is exempt from the requirements of Sections 8624-8, 8624-9, 8624-10, 8624-13 and 8624-14, General Code, since it constitutes but a single transaction.

Respectfully,
JOHN W. BRICKER,
Attorney General.

2428.

APPROVAL—BONDS OF VILLAGE OF UNIVERSITY HEIGHTS, CUYAHOGA COUNTY, OHIO—$14,000.00.

COLUMBUS, OHIO, March 29, 1934.

Industrial Commission of Ohio, Columbus, Ohio.

2429.

APPROVAL—NOTES OF BRADFORD VILLAGE SCHOOL DISTRICT, MIAMI COUNTY, OHIO—$5,833.00.

COLUMBUS, OHIO, March 29, 1934.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

2430.

NURSERY STOCK—PLANTED AND KEPT BY OWNER OF LAND IN WHICH GROWING SHOULD BE VALUED AND ASSESSED AS PART OF LAND.

SYLLABUS:

Nursery trees and shrubs, commonly spoken of as nursery stock, which are planted and kept by the owner of the land in which they are growing, should be valued and assessed as a part of such land.

COLUMBUS, OHIO, March 30, 1934.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—This is to acknowledge the receipt of your recent communication which is as follows:

> "The matter of the proper classification of nursery stock, including fruit, shade and ornamental trees, shrubs and bushes, small fruit, bushes and plants, and property of a substantially similar character and nature,

has been pending before the Commission for quite some time without adequate disposition being made thereof.

The nursery business in this State has grown to be one of quite some import and consists, as you know, of the planting and growing of the above named product for the purpose of the merchandise sale thereof. Some of the items mentioned mature annually, and are sold annually, while some of the other items mentioned require from one to five or ten years to mature to a point where they are ready for sale. As previously stated, the entire purpose of the production of the various items mentioned above is for sale and in no degree are the activities mentioned engaged in solely for the purpose of enhancing the value of the real estate.

It has been urged both by the nurserymen and their legal representatives that this so-called nursery stock is properly classified as 'real property' or 'land' under the provisions of Section 5322 G. C. On the other hand it has likewise been urged that this nursery stock is properly classified as 'personal property' under the provisions of Section 5325 G. C.

We therefore respectfully request your opinion as to whether nursery stock is to be classified for taxation as real estate or as personal property, and further, if classified as personal property, whether or not such nursery stock is to be assessed in the year 1934 at sixty-five per cent (65%) or fifty per cent (50%) of the value thereof.

Inasmuch as the decision of this question is one of immediate importance to the Commission, we would greatly appreciate your early opinion relative thereto."

The question presented in your communication is whether property of the kinds therein mentioned are to be classed as real property or as personal property for purposes of taxation. This question is one of some difficulty. The difficulty in the determination of questions of this kind arises in a measure from the fact that all growing things which are planted by the hand of man and which upon maturity are to be severed or otherwise removed for purposes of sale or otherwise, are, for some purposes and as to some relations, considered as real property, and for other purposes and as to other relations are considered as personal property. This is true with respect to ordinary growing crops. *Herron* vs. *Herron,* 47 O. S. 544; *Baker* vs. *Jordan,* 3 O. S. 438; *Youmans* vs. *Caldwell,* 4 O. S. 72. And the same is true with respect to property of the kind here in question. *Coombs* vs. *Jordan,* 3 Bland's Chancery Reports (Md.) 284, 312; *Price* vs. *Brayton,* 19 Ia. 309; *Smith* vs. *Price,* 39 Ill. 28. It seems, however, that generally and as regards the question of the title of the owner of land to property of this kind growing therein, growing things of this kind are to be considered as real property passing with the land. The general rule with respect to the classification of this kind of property is stated in Thompson on Real Property, Vol. 1, section 102, as follows:

"Trees and shrubs planted in a nursery garden, for the temporary purpose of cultivation and growth until they are fit for market, and then to be taken up and sold, pass by a deed or mortgage of the land, so that neither the grantor, his assignee, nor his creditors can remove them as personal property. One claiming that trees and shrubs, whether growing naturally or planted and cultivated for any purpose, are not part of the

realty, must show special circumstances which take the particular case out of the general rule; he must show that the parties intended that they should be regarded as personal chattels. The mere fact that the trees and shrubs were the stock in trade of the mortgagor in his business as a nursery gardener is insufficient for this purpose. They are prima facie parcel of the land itself, and would pass to a vendee upon a sale of the land unless specially excepted, and in the same way, unless excepted, pass to a mortgagee."

In the case of *Maples* vs. *Millon,* 31 Conn. 598, the question there presented was whether trees and shrubs planted in a nursery garden for the temporary purpose of cultivation and growth until they should become sufficiently mature to be fit for market were real or personal property as between the mortgagor of the land in which such trees and shrubs were growing, and the mortgagee of such land. The court in its opinion in this case said:

"Trees and shrubs are generally as much a part of the realty as the soil itself, whether growing upon it naturally, or planted and cultivated by the hand of man. It is therefore incumbent upon the party claiming that they are personal chattels, which do not pass with the transfer of the land, to show that such was not the intention of the parties. How is this attempted to be done in this case? We have nothing but the simple circumstances that Millon the mortgagor was a nursery gardener, and that the trees and shrubs in question were his stock in trade. This, as we have intimated, might be important if the question arose between landlord and tenant, but its importance here we do not perceive. He owned the land on which he planted the trees. By placing them there for cultivation and growth they became *prima facie* parcel of the land itself. If he had sold and conveyed the land instead of mortgaging it, they would have passed to his vendee unless specially excepted out of the conveyance. This would be so even if it be admitted that they partake to some extent of the nature of emblements, since it is a general rule that where an estate is determined by the act of the tenant the emblements shall go to the owner of the soil. If this is so as between vendor and purchaser, then the only question is whether the same rule applies as between the mortgagor and mortgagee; and we are satisfied that it does. We can discover no reason for construing an absolute conveyance any differently from a mortgage, so far as the interest intended to be conveyed by them is concerned; and we are referred to no authority which sustains any such principle. On the contrary the authorities cited by the counsel for the respondents show that the current of decisions is the other way. And why should it not be so? The mortgagor must be presumed to have intended that every thing which passes by his deed should stand pledged for the security of his debt, and as he made no exceptions to the general words of the deed he must also be taken to have intended that every thing annexed to the realty, so as to become a part of it, should be held by the mortgagee, provided the debt was not paid."

In the case of *Price* vs. *Brayton, supra,* it was held, as set out in the headnote of the report in the case, as follows:

Nursery trees planted by the owner of real estate, become a part of the realty, and pass as such to a purchaser in the foreclosure of a mortgage executed by such owner, though the trees were planted after the execution of the mortgage. A different rule would apply as between landlord and tenant, if the trees were planted by a tenant for purposes of trade."

In the case of *Smith* vs. *Price, supra,* it was held that:

"While fruit-trees and ornamental shrubbery, grown upon premises leased for nursery purposes, would probably be held to be personal property, as between landlord and tenant, yet, as between vendor and vendee, such trees and shrubbery are annexed to and form a part of the freehold, and would pass with a sale of the land."

Likewise, in the case of *Adams* vs. *Beadle,* 47 Ia. 439, it was held that:

"Nursery trees planted by the owner of real estate become a part of the realty and pass as such to a purchaser in the foreclosure of a mortgage executed by such owner, notwithstanding the owner may have executed a chattel mortgage upon the trees, which was recorded prior to the judicial sale."

In the case of *Coombs* vs. *Jordan, supra,* the court in its opinion said:

"A tenant who is a nurseryman or gardner, may remove trees, shrubs, etc. All these things, although attached to the realty, are regarded as personal chattels in favour of creditors; and therefore are not affected to the prejudice of the tenant or his creditors, by a lien consequent upon a judgment against the landlord; but may be taken under an execution against the tenant by whom they were put upon the land. But they are only considered as chattels in favour of the tenant and his creditors during the term; for, after that time, if left upon the land, they become parcel of the inheritance. And they are only considered as chattels when placed upon the land by a tenant; for, if put there by the owner of the fee simple, they are then considered as parcel of the realty. As, however, there seems to be as yet no clear and well settled principles of law laid down in relation to what are commonly called fixtures, each case must depend on its own peculiar circumstances."

In the case of *Kuehn* vs. *City of Antigo,* 139 Wis. 132, the court was called upon to consider a question closely related to that here presented. In this case, the court held that ginseng, a plant the roots of which are the valuable and marketable part thereof, and which require from seven to fifteen years to mature, is, for the purpose of taxation, real estate and not personalty. The court in its opinion said:

"The facts are not in dispute respecting the reputed qualities of ginseng for medicinal purposes and the general characteristics of the plants. It appears that they consist of roots, with a growth of leaves

> forming a top to the plant, and that the roots are the marketable and valuable part. The roots require from seven to fifteen years to mature and fit them for the market. The plants yield no annual crop except seeds, which are produced annually after the third year, but have no market value in the present state of the ginseng industry. A growing plant, in view of its characteristics and the long time required for its maturity, is not to be classed with emblements or chattels produced from the soil, as are common grains, vegetables, and similar products which are harvested annually. *Simanek* vs. *Nemetz,* 120 Wis. 42, 97 N. W. 508; *Webster* vs. *Zielly,* 52 Barb. 482. The growing plants are therefore not to be classed as personal property for the purpose of taxation under the statutes prescribing what personal property is to be taxed."

It appears therefore that upon the common law principles indicated by the authorities above cited growing trees and shrubs are properly taxed as a part of the land unless they have by statute been otherwise classified for purposes of taxation.

In this connection, it is to be observed that the terms "real property" and "personal property" have been defined for purposes of taxation in and by the provisions of sections 5322 and 5325, General Code, respectively. Section 5322, General Code, provides as follows:

> "The terms 'real property' and 'land' as so used, include not only land itself, whether laid out in town lots or otherwise, 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."

Section 5325, General Code, in so far as the same is pertinent to the question at hand, provides that the term "personal property", as so used in provisions relating to the taxation of such property, includes every tangible thing being the subject of ownership, whether animate or inanimate, not forming part of a parcel of real property, "as hereinbefore defined". Inasmuch as aside from domestic animals and a number of other kinds of personal property not important in this connection, the only kinds of personal property that are taxable in this state are such as are used in business, it is pertinent to note the provisions of section 5325-1, General Code. By this section, personal property is to be considered to be used when employed or utilized in connection with ordinary or special operations, when acquired or held as means or instruments for carrying on business, or when stored or kept on hand as material, parts, products or merchandise; and it is therein further provided that "business" includes all enterprises of whatsoever character conducted for gain, profit or income and extends to personal service occupations. In the consideration of the provisions of the sections of the General Code above referred to, it appears that if growing trees and shrubs in a nursery are properly classified as personal property within the purview of the question here presented, they may be properly taxed as personal property used in business within the provisions of section 5325-1, General Code. With respect to the question of the status of property of this kind under the statutory provisions, it may well be argued that inasmuch as under the provisions of section 5322, General Code, the term "real property" includes, not only the land itself, but also "all things contained therein", and the term "personal property"

includes only such tangible things as do not form a part of a parcel of real property as defined in section 5322, General Code, such property is real and not personal property for taxation purposes. And I am inclined to the view that this is the proper construction of these statutory provisions.

In the consideration of the question here presented, however, it is to be noted that section 5360, General Code, relating to the valuation of real property for purposes of taxation, provides that "each separate parcel of real property shall be valued at its true value in money, excluding the value of the crops growing thereon". In the case of *Miller, Treasurer* vs. *Mellen Co.,* 15 N. P. (N. S.) 33, the view was expressed by the court that the above quoted provisions of section 5560, General Code, did not have the effect of classifying growing crops as either real or personal property, or of exempting or excluding them from taxation. As to this, however, it is obvious that if nursery trees and shrubs are considered as growing crops in the provisions of section 5560, General Code, they cannot be valued and taxed as real property. And in this connection I note that in an opinion of this office under date of September 4, 1914, Annual Report, Attorney General, 1914, Vol. II, page 1180, it was held that ginseng, when in a state of cultivation, constitutes a growing crop within the meaning of the taxing statutes, though it is a plant that takes several years to mature; and that such plant is not to be considered as a part of the real estate, but is to be listed as personal property. The Attorney General, in the opinion here referred to, reached the conclusion that cultivated ginseng is taxable as personal property upon the consideration that inasmuch as, in his view, such cultivated ginseng constituted a growing crop within the meaning of section 5560, General Code, and as such was not taxable as real property, it is required to be taxed as personal property in order to avoid an unconstitutional exemption of such property. Upon principle, it is quite impossible to distinguish the question considered by the Attorney General in the opinion above referred to from that here presented; and if cultivated ginseng may properly be considered as growing crop within the provisions of section 5560, General Code, above quoted, I see no reason why nursery trees and shrubs should not be likewise classified and excluded from valuation and taxation as real property. However, I am inclined to the view that the term growing crops or "crops growing thereon" as the same is found in the provisions of section 5560, General Code, relating to the assessment of real property for purposes of taxation, is to be given a more limited application than that given to it in the former opinion of this office, above referred to. This view is supported by the decision of the Supreme Court of Wisconsin in the case of *Kuehn* vs. *City of Antigo, supra.* In this case as I have heretofore noted, the Supreme Court of Wisconsin held that ginseng, for the purpose of taxation, is real property and not personalty and in this case it was further held that the phrase "growing crops", as used in a statute exempting such property from taxation, did not apply to ginseng, but applied only to those annual products of the soil which are commonly treated as personalty. The court in its opinion in this case touching this question said:

> "It is contended that the court erred in holding that growing plants, while unsevered from the soil, pertain, for the purpose of taxation, to the realty, and that they are not exempted in the law as a growing crop under subd. 11, sec. 1038, Stats. (1898). The trial court properly restricted its determination under the issues to the question of whether or not a bed of growing ginseng should be exempt from taxation as a growing crop. This question involves interpretation of the provision of the above-mentioned

statute. The subdivision exempts a number of articles of personal property. The inclusion of 'growing crops' therein suggests that the phrase 'growing crops' was used in a restricted sense, and is to be applied to those products of the soil which are commonly treated like personalty, namely, the usual annual crops, such as cereals, maize, vegetables, and the annual products of perennial plants and shrubs. Such use of the term 'growing crops' in this exemption law accords with the idea that the product so exempted is in legal contemplation one which in its growing state may be treated as a chattel and as separated from the realty. In legal parlance the term 'growing crops' is commonly applied to crops growing in the soil but susceptible of constructive severance from it by the owner's transfer of them as chattels, by the operation of law in cases of estates of decedents, or by levy of an execution. This legal process of constructive severance of growing crops has been restricted to those which are produced or harvested annually and thus converted into a separate and usable article. It seems manifest that it was the legislative purpose to exempt from taxation such growing crops as could by operation of law be constructively severed from the realty in which they were growing and thus be treated in law as chattels and as separated from the realty producing them. We are of opinion that growing ginseng differs greatly from this class of growing crops and is not to be regarded as within the terms of a 'growing crop', in the sense in which the term is employed in subd. 11, sec. 1038, Stats. (1898). It must therefore be considered as part of the land, and is to be included in fixing a valuation on the land for the purposes of taxation. 8 Am. & Eng. Ency. of Law (2d ed.) 302 et seq.; *Miller* vs. *County of Kern,* 137 Cal. 516, 70 Pac. 549."

Touching this question, Thompson on Real Property, Vol. 1, section 115, says:

"Fructus industriales, or cultivated fruits, includes growing crops produced and raised by the industry of man and the cultivation of the soil. A 'crop' is, primarily, some product of the soil gathered during a single year; and may mean either a gathered or growing crop. The term has been defined as 'everything produced from the earth by annual planting, cultivation and labor.' Also, 'the word "crop" in its broadest signification, means the products of the soil which are grown and raised annually, and gathered during a single season.' A crop must be treated as a growing crop from the time the seed is deposited in the ground. The term 'crop' has been held to include both fructus industriales and fructus naturales. At common law, the annual products of the soil, essentially owing their annual existence to labor and cultivation, were, even while attached to the soil, treated as chattels under the name of 'emblements'. They included grain and garden vegetables, and were distinguished from fructus naturales which were the fruit of trees and perennial plants, and which were, while unsevered from the soil, part of the realty."

The same view with respect to the construction and application of statutes of this kind is indicated in the recent decision of the Supreme Court of the State of Washington in the case of *Miethke* vs. *Pierce County,* 173 Wash. 381. In this case, the court had under consideration a statute of that state which prvoided that:

"In assessing any tract or lot of real property, the value of the land,

exclusive of improvements, shall be determined; also, the value of all improvements and structures thereon and the aggregate value of the property, including all structures and other improvements, excluding the value of crops growing on cultivated lands."

The court held that the provisions of this statute excluding from the valuation of land for purposes of taxation "the value of crops growing on cultivated lands," did not apply to nursery stock, as the same was outside of the definition of the term "crops" in the ordinary sense of that term. I am of the opinion, therefore, that growing nursery trees and shrubs, spoken of generally as nursery stock, are not excluded from valuation and assessment as a part of the land, by the provisions of section 5560, General Code, and that the same are properly taxable as real property.

It would be competent for the legislature to classify nursery stock as personal property and to provide for the taxation of the same as merchandise as is done by a statute of the State of Washington which was under consideration by the court in the case of *Miethke,* vs. *Pierce County, supra,* where it was held that such statute was constitutional even though by reason of the provisions of another statute ordinary crops were exempt from taxation. In the absence, however, of a statute of this state classifying property of this kind as personal property, I do not see any escape from the conclusion that the same is properly taxable as real property.

In the consideration of the question here presented, I am not unmindful of the fact that the Common Pleas Court of Clark County in the case of *Miller, Treasurer,* vs. *Mellen Co., supra,* held that growing plants and floral stock, cultivated for the purpose of sale, and which the owner treats as merchandise, are personal property and that the same should be returned and assessed as such. So far as I know, floral stock has been quite uniformly taxed as personal property since this decision was made in the year 1913 and which was later affirmed by the Court of Appeals of that county. If any of the property referred to in your communication comes within the category of the property under consideration in the case of *Miller, Treasurer,* vs. *Mellen Co.,* the same should, I assume, be taxed as personal property.. Nursery trees and shrubs planted and kept by the owner of the land in which they are growing should be valued and assessed for taxation as a part of such land.

Respectfully,
JOHN W. BRICKER,
Attorney General.

2431.

COSMETOLOGY—BEAUTY PARLOR LICENSE REQUIRED WHEN—MANICURING IN BARBER SHOP, HOTEL LOBBY OR DRUG STORE—INTERPRETATION OF "BEAUTY PARLOR"—

SYLLABUS:

1. *When a person does manicuring in a barber shop, hotel lobby or drug store or other place not regularly, as distinguished from occasionally, patronized*