

1863.

INHERITANCE TAX LAW—UNPAID INSTALLMENTS OF ASSESSMENTS LEVIED UNDER STATE AND COUNTY ROAD LAWS DO NOT CONSTITUTE DEBTS OF ESTATE OF A DECEDENT TO BE DEDUCTED FROM HIS PERSONAL ESTATE PRIOR TO DETERMINATION OF SAID TAX.

*Unpaid installments of assessments levied under the state and county road laws do not constitute debts of the estate of a decedent, who was the owner of the property at the time of making the assessment, which should be deducted from his general personal estate prior to the determination of the inheritance tax.*

COLUMBUS, OHIO, February 21, 1921.

*Tax Commission of Ohio, Columbus, Ohio.*

GENTLEMEN:—Acknowledgment is made of the Commission's recent letter in which is it stated that a certain probate court in determining inheritance tax has treated as debts of the estate of the decedent certain road assessments made under section 6906 to 6956-3, inclusive, of the General Code, (the county law) and sections 1178 to 1231-4, inclusive, of the General Code (the state highway law). The commission requests the opinion of this department as to whether or not these assessments, none of which is presently due and payable but all of which had been placed on the special duplicates provided for that purpose and are payable in future installments, constitute debts of the decedent's estate which should be deducted prior to the determination of the inheritance tax.

The question as stated by the commission will be amplified by consideration of the manner in which these unpaid assessments should be treated in the event that they are held not to be debts of the decedent's estate.

It will not be necessary to quote extensively from the road and highway laws. The following abstract of the provisions of certain of the sections of these laws will be, it is thought, sufficient:

"Sec. 6919. The \* \* \* expenses of the (county) improvement shall be apportioned and paid in any one of the following methods \* \* \*:

1. \* \* \* the balance thereof \* \* \* shall be assessed against the *real estate* abutting upon said improvement, or the *real estate* situated within one-half mile of either side thereof, or the *real estate* situated within one mile of either side thereof, according to the benefits accruing to such *real estate*; or

2. \* \* \* the balance thereof shall be assessed against the *real estate* abutting upon the improvement or against the *real estate* situated within one-half mile of either side of said improvement, or the *real estate* situated within one mile of either side thereof according to the benefits accruing to such *real estate*; or,

3. All or any part thereof shall be assessed against the *real estate* abutting upon said improvement, or against the *real estate* situated within one-half mile of either side thereof, or against the *real estate* situated within one mile of either side thereof, or against the *real estate* situated within two miles of either side thereof, according to the benefits accruing to such *real estate*;  
\* \* \*

4. All or any part thereof shall be assessed against the *real estate* abutting upon said improvement, or against the *real estate* situated within one-half mile of either side thereof, or against the *real estate* situated within

one mile of either side thereof, or against the *real estate* situated within two miles of either side thereof, according to the benefits accruing to such *real estate*, \* \* \*."

"Sec. 6921-1. Where the \* \* \* expenses of an improvement, other than the portion thereof \* \* \* to be specially assessed against benefited *real estate*, are to be paid in part by the county and in part by the township \* \* \* (certain levies shall be available). Where bonds are issued to provide funds for any such improvement, the shares of the county and of the township \* \* \* and of the *real estate specially assessed*, if any, may be provided by a bond issue \* \* \*."

This section is rather long, but it refers repeatedly to the share of the "real estate specially assessed."

"Sec. 6922. \* \* \* the county surveyor shall make, \* \* \* an estimated assessment upon the *real estate to be charged therewith* \* \* \*. Such estimated assessment shall be according to the benefits which will result to such *real estate*. \* \* \* Such assessments, when \* \* \* approved and confirmed, shall be a lien on the land chargeable therewith."

"Sec. 6923. All assessments, with interest accrued thereon, made under the provisions of this chapter, shall be placed by the auditor upon a special duplicate to be collected as other taxes, and the principal shall be payable in not more than twenty semi-annual installments extending over a period of not more than ten years, as determined by the county commissioners. In the event that bonds are issued to pay the compensation, damages, costs and expenses incident to such improvement, the principal sum of such assessments shall be payable in such number of equal semi-annual installments as will provide a fund for the redemption of the bonds so issued, and such assessments shall bear interest from the date of and at the same rate as the bonds, and the interest shall be collected in like manner as the principal of such assessments."

"Sec. 6925. If any lands to be assessed are subject to a life estate, the assessments made thereon shall, upon application of the life tenant to the commissioners, be apportioned between the owner of the life estate and the owner of the fee in proportion to the value of their respective states. \* \* \*"

It will be observed from a mere cursory reading of the foregoing excerpts from the county statutes that not until we come to section 6925 is there even the most remote intimation of personal liability on the face of these statutes themselves. Even as to section 6925 the apportionment between the life tenant and the owner of the fee must, it is believed, be regarded as an apportionment of the burden of the assessment *between estates* rather than between persons.

"Sec. 1214. Except as otherwise provided in this chapter, the county shall pay twenty-five per cent of all cost and expense of the (inter-county state highway) improvement \* \* \*. Ten per cent of the cost and expense of the improvement, excepting therefrom the cost and expense of bridges and culverts, shall be a charge upon *the property abutting on the improvement*, provided the total amount assessed against *any owner of abutting property* shall not exceed thirty-three per cent of the valuation of such abutting property for the purposes of taxation. Provided, however, that the county commissioners \* \* \* may increase the per cent \* \* \* to be specially assessed and may order that all or any part of the cost and expense of the improvement contributed by the county and the interested \* \* \*

townships be assessed against *the property abutting on the improvement*; and provided further that the county commissioners \* \* \* may make the assessment \* \* \* against the *real estate* within one-half mile of either side of the improvement or against the *real estate* within one mile of either side of the improvement. \* \* \* The county commissioners or township trustees \* \* \* shall cause the county surveyor to make a tentative apportionment of the *amount to be paid by the owners of the property specially assessed* which apportionment shall be made according to the benefits accruing to the land so located. \* \* \*

(It may be noted here that section 1214 is decidedly ambiguous with reference to the question which has to be determined. The same ambiguity runs throughout the whole state highway law. The question is as to whether the assessment is against persons or against property. The section speaks in one breath of property and in another of persons. The intent therefore is to be gathered from the law as a whole and from other statutes *in pari materia*.

Section 1214-1 of the General Code need not be quoted. It provides certain alternative plans of assessment and speaks only of property or "real estate."

"Sec. 1216. All assessments, with interest accrued thereon, as hereinbefore provided, shall be certified to and placed by the county auditor upon a special duplicate to be collected as other taxes and the principal shall be payable in not more than twenty semi-annual installments extending over a period of not more than ten years as determined by the county commissioners or township trustees and certified to such auditor. In the event that bonds are issued to pay the costs and expenses of such improvement the principal sum of such assessments shall be payable in such number of equal semi-annual installments as will provide a fund for the redemption of the bonds so issued and such assessments shall bear interest from the date of and at the same rate as the bonds, and the interest shall be collected in like manner as the principal of such assessments."

"Sec. 1191. \* \* \* When a part of the inter-county highway system or main market road system is improved \* \* \* without the co-operation with a county or some township thereof, ten per cent of the cost of said construction or improvement shall be assessed against the *land abutting thereon* according to the benefits \* \* \*. The tentative assessment shall be confirmed by the state highway commissioner \* \* \* and \* \* \* certified to the county auditor of the county in which such abutting property is situated to be by him placed upon the duplicate against *said land* and paid in such number of equal semi-annual payments as may be fixed by the state highway commissioner. \* \* \*

Coming back to the seemingly ambiguous section 1214, it will be observed that after all it nowhere directly provides for an assessment against property owners. Generally it speaks of an assessment against property and an "amount to be paid by the owners of the property." Of course, property itself cannot pay assessments; persons must do that, and, of course, also the owner of the property at the time an installment is payable will have to pay the installment to discharge the burden of the assessment on his property. So that to speak of the amount to be paid by the property owners is to use a phrase which is perfectly accurate as descriptive of the real situation, but which falls far short of effecting a personal obligation. There is but one exception to this statement about section 1214 and the other sections, growing out of the proviso, which says:

“provided the total amount assessed against any owner of abutting property shall not exceed thirty-three per cent of the valuation of such abutting property for the purposes of taxation.”

This, however, is a mere proviso and follows immediately the operative clause which declares that “ten per cent \* \* \* shall be a charge upon the property abutting on the improvement.” It must be regarded, therefore, as a mere careless use of language.

It seems rather clear from the sections which have been partially quoted that the assessments made under the state and county road laws are not constituted personal obligations of the owner of the property at the time the assessment is levied by anything in these road laws themselves. The distinction which is being drawn is a vital one. If the obligation is personal, then it attaches primarily to the person who is the owner at the time the assessment is made, and though the lien attaches to the land the charge against the land is merely secondary, like the lien of a mortgage given to secure a promissory note, the primary obligation being that of the owner. On the other hand, if the assessment has in truth been made against the property, as seems to be the case so far as yet appears, then while the owner will have to pay it or else suffer certain consequences to his property, those consequences will be visited not necessarily upon the owner of the property at the time the assessment is made, but on him who is the owner at the time the assessment becomes due and payable. Therefore, the determination of the question which must be answered in considering the commission’s request hinges upon the question as to whether the whole amount of an assessment could be recovered from the person who was the owner at the time it was made or not.

Both the state and the county road laws provide for placing the assessment when made upon some kind of a tax duplicate and collecting them as other taxes. Such provisions refer us to the general statutes providing for the collection of taxes, which may have some influence upon the final result. In this connection consideration should be given to the following sections of the General Code:

“Sec. 2656. When one-half of the taxes charged against any entry on a tax duplicate in the hands of a county treasurer is not paid on or before the twentieth day of December \* \* \* or when the remainder of such tax is not paid on or before the twentieth day of June next thereafter, the county treasurer shall proceed to collect it by distress or otherwise, \* \* \*.”

Without deciding whether this section applies to anything except personal property taxes, it is obvious that it does not do more than direct the treasurer, under certain circumstances, to proceed to collect the taxes to which it does apply, without pointing out from whom the collection shall be made or in what manner it shall be effected, except that such manner shall be “by distress or otherwise.”

“Sec. 2657. The county commissioners \* \* \* may extend the time of payment of taxes \* \* \*. In all cases where such half of a tax *other than on real estate* has not been paid” within a certain time certain consequences shall follow.

This section clearly applies to taxes “other than on real estate.” It clearly has no application to the collection of delinquent assessments on real estate.

“Sec. 2658. When taxes are past due and unpaid, the county treasurer

may distrain sufficient goods and chattels belonging to the *person charged with such taxes, \* \* \**"

This section seems not to apply to real estate taxes. A dictum to this effect is found in *State ex rel. vs. Gibson*, 1 N. P. N. S. 565. But whether it does or not, it is clear that it does not of itself have the force and effect of making a particular person chargeable with the payment of a particular tax. The collection is to be made from the person who is charged with the tax. This leaves open two questions:

First. Whether any person is charged with the tax, as distinguished from the tax being a charge on land; and second, even if some person is charged with the payment of the tax, who that person is.

"Sec. 2667. When taxes or assessments, charged against lands or lots or parcels thereof upon the tax duplicate, authorized by law, or any part thereof, are not paid within the time prescribed by law, the county treasurer in addition to other remedies provided by law may, and when requested by the auditor of state, shall enforce the lien of such taxes and assessments, or either, and any penalty thereon, by civil action in his name as county treasurer, for the sale of such premises, in the court of common pleas of the county, without regard to the amount claimed, in the same way mortgage liens are enforced."

Here is a section which applies not only to real property taxes generally, but also expressly to the collection of assessments.

"Sec. 5678. If one-half the taxes charged against an entry of real estate is not paid on or before the twentieth day of December, in that year, or collected by distress or otherwise prior to the February settlement, a penalty of fifteen per cent thereon shall be added to such half of said taxes on the duplicate. If such taxes and penalty, including the remaining half thereof, are not paid on or before the twentieth of June next thereafter, or collected by distress or otherwise prior to the next August settlement, a like penalty shall be charged on the last half of such taxes. The total of such amounts shall constitute the delinquent taxes on such real estate to be collected in the manner prescribed by law."

The phrase "by distress or otherwise" appearing in this section seems to indicate that real property taxes (and by necessary inference the assessments under consideration) can be collected by distress despite the dictum to which reference has been made. As above pointed out, it really is immaterial to the present question whether real estate taxes can be collected by distress, because even if they can it does not necessarily follow that a summary process of this kind can issue against the person who was the owner of the land at the time the assessment was made, as distinguished from the person who is the owner thereof at the time the delinquency occurs.

"Sec. 5679. If the total amount of delinquent taxes and penalty as provided in the next preceding section, together with one-half of the taxes charged against such real estate for the current year, is not paid on or before the twentieth day of December, of the same year, the delinquent taxes and penalty, and the whole of the taxes of the current year, shall be due, and be collected by the sale of the real estate, in the manner authorized by law. If the first half of the taxes charged upon any real estate is paid on or before the twentieth day of December, as provided by law, but the re-

maining half thereof is not paid on or before the twentieth day of June next thereafter, or collected by distress or otherwise, prior to the next August settlement, as provided by law, a like penalty shall be added to such unpaid taxes, and they shall be treated as delinquent taxes, and, with the taxes of the current year, collected by the sale of such real estate, as aforesaid."

It will not be necessary to quote in connection with this the detailed provisions for the sale of lands for delinquent taxes. It is sufficient to state that the procedure which follows that outlined in section 5679 is against the land rather than against the person.

We come now, it is believed, to the sections which clear up all doubts which have been raised by the examination of the sections thus far entertained. They are as follows:

"Sec. 5680. Each person shall pay tax for the lands or town lots of which he is seized for life, or in dower, or which he has care of as guardian or executor. He shall also pay tax for the lands or town lots which he has care of as agent or attorney, if he has sufficient funds of the principal in his hands."

"Sec. 5681. Each person holding lands shall pay the tax assessed thereon each year, but an agent or attorney shall not be required to pay such taxes, unless sufficient money of his principal is in his hands to pay them."

These sections are followed by numerous others providing for different cases of land tenure. The two which have been quoted show, however, that such personal liability as does exist for the payment of taxes assessed upon real estate, as such, rests upon the owner at the time the tax is due; or at least the owner at the time the tax is assessed on a duplicate for a particular year. The question as to the choice between the two possibilities was left open in *Cincinnati College vs. Yeatman*, 30 O. S. 276, in which the dictum was uttered that:

"While the taxes are levied and assessed upon *property*, they are also a *personal obligation* of the owner of that property, which it is his duty to pay. The general rule then is, that whoever owns the property should pay the taxes assessed on it."

It is at least clear, however, that the personal obligation of which the court was speaking in the case cited is one which results from the ownership of property primarily chargeable with the tax, rather than one which is in its nature the primary liability itself.

But it seems that the question which has been discussed should be set at rest by consideration of the sections providing for the levy and collection of assessments by municipal corporations. These assessments are made in the first instance against real estate. (Section 3812 G. C.); if not paid within a certain time they are to be certified to the county auditor and collected "in the same manner as other taxes are collected." (Section 3892 G. C.).

But in addition to these provisions there are the following, which are not found in the road laws which have been considered:

"Section 3897. Special assessments shall be payable by the owners of the property assessed personally, by the time stipulated in the ordinance providing therefor, and shall be a lien from the date of the assessment upon the respective lots or parcels of land assessed. \* \* \*"

"Section 3898. If payment is not made by the time stipulated, the amount assessed, together with interest, and a penalty of five per cent thereon, may be recovered by suit before a justice of the peace, or other court of competent jurisdiction, in the name of the corporation, against the owner or owners, but the owner shall not be liable under any circumstances, beyond his interest in the property assessed, at the time of the passage of the ordinance or resolution to improve."

These sections clearly impose personal liability upon the owner of the property at the time the assessment was made.

Toledo vs. Barnes, 8 C. C. 684.

The fact that such a section is incorporated in the municipal code and omitted from the road laws argues very strongly that the effect of the two is different. The point, however, seems to have been settled in *Dreake vs. Beasley*, 26 O. S. 315. This was a civil action in which the county treasurer sought to obtain a personal judgment against the defendant for an assessment made against his land under a road improvement law of 1867. The court in a short per curiam opinion says that

"The only question involved is whether such an action is authorized by the act of April 6, 1875, (72 Ohio L. 37), supplementary to the several acts for the collection of delinquent taxes."

The reference here is to an act seemingly similar to present section 5697 of the General Code, which has not heretofore been quoted because in its present form it palpably applies only to the collection of delinquent personal taxes.

The court goes on to say:

"We think \* \* \* that the action is not maintainable. The act of 1875 only authorizes the action where the tax or assessment is charged against the 'person or corporation.' The law under which this assessment was made does not, as we understand it, make the assessment a charge against the owner, but only a charge against the land. True the act provides \* \* \* (as do the road laws which have been quoted) that the assessment 'shall be collected in the same manner as other taxes'; but we understand the law to be that no taxes assessed upon lands can be collected by a personal action against the owner, unless they are by law made a charge against him. In the acts for making *assessments in cities and villages special provisions are found for making the owner* as well as the property liable. (As has been observed, these provisions still exist.) No such provision is contained in the act of 1866, or in acts amendatory thereof."

(To which may be added that no provision similar to those found in the municipal code today appears in the modern state and county road laws.)

This case seems squarely in point under the statutes as they have been somewhat thoroughly analyzed.

It is accordingly the opinion of this department that future installments of assessments levied under the state and county road laws do not constitute a personal obligation of the estate of the decedent who was the owner of the property assessed at the time of the making of the assessment; rather, the lien of the

assessment rates upon the land and, if taken into consideration at all, should affect the value for inheritance tax purposes of the successions to the land. This question is not submitted by the commission and has not been fully considered herein. On the exact point raised by the commission's letter the advice of this department is that the unpaid installments of assessments should not be deducted from the general personal estate of the decedent as debts of that estate.

Respectfully,

JOHN G. PRICE,  
*Attorney-General.*

1864.

SCHOOLS—APPORTIONMENT OF STATE COMMON SCHOOL FUND—  
PERSONAL SERVICE EXPENSE INCURRED IN TRANSPORTATION  
OF PUPILS SHALL BE COMPUTED IN SPECIFIC MANNER MENTIONED  
IN SECTION 7787 G. C.—WHAT BOARD OF EDUCATION  
NOT AUTHORIZED TO COMPUTE IN COST OF TRANSPORTATION.

*In the apportionment of the state common school fund, the personal service expense incurred in transporting pupils shall be computed in the specific manner mentioned in section 7787 G. C., and a board of education is not authorized to compute in the cost of transportation in a school district, such additional items as depreciation, repairs, replacement, storage, taxes, insurance or interest on investment, such personal service expense being limited to the things only which appear in the statute.*

COLUMBUS, OHIO, February 21, 1921.

HON. ALLAN G. AIGLER, *Prosecuting Attorney, Norwalk, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your request for the opinion of this department on the statement of facts submitted to you by the county superintendent of schools of your county, such statement reading as follows:

“This office kindly requests of you the opinion of the Attorney-General of the state of Ohio, upon section 7787, General Code of Ohio, as amended, page 1311, Ohio Laws, 1919, which reads in part as follows:

‘The personal service expense incurred in transporting pupils shall be computed as follows:

1. In case the district owns the vehicle of transportation and the means of locomotion, the entire compensation paid to the driver shall constitute such personal service expense attributable to such driver.
2. In case the district owns the vehicle of transportation, but not the means of locomotion, one-half the amount paid for transporting pupils in such vehicle shall constitute such personal service expense.
3. In case the district owns neither the vehicle nor the means of locomotion, one-third the amount paid for transporting pupils shall constitute such expense.’

(a) What constitutes ‘personal service’ in each of the above paragraphs?

(b) In paragraph ‘3’ above, ‘personal service’ certainly includes in its sum a combination of such items as personal and locomotion wages, depreciation, repairs, replacements, storage, taxes, insurance, interest upon in-