(1) The abstract contains no record of any Government patent, although attached thereto is a certificate of the auditor of state showing that the whole of the Southwest quarter of Section 1, Township 15, Range 4, Columbiana County, Ohio was patented to John Howard, September 1, 1804.

(2) It appears that The Sandy & Beaver Canal Company acquired title to the Southwest quarter of Section 1, on March 24, 1837, but the mortgages recited on page 3 et seq. of the abstract, and apparently foreclosed in the cases of Thomas Charlton vs. The Sandy & Beaver Canal Company and James Kelly vs. The Sandy & Beaver Canal Company, do not cover the land in question or any land in Section 1, so far as disclosed by the abstract. Notwithstanding this fact the proceedings eventually bring into their scope the land in question and the same is subsequently acquired by James Kelly on April 22, 1857.

If at all possible, the chain of title from the time of the patent to April 22, 1857 should be more fully abstracted.

(3) The mortgage from Julian Irey to Mary E. Hoopes, acknowledged September 5, 1919, (Item 40, page 48) is still a subsisting lien on the land in the West half of the Southwest quarter.

(4) The 1926 taxes are unpaid and a lien. The abstract shows that no examination has been made in the United States courts, and that examination was made in the name of record owners only only for the period during which each one respectively held said title.

No deed was submitted with the abstract and other papers except a blank form of Ohio warranty deed containing a description of the property which it is proposed to convey to the state. Since this deed has not been prepared and executed this department is unable to pass upon the same.

The encumbrance estimate submitted with the above abstract bears No. 3984, is dated December 22, 1926, bears the certificate of the Director of Finance under date of December 23, 1926, and appears to be in regular form.

I am returning herewith your file pertaining to Tract No. 14, including the abstract of title, encumbrance estimate and other papers.

Respectfully,
EDWARD C. TURNER.
Attorney General.

417.

AUTOMOBILE—SEIZED FOR ILLEGAL TRANSPORTATION OF LIQUOR —RIGHTS OF MORTGAGEE.

SYLLABUS:

If a mortgagee intervenes under Section 6212-43 *G. C. and establishes that he holds a bona fide lien which was created without notice to him that the vehicle was being used or was to be used for the illegal transportation of liquor, he will be entitled to priority of distribution of proceeds as against the state, even though his chattel mortgage was not recorded until after the seizure. The state is not a creditor under Section* 8560 *G. C.*

COLUMBUS, OHIO, April 30, 1927.

HON. B. F. MCDONALD, *Prohibition Commissioner, Columbus, Ohio.*

DEAR MR. MCDONALD:—I am in receipt of the following agreed statement of facts respecting an automobile confiscated under Section 6212-43 of the General Code of Ohio:

There was an unfiled chattel mortgage on the automobile. The validity of the mortgage as between the mortgagor and mortgagee is admitted.

Under the foregoing agreed statement of facts, the mortgagee contends that the chattel mortgage is good against all except creditors and that the state is not a creditor.

The questions thus presented may be stated as follows:

Question 1: Is the chattel mortgage valid as against the state?

Question 2: If the mortgage is valid, may mortgagee claim possession of the automobile?

Question 3: If the condition of the mortgage has been broken, may the mortgagee be considered in the status of the owner?

Question 4: Is such mortgagee entitled to assert the priority of his lien?

Section 8560 of the General Code provides as follows:

"A mortgage, or conveyance intended to operate as a mortgage, of goods and chattels, which is not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, subsequent purchasers, and mortgagees in good faith, unless the mortgage, or a true copy thereof, be forthwith deposited as directed in the next succeeding section."

Section 8561 of the General Code of Ohio provides as follows:

"The instruments mentioned in the next preceding section must be deposited with the county recorder of the county where the mortgagor resides at the time of the execution thereof, if a resident of the state, and if not such resident, then with the county recorder of the county in which the property so mortgaged is situated at the time of the execution of the instrument."

Section 6212-43 of the General Code of Ohio provides as follows:

"When the commissioner of prohibition, his deputy inspectors, or any officer of the law, shall discover any person in the act of transporting in violation of law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer named herein, he shall take possession of the vehicle and team, or automobile, boat, water or air craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the law of the state prohibiting the liquor traffic, in any court having jurisdiction under such law, but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond with sufficient sureties, in a sum equal to the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide by the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure,

and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall distribute the balance as is distributed money arising from fines and forfeited bonds under the law of the state prohibiting the liquor traffic.

All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. If, however, no one shall be found claiming the team, vehicle, water or air craft, automobile, or other conveyance, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken, or if there is no newspaper published in such city or county, in a newspaper having circulation in the county, once a week for four weeks and by hand bills posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold and the proceeds after deducting the expense and costs shall be distributed as hereinbefore provided in case there was a claimant for the said vehicle or conveyance."

Whether the chattel mortgage on the confiscated automobile is void under Section 8560, G. C., depends on whether the state may be considered a creditor.

While there are some cases to the contrary, by the weight of authority, neither fines, costs nor penalties in criminal cases constitute debts. (17 Corpus Juris, page 1378; see also State vs. Keifer, Administrator, 16 O. N. P. (N. S.) 41.)

In the case of State vs. Papania, No. 609, Court of Common Pleas, Stark County, Ohio, (reported in the Ohio Law Abstract for July 15, 1925 at page 422) Judge Krapp, on June 6, 1925, held:

"When an automobile is seized and sold under Section 6212-43, G. C., lien of a chattel mortgage is valid although mortgage not filed, and the mortgagee is entitled to distribution of the proceeds."

The case of Kohler vs. State ex rel. Goldstein (Law Abstract for February 12, 1927) was decided according to the provisions of Section 11150, G. C., and is not an authority for holding that a fine is a debt.

I am therefore of the opinion that the state can not be considered a creditor of the defendant and that the failure to file the chattel mortgage does not render such mortgage void as against the state under the provisions of Sections 8560 and 8561 of the General Code of Ohio.

In the case of State ex rel. Tenant Finance Corporation vs. Davis, Mayor, the Supreme Court of Ohio, in 111 O. S. 569, held:

"Under Section 6212-43, General Code, where an officer of the law has taken possession of an automobile 'the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond with sufficient sureties, in a sum equal to the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of the trial to abide by the judgment of the court.' A chattel mortgagee of such automobile, although default in payment of an in-

stallment upon the chattel mortgage has taken place before the seizure of the automobile by the officer of the law, is not an 'owner' within the purview of the above section."

In the course of the opinion, at page 574, the court said:

"A chattel mortgage creates a specific lien by express contract. Since the statute makes specific provision to pay all liens out of the proceeds of the sale of the car, we see no reason for holding that a chattel mortgage lien is not of those intended to be cared for. The mortgagee, hence, within the purview of this statute, is not the owner, and the demurrer to the answer must be overruled."

I am therefore of the opinion that the mortgagee is not entitled to the possession of the automobile, nor may he claim the status of an owner thereof for any purpose in a proceeding under Section 6212-43, G. C.

In the case of Van Oster vs. Kansas, reported in the Advance Opinions of December 15, 1926, page 143, the Supreme Court of the United States held:

"The owner of an automobile which entrusts it to another with authority to make use of it is not deprived of his property without due process of law by a statute authorizing its forfeiture if it is used by the bailee in the unlawful transportation of intoxicating liquor although such use is without the knowledge or consent of the owner."

In the course of the opinion, Mr. Justice Stone said:

"It has long been settled that statutory forfeitures of property entrusted by the innocent owner or lienor to another who uses it in violation of the revenue laws of the United States is not a violation of the due process clause of the Fifth Amendment. * * * We do not perceive any valid distinction between the application of the Fourteenth Amendment to the exercise of the police power of a state in this particular field and the application of the Fifth Amendment to the similar exercise of the taxing power by the Federal Government, or any reason for holding that one is not as plenary as the other."

At another point in the opinion, Mr. Justice Stone said:

"It is not questioned that a state in the exercise of its police power may forfeit property used by its owner in violation of state laws prohibiting the liquor traffic."

In referring to the provisions of Section 6212-43, G. C., the Supreme Court of Ohio, by Judge Allen, in the case of The City of Findlay vs. Associates Investment Company, No. 19570, decided June 15, 1926 and to be found in the Ohio Law Bulletin & Reporter for September 6, 1926, said:

"Statutes of this nature providing for the sale of property used in violation of criminal statutes, are generally held to be constitutional as being within the police power. The reasons are excellently expressed in State vs. Peterson (107 Kans. 641; 193 p. 342.) The court says: 'Doubtless the legislature realized that any provision for the protection of a lien of

a mortgagee would open the door to collusion and afford a ready means of evading the law. How readily such a provision might be used for defeating the purpose for which the law was enacted is apparent, when we consider that any person desiring to engage in illegal transportation of intoxicating liquors could, by placing an encumbrance upon an automobile, minimize the financial investment and hazard of the business.'"

I am therefore of the opinion that unless said mortgagee intervenes at the hearing or other proceeding brought for the purpose of confiscating and selling said automobile, or for distributing the proceeds of sale, and establishes by competent evidence that he holds a bona fide lien which was created without the lienor having any notice that the vehicle was being used or was to be used for the illegal transportation of liquor, such mortgagee waives the right to participate in the proceeds of the sale. It will be the duty of the court to order the sale of the automobile whether the mortgagee intervenes or not, if there has been a conviction of the user thereof, unless good cause to the contrary is shown by the owner.

If, however, the mortgagee does intervene and does establish that his lien is bona fide and was created without any notice to him that the vehicle was being used or was to be used for the transportation of liquor, I am of the opinion that he will be entitled to priority over the state for the amount of his lien. It will be noted that the statute (Section 6212-43, G. C.,) transfers all liens against the property sold to the proceeds of the sale of the property.

The costs of the sale, together with the costs of seizing and detaining the automobile, should be paid ahead of all liens. In other words, the proceeds of the sale are what is left after paying the expenses in connection with the seizure and sale of the automobile.

Respectfully,
EDWARD C. TURNER,
Attorney General.

418.

APPROVAL, FINAL RESOLUTION ON ROAD IMPROVEMENT—LIMA-SANDUSKY ROAD, I. C. H. NO. 22, ALLEN COUNTY.

COLUMBUS, OHIO, April 30, 1927.

HON. GEORGE F. SCHLESINGER, *Director of Highways and Public Works, Columbus, Ohio.*

419.

APPROVAL, NOTE OF SUNFISH TOWNSHIP RURAL SCHOOL DISTRICT, PIKE COUNTY—$4,800.00.

COLUMBUS, OHIO, April 29, 1927.

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