BUCKEYE LAKE

	Valuation
The Sunfish Club, cottage site----------	$1,666 67

I am returning the above leases, which have been found correct as to legality and form, with my approval endorsed thereon.

MIAMI AND ERIE

	Valuation
Akron, Canton & Youngstown Railway Company, water lease---	$973 34

I am unable to enter my approval on the above lease, for the reason that the resolution passed by the company states,

> "that the president or vice-president and secretary of this company be, and they are hereby, authorized and directed to execute and deliver on behalf of this company a lease from the State of Ohio for the use of water from the Miami and Erie Canal at Delphos, Ohio."

It is observed that the secretary has failed to sign this lease. Upon the secretary of the company signing this lease, in triplicate, in the presence of two witnesses, I will approve the same.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1797.

COUNTY TREASURER—MAY RECEIVE CHECKS FOR TAXES—TAX REMAINS IN FORCE UNTIL MONEY IS RECEIVED ON CHECK—TAX IS FIRST LIEN.

SYLLABUS:

Under the provisions of Section 2744, General Code, a county treasurer may receive checks from taxpayers, but such receipt shall in no manner be regarded as payment until the money is received on said checks. If payment on said checks is refused by the bank on which it is drawn, the tax will remain in force even though the tax is marked paid and a receipt is given, in reliance upon which a person has bought the land. Said tax is a lien paramount to all other liens and claims.

COLUMBUS, OHIO, March 2, 1928.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Receipt is hereby acknowledged of your recent communication which reads:

> "We are hereby withdrawing request for opinion of February 14, 1928, and substituting in its stead the following:
>
> The treasurer of Defiance County in July, 1926, received a check for the payment of taxes on 154 acres of land in that county and marked the taxes 'Paid' upon the tax duplicate. The check was promptly presented for pay-

ment to the bank on which it was drawn, whereupon payment was refused by reason of there not being sufficient funds on deposit in the bank. A receipt was issued to the person presenting the check for the amount of the taxes on the land. The county treasurer continued to carry the check as cash until September, 1927. Upon an investigation made by an examiner from this department this check was found in the hands of the county treasurer who succeeded the treasurer who received the check and which was still counted as cash. At the suggestion of the examiner, the taxes which the check was given to pay, that is, the taxes for the year 1925 were restored to the tax duplicate. Between the time that the check was received, and the restoration of the taxes to the duplicate, to-wit, May 7th, 1927, the property was sold and a mortgage of $10,000.00 was placed upon the same. At the time of this sale, all unpaid taxes then on the duplicate were paid.

Question: Were the taxes legally restored to the duplicate and are the same a lien upon the property, that is, a prior lien to the mortgage? If not, who is responsible for these taxes which have never been paid?"

Section 2744 of the General Code reads as follows:

"A county treasurer may receive checks, but such receipt shall in no manner be regarded as payment. No sum shall be considered paid until the money therefor has been received by the treasurer or a depositary. No responsibility shall attach in any manner directly or indirectly to a treasurer, his sureties or the county by reason of the receipt of a check and collection of checks shall be entirely at the risk of the person turning them into the treasury."

This section was passed in 1908, 99 Ohio Laws, page 468, and has not been amended. This section provides that a county treasurer may receive checks in payment of taxes but only upon the following conditions:

(a) Such receipt shall in no manner be regarded as payment.

(b) No sum shall be considered paid until the money therefor has been received by the treasurer or a depositary.

(c) No responsibility shall attach in any manner directly or indirectly to a treasurer, his sureties or the county by reason of the receipt of a check.

(d) Collection of checks shall be entirely at the risk of the person turning them into the treasury.

The check in question was given in July, 1926, for the payment of the 1925 taxes. The county treasurer received the check and the taxes were marked "paid" on the tax duplicate and a receipt issued. The check was promptly presented at the bank on which it was drawn but payment was refused because of insufficient funds. The county treasurer carried this check as cash; it was delivered to his successor and continued to be carried as cash until September, 1927, when the taxes were restored to the duplicate.

Section 2744, General Code, is quite clear and specific in regard to the effect of a check given in payment of taxes. Even before the enactment of said Section 2744, General Code, it was stated, in the case of *Manck and Bauer* vs. *John G. Fratz, County Treasurer,* in the Superior Court of Cincinnati, 4 W. L. B. 1043, by Harmon, Judge:

"If the defendant had received the check in his individual capacity, and failed to present it the next day, the bank being in the same town with the defendant, he would have to lose it, and not the person drawing it. But this action was not against the defendant individually. It was against him as a representative of the State of Ohio, and the relief asked was that the sov-

ereign right of the State of Ohio to collect its taxes should be enjoined. The defendant, as the agent of the state, has no implied power. His duty is to collect in money, the taxes due the state. If the taxes are not paid, his duty is to proceed to sell the property. He had no right to receive the check, so as to bind the state if the check was not paid. If he received the check as a matter of accommodation, the state could not be bound. It is not subject to the ordinary rules in such cases. The taxes were assessed against the plaintiffs. The plaintiffs had never paid them. No money of theirs ever got into the treasury."

In an opinion of this department, Opinions of the Attorney General, 1917, Vol. I, page 966, the first two paragraphs of the syllabus read as follows:

"1. Ordinarily, the receipt by a county treasurer of a check in payment of the liquor tax under Section 6071, G. C., is not payment of such assessment, even if the officer, on receiving the check, marks the duplicate 'paid' and issues a receipt therefor, if the check is not honored by payment.

2. County treasurers accepting checks in payment of taxes are not bound by the provisions of Section 8291, G. C., providing that a check must be presented for payment within a reasonable time after its issue, or the drawer will be discharged from liability thereon, to the extent of the loss caused by the delay."

It is also stated in said opinion at page 967 that:

"Normally, the check given by Mr. Ward to the county treasurer not having been honored by payment, the situation presented with respect to the tax due on account of the business conducted by Mr. Ward would be the same as if the check had not been tendered or received, and this situation would not be altered by the fact that on receiving the check the tax for the amount of the assessment was marked 'paid' by the treasurer and auditor of the county."

It is evident that the receipt of said check by the county treasurer and the marking "paid" on the tax duplicate opposite the taxes charged would not operate as a payment of said taxes unless said check was honored by the bank upon which it was drawn when presented for payment.

You state that this check was presented promptly for payment. It is therefore unnecessary to consider the effect which the failure promptly to present said check for payment would have had, although it is clear under the provisions of Section 2744, General Code, that the taxes are not paid until the money is in the hands of the treasurer or in the depositary.

It is necessary, however, to consider further the effect that the carrying by the county treasurer of said check as cash through two or more settlements with the county auditor has upon said question; and also what effect the restoration of the taxes to the duplicate after said settlements with the county auditor, and after said land had been sold and a mortgage taken thereon, would have. The specific question is, were the taxes legally restored to the duplicate and are the same a lien upon the property, prior to the lien of the mortgage. In the event this question is answered in the negative, you also inquire as to who is responsible for the payment of said taxes.

In the 1917 opinion of this department, supra, it is stated in the third paragraph of the syllabus that:

"3. When a county treasurer, by an arrangement between himself and a person against whom a liquor assessment has been made, accepts a check therefor, holding said check, making his settlements with the auditor of state and county auditor, treating said check as cash and not presenting it for payment until after all of said settlements, the treasurer is liable on his bond for the amount of same."

The question presented to my predecessor was similar to the present question, with the exception that in that case the check was not presented promptly and was not presented at all until after there had been a settlement by the treasurer with the county auditor; and it was assumed by my predecessor that the check in question was not presented to the bank for payment because of some arrangement between the maker of the check and the treasurer. In consideration of this fact in connection with the other facts presented, my predecessor held that the treasurer was liable on his bond for the amount of the taxes.

In the instant case, however, the county treasurer promptly presented the check for payment to the bank on which it was drawn and payment was refused.

The tax was not paid and should have been restored to the duplicate. This was not done until September, 1927.

In an opinion of this department found in Opinions of the Attorney General, 1921, Vol. I, page 542, my predecessor was considering the question as to whether or not when the county treasurer had received Canadian money from taxpayers in payment of their taxes instead of United States money, said county treasurer must bear the loss of any depreciation in such Canadian money. The syllabus of said opinion reads as follows:

"A county treasurer having accepted Canadian instead of United States money in his fiscal transactions must bear the loss of any depreciation in such foreign money accepted."

The foregoing opinion quotes from the 1917 opinion, supra, and states that:

"The situations are apparently largely analogous and it must be held in the case under consideration that the county treasurer having accepted Canadian money instead of United States money in his fiscal transactions must bear the loss of any depreciation in such foreign money accepted."

In the foregoing case, however, it was not a question of receiving a check in the payment of taxes, but of receiving foreign money, and does not come within the provisions of Section 2744, General Code. In the instant case a check was received by the county treasurer and upon presentation to the bank upon which it was drawn payment was refused. It is evident, therefore, that under the circumstances in this case the receipt of said check can in no manner be regarded as payment as the money was not received by the treasurer or the depositary.

Cooley on Taxation, Vol. III, Sec. 1252, states:

"A bank-cheque is conditional payment only, and the tax will remain in force if the cheque is dishonored."

The author cites a New Jersey case, 37 N. J. L. 5, which sustains the author's statement:

"Even although a receipt was given at the time in reliance upon which a person has bought the land."

Section 5671, General Code, reads in part as follows:

"The lien of the state for taxes levied for all purposes, in each year, shall attach to all real property subject to such taxes on the day preceding the second Monday of April, annually, and continue until such taxes, with any penalties accruing thereon, are paid."

In the case of *The Security Trust Co.* vs. *Root,* 72 O. S. 535, it was held that by virtue of this section,

"The lien of the state for taxes is paramount to all other liens."

It is therefore my opinion that the taxes in said case were legally restored to the tax duplicate and the situation is the same as it would have been had there been no receipt of said check for the payment of said taxes; said taxes are a lien paramount to all other liens and claims.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1798.

APPROVAL, ABSTRACT OF TITLE TO LAND OF OTIS P. MORRIS FOR THE SITE OF SCHOENBRUN, IN GOSHEN TOWNSHIP, TUSCARAWAS COUNTY, OHIO.

COLUMBUS, OHIO, March 2, 1928.

Re: Approximately 111.39 acres of land in Goshen Township, Tuscarawas County, Ohio—Otis P. Morris.

HON. ROBERT H. NUSSDORFER, *Secretary of Committee for Purchase of Site of Village of Schoenbrun, Dover, Ohio.*

DEAR SIR:—Referring to Opinion No. 1546 of this department under date of January 7, 1928, you will note that upon an examination of the abstract of title of the lands and premises above noted, I found that said Otis P. Morris had a good and merchantable title to said premises, subject to certain exceptions therein stated.

The first exception noted in said opinion was with respect to the unpaid taxes for the year 1927. The corrected abstract now shows that said taxes have been paid.

Exception No. 4 noted in said opinion was with respect to a certain oil and gas lease executed by said Otis P. Morris and wife in favor of The Ohio Fuel Gas Company on August 25, 1926. Said oil and gas lease has been presented to me with the notation thereon showing that under date of January 25, 1928, a release and cancellation of said oil and gas lease was executed by The Ohio Fuel Gas Company, and that said lease on January 26, 1928, was cancelled, of record on the Record of Leases of Tuscarawas County, Ohio.

Exceptions Nos. 2 and 3 noted in the opinion above referred to have reference to certain licenses or easements executed by said Otis P. Morris to The Ohio Service