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TOLL BRIDGE ACROSS OHIO RIVER — WHERE KENTUCKY ACQUIRES LAND IN OHIO, USE, APPROACH TO SUCH BRIDGE — PROPERTY AND IMPROVEMENTS TAXABLE AS THOUGH INDIVIDUALLY OWNED — PAST DUE TAXES — COUNTY TREASURER, SITUS OF PROPERTY, MAY CAUSE RECEIVER TO BE APPOINTED TO COLLECT REVENUES UNTIL TAXES AND COSTS OF RECEIVERSHIP PAID—SECTIONS 5703; 5703-1, 5703-2 G. C. — TAX LIEN MAY BE ENFORCED THROUGH FORECLOSURE PROCEEDINGS—SECTIONS 5718-3 G. C.

SYLLABUS:

1. *When the State of Kentucky acquires land in the State of Ohio for the purposes of an approach to a toll bridge across the Ohio River and for the construction thereon of a part of the bridge, such property and the improvements constructed thereon are taxable in the same manner and to the same extent as though owned by an individual.*

2. *When the State of Kentucky owns land in the State of Ohio which it uses in the operation of its toll bridge across the Ohio River and the taxes assessed against the same become past due and unpaid, the county treasurer of the county in which such real property lies may cause a receiver to be appointed for such lands to collect the revenues therefrom until such taxes and the costs of receivership have been fully paid in the manner authorized by Sections 5703, 5703-1 and 5703-2, General Code.*

3. *When the State of Kentucky is the owner of real property located in Ohio, which it uses in connection with the operation of a toll bridge over*

*the Ohio River, and the taxes thereon have become delinquent, the lien of such taxes may be enforced through foreclosure in the manner prescribed in Section 5718-3, General Code.*

Columbus, Ohio, May 13, 1940.

Hon. Roy L. Henry, Prosecuting Attorney,  
Ironton, Ohio.

Dear Sir:

I am in receipt of your request for opinion reading:

"I respectfully request your opinion upon the following question:

Mr. H. H. Hopkins, County Treasurer, and myself have been working for some time for ways and means of collecting the tax due from the Commonwealth of Kentucky on that portion of the bridge known as the Coal Grove-Ashland Bridge which is in Lawrence County, Ohio. It is now apparent that if any tax is collected it must be through a suit in court. The Commonwealth of Kentucky has taken the view that it is public property and not taxable. I would like your opinion first upon that phase as to whether or not that portion of the bridge which extends into Lawrence County, Ohio, is taxable by this subdivision.

Second, if the tax can be levied, what court would have jurisdiction of the action? In other words where will we file the suit, in the Common Pleas Court of this county or in another jurisdiction?"

I do not understand your request to present the question as to whether that portion of the bridge structure which lies within the territorial limits of the State of Ohio, as such, constitutes taxable property. Such question was before the court in *Sandusky Bay Bridge Company v. Fall*, *Treas.*, 41 O. App., 355, and the bridge was held to be taxable when owned by a private corporation even though on or over lands owned by the State.

See also:

*Smith v. Mayor of New York*, 68 N. Y., 552;  
*People, ex rel. City of Chicago, v. Upham*, 221 Ill., 555;  
*Inhabitants of Kittery v. Proprietors of Portsmouth  
Bridge Company*, 78, Me., 93;  
*State, ex rel. Delaware and Eton Bridge Company, v.  
Metz*, 29 N. J. Law, 122;  
*Russell, Recr., v. City of New Haven*, 51 Conn., 259.

I understand your inquiry to be more particularly whether such type of property is taxable when it is owned by the sovereign State of Kentucky. As stated in the third syllabus of *Sandusky Bay Bridge Company v. Fall, Treas.*, supra:

“State Constitution contemplates that all property physically located within state shall be taxed unless clearly exempted by legislative enactment.”

See also:

*Wilson v. Licking Aerie*, 104 O. S., 137;  
*French v. Bobe*, 64 O. S., 323.

Such holding of the court is well supported by the authorities. In fact, Section 5328, General Code specifically provides that:

“All real property in this state shall be subject to taxation, except only such as may be expressly exempted therefrom.”

Section 3410-6, General Code, exempts certain property from taxation when owned by a township. Sections 4759 and 5349, General Code, exempt certain property from taxation when owned by a board of education. Section 5351, General Code, exempts real property belonging exclusively to the State or the United States. Sections 5352, 5353, 5353-1 and 5356, General Code, exempt real estate under certain circumstances from taxation when owned by a city, village, township and certain specified subdivisions. Such exemptions are authorized by Section 2 of Article XII of the Ohio Constitution. Such provisions make no reference to the exemption of real estate from taxation when it is owned by a sister state.

It should be recalled to mind that when a state acquires and holds title to land in another state, it holds such land as a subject of the sovereign state in which the land is located and not as a sovereign. *Dodge v. Briggs*, 27 Fed., 160; *Burbank v. Fay*, 65 N. Y., 57. Under such circumstances, the state so holding title is in the same capacity as a private owner; its estate is subject to the same incidents. *Burbank v. Fay*, supra.

As was stated by the court in *State ex rel. Taggart, v. Holcomb*, 85 Kan., 178:

“When a city of the state of Missouri comes into Kansas, it comes in as a private party, and brings with it none of its prerogatives of sovereignty. The general rule is that all property not expressly exempted is taxable, and the fact that the state does not

tax itself and its municipalities to obtain revenue for itself is no reason why a foreign municipality, who is here in the capacity of a private proprietor, and whose property receives protection from the state, should contribute nothing toward that protection, or should escape paying the taxes imposed upon other owners of property."

Such case specifically holds that when a state or municipality acquires and owns land in another state, its liability for taxes thereon is in no different status than that of any individual owning similar property.

In *Susquehanna Canal Company v. Pennsylvania*, 72 Pa. St., 72, the court said: "We cannot doubt the power of our legislature to tax the property of another state situated in Pennsylvania." The court further observed that "if the State of Maryland owned land in Pennsylvania, the power of the latter state to tax it could not be questioned."

A question quite similar to your first inquiry was answered by a former Attorney General in *Opinions of the Attorney General for 1932*, page 1490, as follows:

"That part of the bridge constructed by the Commonwealth of Kentucky across the Ohio River between Maysville, Kentucky, and Aberdeen, Ohio, and the upland connected therewith, which are located in Ohio, are taxable under the laws of this state."

Such opinion is well reasoned. Since there has been no material change in the Ohio statutes and since the federal courts have held that such taxation does not unlawfully interfere with interstate commerce, I am not persuaded to depart from such ruling.

See:

*City of Louisville v. Babb*, 75 Fed. (2d), 162;  
*Henderson Bridge Company v. Henderson City*, 173  
U. S., 592;  
*Covington & Cincinnati Bridge Company v. Kentucky*,  
154 U. S., 204, 212.

By reason of the foregoing, I must answer your first inquiry in the affirmative.

With respect to your second inquiry, different considerations must be referred to. Under the present statutes of this State there is no personal obligation on the part of the taxpayer to pay the tax. That is, the owner of real estate may not be sued and a personal judgment obtained against him for the amount of the tax or the penalty and interest thereon, if any.

Newman v. Newman Mfg. Co., 31 O. N. P. (n. s.), 273;  
Brown v. Russell, 20 O. App., 101.

As stated in Dreake v. Beasley, 26 O. S., 315, "No taxes assessed upon lands can be collected by personal action against the owner, unless they are by law made a charge against him." While it is scarcely to be doubted that the legislature may constitutionally make taxes the personal obligation of the taxpayer (*Gest v. Cincinnati*, 26 O. S., 275), nevertheless, until it has done so, such taxes are not such obligation. As pointed out in the cases above cited, real estate taxes under the present tax laws are merely a tax in rem. The remedy for the enforcement of their payment is by means of the enforcement of the lien provided by statute and in the manner provided by statute.

As I have above pointed out, the State of Kentucky, when it becomes the owner of property located in Ohio, holds the property subject to the same burdens and duties as would a private owner. It would, therefore, seem to me that if a personal judgment could not be obtained against a private owner when it owned the real estate under conditions as described in your inquiry, a personal judgment could not be obtained against the State of Kentucky under like circumstances.

The next query presented by your inquiry is as to the proper method of procedure to foreclose the lien for the taxes in question, as to the court having jurisdiction of such proceedings, and, having determined as to the court having jurisdiction, the proper method of obtaining service of summons.

You are undoubtedly familiar with the provisions of Section 5703, General Code, which reads in part as follows:

"In addition to all other means and methods provided by law for collecting taxes and assessments heretofore or hereafter charged upon real estate specifically as such and penalties and interest, or either, charged on any tax list and duplicate or delinquent land tax list in any county against any entry of real estate, the county treasurer of such county at any time after any installment of such taxes or assessments, or both, shall have been delinquent for more than six months and remain due and unpaid, shall apply by petition to the common pleas court of the county to be appointed receiver ex officio of the rents, issues and income of the real property against which such taxes or assessments, or both, are so charged for the purpose of collecting and satisfying out of such rents, issues and income, the taxes or assessments or both upon such real property together with the penalties, interests and costs, if any, charged or thereafter

becoming chargeable on any tax list and duplicate, or otherwise collectible in respect thereof and such costs and expenses of the receivership as may be allowed and adjudged by the court. It shall be sufficient, having made proper parties to the suit, for the county treasurer to allege in such petition a description of such real property as the same appears on the tax list and duplicate, that the amount of money appearing to be due and unpaid by the tax list and duplicate or by the delinquent land tax list, as the case may require, has been due and unpaid for more than six months and that he verily believes that collection thereof can be made by applying the rents, issues and income of such real property thereto, without setting forth therein any other or special matter relating thereto. The prayer of the petition shall be that the court make an order that the rents, issues and income of such real property be applied to the payment of the amount set forth in the petition and, in the event interest or penalty is otherwise chargeable or collectible by law on all or any part of such amount, to the payment of such interest or penalty to the date of final entry in such action, and that the plaintiff be appointed receiver ex officio of such rents, issues and income for that purpose. In such proceedings the county treasurer may join in one action all or any number of lots or lands, but the decree and any orders shall be rendered severally or separately, and any proceedings may be severed in the decision of the court for the purpose of trial, error or appeals, where an appeal is allowed, and the court shall make such order for payment of costs as shall be deemed equitable and proper. The tax duplicate, or as the case may require, the delinquent land tax certificate filed by the county auditor with the prosecuting attorney, shall be prima facie evidence on the trial of such action of the amount and validity of the taxes, assessments, interest and charges appearing due and unpaid thereon and of the non-payment thereof. The petition of the county treasurer shall be verified and shall be prima facie evidence of all other facts therein stated."

Sections 5703-1 and 5703-2, General Code, further describe the procedure for the collection of real estate taxes through receivership proceedings.

You will note that such section places the jurisdiction to appoint the receiver in the court of common pleas of the county wherein the unpaid realty taxes appear on the duplicate.

Inquiry may be made as to the manner in which service of summons may be had on the State of Kentucky in such proceeding. When we refer to Section 11292, General Code, we find the following provisions:

"Service may be made by publication in any of the following cases:

\* \* \* \* \* \* \* \* \*

3. In an action to foreclose a mortgage or to enforce a lien or other incumbrance or charge on real property, when the defend-

ant is not a resident of this state or his place of residence can not be ascertained.

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7. In an action in which it is sought by a provisional remedy to take or to appropriate in any way property of the defendant, when the defendant is not a resident of this state or is a foreign corporation or his place of residence can not be ascertained;

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9. In an action which relates to or the subject of which is real or personal property in this state, when the defendant has or claims a lien thereon, or an actual or contingent interest therein, or the relief demanded consists wholly or partly in excluding him from any interest therein, and such defendant is not a resident of this state, or is a foreign corporation, or his place of residence can not be ascertained;

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From the language of such section it would appear that constructive service may be had on the State of Kentucky in such action, since such State is not a resident of the State of Ohio and has no attributes of sovereignty with respect to the ownership of realty in Ohio, as we have hereinbefore pointed out. I am, therefore, of the opinion that if proper proceedings are instituted in Lawrence County the Court of Common Pleas of such county could properly appoint a receiver under authority of Sections 5703, 5703-1 and 5703-2, General Code, to collect the income from the portion of the bridge which is located within the geographical limits of Ohio until the taxes and expenses of receivership shall have been paid.

You may further desire to be informed whether in my opinion you may institute foreclosure proceedings to enforce the lien of the state or county for the taxes against such property so owned by Kentucky. If such action lies against a foreign state, foreclosure proceedings in the court of common pleas of the county in which the land lies are specifically authorized by Sections 5713, et seq., General Code, and, as above pointed out, you could obtain constructive service under authority of Section 11292, General Code. The only question that presents a possible query is whether such proceedings constitute an unlawful interference with interstate commerce within the meaning of that term as used in the Federal Constitution. As I have shown above, the federal court has held that the taxing of such property owned by Kentucky does not constitute an unlawful interference with interstate commerce.

From the very nature of a tax it would appear that if it does not un-

lawfully burden interstate commerce to tax property used in interstate commerce, it would not be an unlawful interference with interstate commerce to enforce payment of the tax. (See *Adams Express Company v. Ohio State Auditor*, 165 U. S., 194, 220; *Postal Telegraph Cable Company v. Adams*, 155 U. S., 688.) "A tax is an enforced contribution to provide for the support of the government" (*United States v. La Franca*, 282 U. S., 568, 573); "an enforced burden of contribution imposed by sovereign right for the support of the government, the administration of the law, and to execute the various functions the sovereign is called upon to perform (*Kremm v. Davenport (Fla.)*, 120 So., 904). See also *French Republic v. Board of Supervisors of Jefferson County*, 200 Ky., 18, 21; *Baisden v. Gibson*, 208 Ky., 341, 345. In fact, it would seem that if the exaction were not compulsory it would be a contribution rather than a tax.

As is pointed out in *Western Live Stock v. Bureau of Revenue*, 303 U. S., 250, the mere fact that the imposition of a tax by a state increases the cost of interstate commerce does not render the tax illegal. The tax to be illegal for such purpose must have a *direct* tendency to create a burden on such commerce which is not borne by corporations or persons similarly engaged in intrastate commerce. In the case of a toll bridge, the Ohio statutes have assessed and must, by reason of Section 2 of Article XII of the Constitution, tax such real estate by uniform rule and according to value the same as any other real estate however used. I have been unable to find any decision which would require the State of Ohio to adopt any other method either of assessment or collection of tax on property owned by the State of Kentucky and located in Ohio than is used against a private taxpayer under similar circumstances. The foreclosure or subjection of the land to the payment of the tax is merely incidental to the taxation of the article and not a direct burden on commerce. It, therefore, seems to me that the State of Ohio has the same remedies to enforce the payment of the tax as it would against the property of an interstate railroad or pullman car company, in which cases it has consistently been held that the payment of the tax may be enforced as against intrastate corporations.

Specifically answering your inquiries, it is my opinion that:

1. When the State of Kentucky acquires land in the State of Ohio for the purposes of an approach to a toll bridge across the Ohio River and for the construction thereon of a part of the bridge, such property and the



improvements constructed thereon are taxable in the same manner and to the same extent as though owned by an individual.

2. When the State of Kentucky owns land in the State of Ohio which it uses in the operation of its toll bridge across the Ohio River and the taxes assessed against the same become past due and unpaid, the county treasurer of the county in which such real property lies may cause a receiver to be appointed for such lands to collect the revenues therefrom until such taxes and the costs of receivership have been fully paid in the manner authorized by Sections 5703, 5703-1 and 5703-2, General Code.

3. When the State of Kentucky is the owner of real property located in Ohio, which it uses in connection with the operation of a toll bridge over the Ohio River, and the taxes thereon have become delinquent, the lien of such taxes may be enforced through foreclosure in the manner prescribed in Section 5718-3, General Code.

Respectfully,

THOMAS J. HERBERT,  
Attorney General.