one within the direct statutory authority of section 5560 of the General Code as previously stated. In other words, if the value of the minerals to the church can be ascertained, that value can be subtracted from the value of the whole tract and placed on the tax duplicate, the remainder in value of the tract remaining on the exempt list. This, as you will perceive, is not exactly the same thing as taxing the royalty. Rather it is taxing so much of the land (in value) as is leased with a view to profit; that is, the oil and gas in the land and the right to use the surface for the purpose of exploring for and extracting them. This would require an ascertainment of the hypothetical value of a conveyance of the oil and gas in place, which is perhaps a difficult or impossible thing to do, because in the industries affected it is not customary to take such conveyance. It can be gotten at, however, in an indirect way by applying the principles on which undeveloped oil and gas lands are being assessed with a view to their oil and gas properties.

This department does not feel at all assured that the suggestion just made is practicable, but it is as far in the direction of according some exemption to the real estate in question as can safely be gone. If the method suggested proves impracticable, the only alternative in this regard is to treat the lot (as distinguished from the building) as taxable in its entirety because "leased or otherwise used with a view to profit."

Respectfully,
JOHN G. PRICE,
Attorney-General.

3631.

ASSESSMENTS—SEPARATELY OWNED MINERAL RIGHTS PERTAINING TO TRACT OF LAND THE SURFACE OF WHICH ABUTS UPON ROAD IMPROVEMENT, CONSTITUTE REAL ESTATE ABUTTING UPON SUCH IMPROVEMENT.

Separately owned mineral rights pertaining to a tract of land the surface of which abuts upon a road improvement, constitute real estate abutting upon such improvement.

COLUMBUS, OHIO, September 23, 1922.

HON. WILLIAM T. DIXON, JR, *Prosecuting Attorney, St. Clairsville, Ohio.*

DEAR SIR:—You have requested the opinion of this department upon the following question:

> "The Township Trustees of Warren Township have submitted to us the question of their right to place an assessment upon the real estate abutting on the improvement of the Barnesville-Hendrysburg Road, and whether that assessment may be placed on coal lands separately owned from the surface.
>
> The coal lands are partly being developed and partly not being mined by various parties other than the owners of the surface.
>
> Kindly let us have your opinion as to whether or not the Trustees have a right to place an assessment against the coal land separately owned from the surface which abut the improvement."

It is assumed that the improvement contemplated by the trustees is to be made under sections 3298-1 and succeeding sections of the General Code from which the following quotations may be selected:

> "Sec. 3298-13. The compensation, damages, costs and expenses of the improvements shall be apportioned and paid in any one of the following methods, as set forth in the petition: 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, according to the benefits accruing to such real estate; and the balance thereof, if any, shall be paid out of the proceeds of any levy or levies for road purposes upon the grand duplicate of all the taxable property in the township, or from any funds in the township treasury available therefor. * * *"

> "Sec. 3298-14. When property is separated from an improvement by a canal, street or interurban railway, steam railway or in any similar manner, such property shall be regarded for the purpose of assessment under the township road improvement laws as property abutting upon said improvement and both the land owned or occupied by such street, interurban or steam railway and the land lying back thereof shall be assessed on account of said improvement in the manner provided by law."
>
> "Sec. 3298-15a. As soon as all questions of compensation and damages have been determined, the county surveyor shall make, upon actual view, an estimated assessment upon the real estate to be charged therein of such part of the compensation, damages, costs and expenses of said improvement as is to be specially assessed. Such estimated assessment shall be according to the benefits which will result to such real estate. * * *"

It may be worth while to refer to section 5560 of the General Code relating to the listing of real estate for general tax purposes, which contains the following provision:

> "* * * where the fee of the soil of a tract, parcel or lot of land, is in any person natural or artificial, and the right to minerals therein in another, it shall be valued and listed agreeably to such ownership in separate entries, specifying the interests listed, and be taxed to the parties owning different interests, respectively."

This section is followed by others providing for the making of the division on the books of the county auditor following the severance of the mineral rights from the remainder of the real estate.

It is observed that your letter states that the township trustees are about to adopt that plan of assessment under which the assessment district is limited to the real estate *abutting* upon the said improvement." Thus two questions are raised, namely:

1. Are separately owned mineral rights "real estate" within the meaning of this provision?

2. If they are, and if they pertain to tracts, the surface of which abuts upon the proposed improvement, can the mineral rights themselves be considered as abutting thereon?

Curiously enough there seems to be an entire lack of authority upon these very

interesting questions, although the statutes of the several states relating both to the method of imposing special assessments for local improvements and to the method of taxing separately owned minerals are very similar to each other. In the absence of any such direct authority it has been found necessary to consider these questions on principle.

At the outset, it is certain that minerals in place owned and held under a title separate from that by which the surface of the land in which they are located is owned and held constitute real estate in the general sense. Without referring to authorities, it is sufficient to observe that such ownership of such minerals can be created only by grant or reservation by or in a conveyance effectual to create or preserve an interest in real estate; they descend as real estate, and for all conceivable purposes are treated as real estate in distinction to personal property.

Moreover, it appears that in this state such separately owned minerals are listed for general taxation separately from the surface, so that they constitute real estate or "real property" within the meaning of the general taxing statutes. Reference might be made to section 5322 in addition to those previously quoted. This section defines the term "real property" and "land" as used in the title pertaining to property taxation as including "not only land itself" and "all things contained therein," but also all improvements "and all rights and privileges belonging, or appertaining thereto." In a sense the imposition of special assessments for local improvements is a kind of taxation, though in other senses it is to be carefully distinguished from taxation. The fact that separately owned mineral rights constitute separate subjects of property taxation, and thus are separately listed upon the tax books of the county, is not without its weight in connection with the question under consideration because assessments under the road laws, including the one under examination, are to be certified to the county auditor and placed upon a special duplicate. Presumably therefore, the auditor is to use as the basis of his assessments the tax records in his office. This assumption is strengthened by the provision of section 3298-15c providing for the apportionment of the assessment between a life tenant and the owner of the fee. General taxes are not so apportioned, so that it was necessary to make special provision in the assessment law therefor. In other words, wherever it is necessary to depart from the form of the tax list in making up the special assessment duplicate we find a provision for such a departure; which tends to establish the conclusion previously assumed to the effect that tax lists constitute the basis of the special assessment duplicate.

These things being true, it is at least arguable that anything which constitutes real estate for the purpose of general tax listing is also to be considered as "real estate" for the purpose of apportioning a special assessment. Of course, the assessment statutes preclude the imposition of any part of a special assessment upon property that is not specially benefited. It is not all real estate within the assessment area, but only that against which an assessment "according to the benefits accruing" to such real estate can be apportioned which can be the subject of assessment. But assuming that a given interest in land which is the subject of general property tax listing can be said to be benefited by a proposed improvement, the inference from the statutes previously considered would seem to make it the subject of such an assessment.

Inasmuch then as separately owned minerals are "real estate" both in the general sense and in the sense in which the term is used in the statutes of Ohio relating to taxation, it is the opinion of this department that the first question above stated is to be answered in the affirmative, and that separately owned minerals which are benefited by a proposed road improvement may be assessed as such.

The question as to whether separately owned minerals may be considered to be "abutting upon" the improvement is very much more difficult. The usual meaning of the word "abutting" is such as to imply the idea of actual contact. This meaning is enlarged by section 3298-14 wherein it is provided that separation of real property from an improvement in certain ways is not to be regarded as taking such property out of the class of abutting property. This provision, however, is not of much help in the solution of the present question, for though it contains the general words "or in any similar manner," yet on principles of statutory interpretation, these words must be limited to things of a character similar to those previously enumerated. The previous enumeration in this instance indicates a class of things lying on the surface of the ground; so that the section referred to in the opinion of this department does not afford any help in the solution of the present question.

The question is novel. Can sub-surface rights be held to "abut" upon a surface improvement? It must be remembered that the sub-surface rights pertain to a tract, the boundaries of which are theoretically delineated upon the surface. That is to say, the sale of all coal in place under a forty acre farm passes title to all coal found within subterranean boundaries ascertained by extending the surface boundaries toward the center of the earth. To be sure, it may turn out that the vein of coal under a forty acre tract does not extend completely under or across the tract; but this is a fact which cannot be ascertained without actually mining. It remains true that the coal rights in such a case would be limited by the same boundaries as the surface.

Some slight evidence of legislative usage is found in section 3812 of the General Code which contains the following language:

> "* * * The council of any municipal corporation may assess upon the abutting, adjacent and contiguous or other specially benefited lots or lands in the corporation, any part of the * * * cost * * * connected with the improvement of any street * * * by * * * constructing * * * sewers, drains * * * water mains or laying of water pipe * * * by any of the following methods: * * *
>
> Third: By the foot front of the property bounding and abutting upon the improvement."

It will be observed that this section speaks of the property within the assessment area under the third plan as that "bounding and abutting upon the improvement" and not that " bounding and abutting upon the street to be improved." Yet, among the kinds of improvements for which assessments according to this plan are authorized is the construction of sewers and drains and the laying of water pipe. They are sub-surface improvements. Though the idea is perhaps far-fetched, it seems that if surface lands can be said to abut upon a sub-surface improvement, then conversely sub-surface lands can be held to abut upon a surface improvement.

Other arguments of a similar character might be indulged in. For example, it might be inquired what is meant by the word "improvement" in section 3298-13. If it be held to mean the road to be improved, then it might be argued that the boundaries of that road in a sense extend like any other real estate from the center of the earth to the highest heaven. All such arguments, however, are really beside the point. There is certainly a sense in which the mineral rights under a tract of

land, the surface of which abuts upon an improvement, can be said themselves to be real estate abutting upon the improvement. In the substantial sense this is so because the practicable use of real estate whether surface or sub-surface must in the nature of things depend upon its accessibility. No reason is perceived why the improvement of a road is not in essence if not in degree as beneficial to subterranean rights in land as it is to the ownership of the surface. The spirit and purpose of all the assessment laws is that specially benefitted property shall bear a share of the public burden commensurate with the special benefit which it receives. This principal is limited by the requirement that such assessments are limited to the benefits actually received. But within the spirit thus ascertained, it is believed that separately owned mineral rights pertaining to a tract of land the surface of which abuts upon a road improvement, are, and constitute, real estate abutting upon such improvement.

Respectfully,
JOHN G. PRICE,
Attorney-General.

3632.

APPROVAL, AMENDMENT TO ARTICLES OF INCORPORATION, THE OHIO HARDWARE MUTUAL INSURANCE COMPANY, COSHOCTON, OHIO.

COLUMBUS, OHIO, September 26, 1922.

HON. HARVEY C. SMITH, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—The certificate of amendment to the Articles of Incorporation of The Ohio Hardware Mutual Insurance Company, of Coshocton, Ohio, is herewith returned to you with my approval endorsed thereon.

Respectfully,
JOHN G. PRICE,
Attorney-General.

3633.

APPROVAL, BONDS OF MESOPOTAMIA TOWNSHIP RURAL SCHOOL DISTRICT, $25,000, TO ERECT A SCHOOL BUILDING.

COLUMBUS, OHIO, September 26, 1922.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.