply to existing causes of action, its enactment would not change the order of priority as between the assessment lien and that of the mortgagee."

The Supreme Court of Ohio, in the case of *State vs. Pursell*, 34 O. S. 352, stated that,—“rights having vested under a statute are not affected by repeal of that statute.”

In an opinion of one of my predecessors, found in 1920 O. A. G., p. 580, is stated the interpretation placed upon Section 26 by the Supreme Court of Ohio in the case of *State ex rel. vs. Zangerle*, 101-235, namely, that “Section 26, G. C., is a rule of legislative interpretation and should be construed as a part of any amended act unless such amendment expressly provides.”

In view of the above discussion, and in specific answer to your inquiry, my opinion is that the provisions of Section 5506 as amended by the 88th General Assembly do not apply to the franchise taxes for 1929, the statutory payment period of which expired July 15, 1929.

Respectfully,
GILBERT BETTMAN,
Attorney General.

706.

APPROVAL, BONDS OF CITY OF ZANESVILLE, MUSKINGUM COUNTY—
\$90,000.00.

COLUMBUS, OHIO, August 3, 1929.

Industrial Commission of Ohio, Columbus, Ohio.

707.

APPROVAL, ABSTRACT OF TITLE TO LAND OF EMMA J. GRUBAUGH
IN HANOVER TOWNSHIP, ASHLAND COUNTY.

COLUMBUS, OHIO, August 6, 1929.

HON. CARL E. STEEB, *Secretary, Ohio Agricultural Experiment Station, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your communication of recent date submitting for my examination and approval a corrected abstract of title, warranty deed and other files relating to two certain tracts of real property of sixty acres and fifteen acres, respectively, in Hanover Township, Ashland County, Ohio, which tracts were more particularly described in Opinion No. 20, directed to you under date of January 25, 1929.

Upon examination of the corrected abstract of title submitted, I find Emma J.