over and through said city, upon such terms as said state may accept in lieu thereof.

Section 3. That whatever title and interest remains in the state of Ohio in that part of the Hocking canal vacated and abandoned by section 1 of this act are hereby relinquished, transferred and conveyed to the said city of Logan, Ohio."

It is presumed that the point in which your department is immediately interested is whether the right of the state to the rentals which it had been collecting by virtue of the leases in question terminated with the becoming effective of the act quoted.

The title of the state to its canal lands is a fee simple title.(State ex rel.vs.Railway, 53 O. S. 189; Haynes vs. Jones, 91 O.S. 197). This being so, the clear intent of section 2 of the act quoted is to vest in the city of Logan such title as will enable it to convey in fee simple the portion of the canal lands abandoned by the act; subject, of course, to the primary sewerage and drainage use, to the reversionary condition as to unsold lands, and to the right of way reservation, respectively specified in section 2. Such an intent of itself seems inconsistent with the idea of a further reservation of lease rentals to the state, when no express reservation to that end appears in the act. But any doubt on that score is entirely removed by the terms of section 3. That section makes conveyance to the city of the entire residuary title and interest of the state, and hence leaves no foundation for the continued collection of the lease rentals.

It may be noted in passing that the act quoted follows the general form of an earlier act in 108 O. L. 691, authorizing the city of Nelsonville to use certain canal lands for street and other purposes. That the latter act is inconsistent in its provisions as to the residuary title was pointed out in an opinion of this department (No. 2954) directed to Hon. W. B. Bartels, prosecuting attorney, Athens, Ohio, under date March 28, 1922, copy of which is enclosed; but the inconsistency there noted has been avoided in the later act, now under discussion, by the use of the clause "or disposed of by said city." as underscored in the quotation above.

You are therefore advised that with the becoming effective on August 17, 1921, of the act quoted, the right of the state to rentals from leases of lands abandoned by the act for canal purposes, terminated.

Respectfully,
JOHN G. PRICE,
Attorney-General.

3411.

TAXES AND TAXATION—FALSE RETURN OR FRAUDULENT EVASION OF DUTY TO MAKE RETURN—COUNTY AUDITOR NOT RESTRICTED TO FIVE YEARS IMMEDIATELY PRECEDING IN PLACING OMITTED TAXES ON DUPLICATE—SECTION 5398 G. C. CONSTRUED.

In case of a false return for taxation or a fraudulent evasion of the duty to make a return or statement for taxation, the county auditor is not restricted to the five years immediately preceding his inquiries and corrections in placing omitted taxes on the duplicate under section 5398 G. C.

COLUMBUS, OHIO, July 28, 1922.

HON. R. S. PARK, *Prosecuting Attorney, Chardon, Ohio.*

DEAR SIR:—In your letter of recent date you state that T. died a resident of

Geauga county, where he had lived continuously since 1911; that his estate was comprised principally of mortgage bonds of the valuation of over $300,000, and that during the period between 1911 and 1921 inclusive T. concealed most, if not all of this property in his tax returns under such circumstances as that the taxing officials are satisfied that his returns for these years were "false" within the meaning of section 5398 of the General Code.

You submit the question as to whether the county auditor, if upon inquiry he is satisfied that T. did make false returns in each of the years intervening between 1911 and the date of his death, is authorized, upon making the necessary inquiries, to place upon the duplicate against the estate of T. omitted taxes for all of these years or only for the five years next preceding the year in which the inquiries and corrections are made.

You point out that there can be no question that the five year limitation applies when an incorrect or insufficient tax return is made in good faith and section 5399 of the General Code is resorted to for authority to place omitted taxes on the duplicate for preceding years, but suggest that the limitation does not apply in case of false returns.

This question involves consideration of the following sections of the General Code.

"Sec. 5398. If a person required to list property or make a return thereof for taxation, either to the assessor or the county auditor, in the year 1911 or in any year thereafter makes a false return or statement, or evades making a return or statement, the county auditor for each year shall ascertain as near as practicable, the true amount of personal property, moneys, credits, and investments that such person ought to have returned or listed for the year 1911 or for any year thereafter *for which the inquiries and corrections provided for in this chapter are made.* To the amount so ascertained as omitted for each year he shall add fifty per cent, multiply the omitted sum or sums, as increased by said penalty by the rate of taxation belonging to said year or years, and accordingly enter the amount on the tax lists in his office, giving a certificate therefor to the county treasurer who shall collect it as other taxes."

"Sec. 5399. If any person required to list property, * * * in the year nineteen hundred and eleven, or in any year or years thereafter fails to make a return or statement, or if such person makes a return or statement of only a portion of his taxable property * * * the county auditor for each year as to such property omitted and as to property not returned * * * shall ascertain as near as practicable the true amount of * * * property * * * that such person ought to have returned or listed, * * * for not exceeding the five years next preceding the year *in which the inquiries and corrections provided for in this section and in the next preceding and the next two succeeding sections are made and not in any event prior to the year nineteen hundred and eleven.* * * *"

These sections formerly read as follows:

"Sec. 5398. If a person required to list property or make a return thereof for taxation, either to the assessor or county auditor, in any year or years makes a false return of statement, or evades making a return or statement the county auditor for each year, shall ascertain as near as practicable, the true amount of personal property, moneys, credits and investments that such person ought to have returned or listed *for not exceeding the five years preceding* the year in which the inquiries and corrections provided for in this chapter are made. To the amount so ascertained, as omitted for each year

he shall add fifty per cent, multiply the omitted sum or sums, as increased by said penalty, by the rate of taxation belonging to said year or years, and accordingly enter the amount on the tax lists in his office, giving a certificate therefor to the county treasurer who shall collect it as other taxes."

"Sec. 5399. If any person required to list property * * * in any year or years, fails to make a return or statement, or if such person makes a return or statement of only a portion of his taxable property, * * * the county auditor, for each year, as to such property omitted and as to property not returned * * * shall ascertain as near as practicable the true amount of * * * property * * * that such person ought to have returned or listed, * * * for not exceeding the five years next preceding the year *in which the inquiries and corrections provided for in this section and in the next preceding and the next two succeeding sections are made,* * * *."

When the so-called Smith-Alsdorf law, the predecessor to the present Smith one per cent law, was passed in 1910, a part of the policy embodied in that measure was a sort of general amnesty to tax dodgers in the hope that together with the limitation on tax rates such a policy would bring about a voluntary return of intangible property. So we find these two section, with others, being put into their present form as part of this tax limitation act. 101 O. L. 430.

It seems clear that the main purpose of amending the two sections was to prevent the inquiries and corrections from going back of the year 1911. However in the course of amendment of section 5398, the significant language "for not exceeding the five years preceding the year", which had formerly been in section 5398, was omitted therefrom. True, the legislature at the same time left in both the sections their mutual references to each other. So that section 5398, as amended, still refers to the "inquiries and corrections provided for in this chapter" and section 5399 still says, as it formerly did, "for not exceeding the five years next preceding the year in which the inquiries and corrections provided for in this section *and in the next preceding * * * sections are made.*" In these respects there was no change in the sections.

It is impossible to escape the conclusion that the legislature deliberately left out the five year limitation which was formerly found in section 5398. Of course it might be argued that in view of the reference in this section to the provisions of section 5399 and the reference back in that section to the provisions of section 5398, the five year limitation found in section 5399 is made to apply to the proceedings under both sections so that the legislature's motive in omitting this language in 1910 may have been merely to dispense with unnecessary repetition. On the other hand you argue the legislative motive must be to make this, together with other distinctions between the case of a bona fide but incorrect return and a deliberately false and fraudulent return. From the viewpoint of this department both these arguments are founded upon mere speculation. It is not so important to inquire why the legislature struck out the vital language, the absence of which has been noted, as it is to observe that it did strike it out and to inquire what the effect of so doing is. In the opinion of this department it is impossible to avoid the conclusion that there is no longer any limit except the year 1911 on the number of years preceding the years in which the inquiries and corrections are made under section 5398 of the General Code for which omitted taxes may be placed on the duplicate. The mere fact that section 5399 imposes a limit upon the action of the county auditor thereunder and in so doing refers as well to the inquiries and corrections provided for in the next preceding section as to those provided for "in this section," while it affords some slight evidence of a contrary intention, is not enough to overthrow the inference in support of the conclusion above announced which must be drawn from the change made in section 5398 itself; for section 5399 does not provide that all action under the preceding section shall be limited to

the five years prior to the year in which inquiries and corrections are made, which would be the exact way of stating the opposite rule, but it merely enacts that action under section 5399 in placing omitted taxes on the duplicate in case of bona fide incorrect or incomplete returns shall not go back further than the five years next preceding the years in which the inquiries and corrections provided for in that section and in the next preceding and the next two succeeding sections are made. The section is so phrased and has always been so phrased in the opinion of this department because of the form in which the power of the auditor to inquire is conferred. In a sense it might be said that the auditor must find that a false return has been made before he can proceed at all to inquire under section 5398; and that he must find that an innocent but incorrect return has been made or a bona fide omission to list has occurred before he can proceed at all under section 5399. Undoubtedly in practice the auditor cannot discover what the circumstances may have been in many cases until he has made his inquiries. The legislature could have expressed its intention more clearly by authorizing one inquiry and then providing that in the event the auditor found that the return was false and fraudulent he should add the fifty per cent penalty and go back an indefinite number of years but not beyond the year 1911, but if he found that returns were unintentionally incorrect or incomplete he should not add the penalty and should not go back more than five years. This it is believed is what the legislature was aiming at and in order to make it clear that separate proceedings need not be had for each class of cases, these references from one section to another in the group were placed in the statutes at an early date and have always been there. Their presence being thus accounted for, the inference that the legislature intended the five year limitation which is now mentioned only in 5399 to apply to section 5398 as well because of the form of the words used is overthrown or at least greatly weakened, especially in the face of the fact that the five year limitation was formerly found in both sections together with these cross references.

For the foregoing reasons this department is of the opinion, as above stated, that if the county auditor finds that false and fraudulent returns were made by the decedent he is not limited to the five years preceding the year in which the inquiries and corrections were made in placing on the duplicate such amount of omitted taxes as he believes the estate should pay.

Respectfully,
JOHN G. PRICE,
Attorney-General.

3412.

DELINQUENT LAND TAX—PETITION TO FORECLOSE—CERTAIN DESCRIPTION APPEARING IN SAID LAND TAX CERTIFICATE ALSO MORE MINUTE AND PARTICULAR DESCRIPTION OF SAID REAL ESTATE AS SHOWN BY DEED RECORDS—SHERIFF MAY CONVEY BY MORE PARTICULAR DESCRIPTION RATHER THAN GENERAL DESCRIPTION CARRIED ON TAX DUPLICATE.

It is proper and good practice for a petition to foreclose an unredeemed land tax certificate, under section 5718 G. C., in addition to the description appearing in said certificate, to set out a more minute and particular description of said real estate, as shown by the deed records.