tax and assessment liens thereon at the time of the sale of the property in said foreclosure proceedings, whether the proceeds of the sale of the property are sufficient to pay such taxes and assessment liens in full, or not. However, before such tax and assessment lien can be deemed to be satisfied, that part of the proceeds of the sale of the property available for the payment of such taxes and assessments and all penalties and interest thereon, must be paid to the county treasurer; and where the proceeds of the sale of property in such tax foreclosure action available for payment in satisfaction of the taxes and interest thereon set out in the delinquent tax certificate, and all subsequently accruing taxes and assessments, have been deposited by the sheriff to his credit in a bank, the sheriff will be liable for the loss of any of such moneys sustained by reason of the failure of such bank.

Respectfully,
JOHN W. BRICKER,
Attorney General.

1554.

APPROVAL, AGREEMENT FOR ELIMINATION OF GRADE CROSSING IN THE VILLAGE OF LEAVITTSBURG, TRUMBULL COUNTY, OHIO —ERIE RAILROAD COMPANY AND B. AND O. RAILROAD COMPANY.

COLUMBUS, OHIO, September 14, 1933.

HON. O. W. MERRELL, *Director of Highways, Columbus, Ohio.*

DEAR SIR:—You have submitted agreement by and between O. W. Merrell, Director of Highways, and Erie Railroad Company, lessee of and operating the railroad and property of the Nypano Railroad Company, and sublessee of and operating the railroad and property of the Cleveland and Mahoning Valley Railway Company, and The Baltimore and Ohio Railroad Company, which relates to the elimination of the grade crossing over the tracks of the Erie Railroad Company and the Baltimore and Ohio Railroad Company on State Highway No. 322 in the Village of Leavittsburg, Trumbull County, Ohio.

After examination, it is my opinion that said contract is in proper legal form and will constitute a binding contract when properly executed by the Director of Highways.

Respectfully,
JOHN W. BRICKER,
Attorney General.

1555.

CHECK—EFFECT OF DISHONOR THEREOF WHEN GIVEN IN PAYMENT OF REAL PROPERTY TAXES—EFFECT WHERE GRANTEE HAD NO KNOWLEDGE THAT TAXES WERE NOT PAID.

SYLLABUS:

Where a county treasurer pursuant to the authority conferred upon him by section 2744, General Code, receives checks in the collection of taxes on real prop-

erty, the receipt of such checks does not constitute payment of the taxes for which they are given although the county treasurer upon receipt of the checks marks such taxes as "paid", as required by section 2594, General Code; and in such case where the checks given for such taxes are dishonored by non-payment thereof, the taxes for which the checks were given persist as a lien on the property in all cases where there has been no change in the title of the property, or where the property was thereafter conveyed with knowledge on the part of the grantee that the taxes represented by such checks were unpaid; and in such cases the delinquent taxes and penalties thereon should be restored to the duplicate.

However, where a person purchases real property in reliance upon the tax duplicate, entries and records in the county treasurer's office showing that the taxes on such property have been paid, he holds such property free and clear of the taxes assessed although such taxes may not in fact have been paid owing to the fact that checks given by the former owner in payment of such taxes have been dishonored and remain unpaid.

COLUMBUS, OHIO, September 14, 1933.

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

GENTLEMEN:—This is to acknowledge the receipt of a communication from you which reads as follows:

> "You are respectfully requested to furnish this department your written opinion upon the following:
>
> Upon the examination of the treasury of Cuyahoga County, it was found that a large number of checks, received by the treasurer for payment of taxes, were held in the treasury for a period of from one to two and one-half years, the taxes being marked paid at the time of the receipt of the checks and accounted for in subsequent settlements with the county auditor. It was subsequently determined that the treasurer was unable to collect on such checks in the aggregate sum of over $90,000.00, and the checks are now being held as assets of the treasury, although of no value.
>
> QUESTION: In view of the provisions of Sections 2666 and 2744 of the General Code, may the taxes which were represented by the checks be considered unpaid, and the tax lien be reinstated against the property, even though there may have been changes in the ownership during the period during which these checks were held?"

In consideration of the question presented in your communication, it is to be noted that at the time of the transactions therein referred to, section 5671, General Code, then, as now, provided that the lien of the state for taxes levied for all purposes shall attach to all real property subject to such taxes on the day therein designated, and shall continue until such taxes, with any penalties accruing thereon, are paid. In this connection, it is to be further noted that although under the provisions of section 2744, General Code, referred to in your communication, the county treasurer in the collection of taxes may receive checks therefor, the receipt of such checks for this purpose is in no manner to be regarded as payment of such taxes. This section of the General Code further provides:

> "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."

Wholly aside from the provisions of section 2744, General Code, above noted, it is an established legal principle that a check or draft given to a county treasurer or other collector for the payment of taxes does not discharge the tax, unless the check or draft be in fact paid. *Houghton* vs. *Boston,* 159 Mass. 138; *Barnard* vs. *Mercer,* 54 Kas. 630; *Skinner* vs. *Mitchell,* 108 Kas. 861; *Moore* vs. *Auditor General,* 122 Mich. 599; *Richards* vs. *Hatfield,* 40 Nebr. 879; *Kuhl* vs. *Jersey City,* 23 N. J. Eq. 84; and *Manck & Bauer* vs. *Fratz,* 7 O. Dec. Rep. 705.

It follows, therefore, that with respect to real property as to which there has been no change in ownership since the unpaid checks mentioned in your communication were given in payment of taxes thereon, and real property thereafter conveyed with knowledge upon the part of the grantee that checks given for such taxes were unpaid, the taxes thereon represented in amount by such unpaid checks persist as a lien upon such real property. This is true notwithstanding the fact that since the amendment of section 2667, General Code, by the 89th General Assembly, 114 O. L. 826, the county treasurer has no authority under this section of the General Code to enforce the lien of general taxes on real property, and notwithstanding any question that may be suggested with respect to the authority of the county auditor to now charge such delinquent real property with taxes, penalty and interest thereon so as to make such property subject to foreclosure and sale under the delinquent land tax law (section 5704, et seq., General Code).

It may well be that if the county treasurer in his settlements with the county auditor and county commissioners considers such unpaid checks as cash and settles for such taxes as taxes paid by such unpaid checks, such county treasurer with respect to the state, the county and the taxing districts therein is liable individually and on his bond for the taxes charged to him on such settlements. And in this situation, the county treasurer may resort to the remedy against the delinquent property owner afforded to him by section 2666, General Code, referred to in your communication. This, however, does not alter the fact that with respect to the owners of real property giving the checks here in question in payment of taxes thereon, and as between such owners and the county treasurer, the taxes remain unpaid and are a lien on the property. I am of the opinion, therefore, that with respect to real property the title to which has not changed since these unpaid checks were given in payment of taxes thereon and as to property thereafter conveyed with knowledge on the part of the grantee that the taxes represented by such checks were unpaid, the delinquent taxes and penalties thereon should be reinstated on the proper duplicate.

A different question, however, is presented with respect to real property which was thereafter conveyed and where it appears that the grantee in such deed of conveyance had no knowledge that taxes on the property represented by such unpaid checks were not in fact paid. A purchaser of such property would have a right to rely upon the records in the office of the county treasurer with respect to the taxes on the property purchased by him; and where, as in this case, such records would affirmatively show that such taxes were paid, he would have a right to rely upon the representation thus made with respect to the payment of such taxes, and if he purchased this property and took the conveyance of the same in reliance upon this representation thus appearing in the records of the county treasurer, he would hold his property free and clear of the lien of

such taxes, although the check or checks given by the former owner in payment of such taxes remain unpaid. Touching this question, it was held in the case of *Seward* vs. *County of King,* 122 Wash. 225, that a county whose treasurer, upon receipt of a check in payment of a tax upon a certain parcel of real property, marks the tax paid, and issues a proper receipt, is estopped from asserting the non-payment of the tax when the check is dishonored, as against one who purchases and pays for the property in reliance on the receipt. In the case of *Curnen* vs. *New York,* 79 N. Y. 511, it was held that the act of a city officer certifying a tax on the records of his office as paid creates an estoppel with respect to the purchaser of the land relying on the record. This rule was later followed by the appellate division of the supreme court of that state in the case of *Weil* vs. *the City of New York,* 179 App. Div. 80. The decision of the court in this case was affirmed without opinion in the case of *Weil* vs. *City of New York,* 223 N. Y. 599. The same rule was followed in the somewhat analogous case of *Philadelphia* vs. *Anderson,* 142 Pa. 357, where it was held that a city was estopped by a certificate of a search for taxes, signed and issued by a receiver of taxes acting within the scope of the authority conferred upon him by law. In the case of *Herzstam* vs. *Sparks, County Treasurer,* 31 O. L. R. 292, decided by the Court of Appeals of Montgomery County, Ohio, it was held that an injunction would lie against the collection of taxes from a purchaser of real property, who before making the purchase consulted the public records in the office of the county treasurer and found the taxes marked paid, and who purchased such property in reliance upon the information thus obtained. The court in its opinion in this case was called upon to consider the provisions of section 2594, General Code, which section is likewise applicable in the consideration of the question here presented. This section, so far as the same is applicable, reads as follows:

> "The auditor shall set down the amount of taxes charged against each entry in two separate columns, one-half thereof, exclusive of road taxes, in each column, and add all road taxes to the first half with a sufficient blank space at the right of each column to write the word 'paid', and when payment of either half of such taxes is made, the treasurer shall write in the blank space opposite such tax, the word 'paid'."

Referring to the entries which the county treasurer, on the payment of taxes, is required to make on his duplicate of the tax list, the court in its opinion in this case said:

> "These entries are made in what is commonly known as the tax duplicate, and it is regularly examined as evidence of the amount of tax due on real property and the payment or non-payment thereof.
>
> It is significant that under this delegation of authority there devolves upon the treasurer the obligation of determining if, and when, the taxes are paid and thereupon to make an entry to that effect. This is a public record, probably, because it is kept as an incident to the necessary duties of the office but, certainly, because of the mandatory provision of the statute. The individual who pays the tax does not have to resort to this record. He has the evidence of payment in the form of his tax receipt. But all others who have an interest in the property involved must depend on such record because no other source of public information is available.

> The plaintiff in this case had such an interest in the real estate described in the petition as a prospective purchaser of the lease-hold, by the terms of which he was required to pay the taxes thereon, as gave him the right to seek information as to their payment from the tax duplicate in the hands of the treasurer and to rely upon the entry therein made."

In the case of *Jisks* vs. *Ringgold County,* 11 N. W. Reporter, decided by the Supreme Court of Iowa, the court said:

> "There should be some way by which a person deciding to purchase real estate can with reasonable certainty ascertain what liens are thereon and the exact condition of the title. At the time the plaintiff purchased the real estate the taxes in question were not liens thereon and no subsequent acts of the treasurer could have the effect of making them such to the plaintiff's prejudice."

The rule recognized and applied in the authorities above cited is, perhaps, sustained to some extent by the cases of *Evans* vs. *Mannix, County Treasurer,* 90 O. S. 355; and *Van Huffel,* vs. *Harkelrode, County Treasurer,* 284 U. S. 225. In the first of these cases it was held that a tax on the traffic in intoxicating liquors could not, consistent with constitutional guaranties, be assessed against the owner of real property on account of illegal sales of intoxicating liquor made on such property, where the same were made without the knowledge and consent of such owner. In the other case above cited, it was held that the purchaser of real estate sold on order of the court in a bankruptcy proceeding held such property free and clear of the lien of taxes theretofore assessed on the property, although by error of the court in the distribution of the proceeds of the sale of the property, such taxes remained unpaid.

Following the rule applied by the courts in the cases above cited, I am of the opinion that where a person purchases real property in reliance upon the tax duplicate entries and records in the county treasurer's office showing that taxes on such property have been paid, he holds such property free and clear of the taxes assessed, although such taxes may not in fact have been paid owing to the fact that checks given by the former owner in payment of such taxes have been dishonored and remain unpaid. The conclusion reached by me on this question is in conflict with that reached by one of my predecessors in an opinion found in Opinions of the Attorney General for 1928, Vol. I, page 566, where it was held that if payment on checks given for the payment of taxes is refused by the bank on which such checks are drawn, the tax will remain in force even though the tax has been marked paid and receipt is given, in reliance upon which a person has bought the land. No authorities are cited in said opinion in support of the conclusion there reached with respect to the immediate question, and no note is made therein of the authorities above cited on this question. For the reasons above stated, I am of the opinion that the questions presented in your communication should be answered as above indicated.

Respectfully,
JOHN W. BRICKER,
Attorney General.