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SYLLABUS:

A county auditor is without authority to remove privately-owned land subject to a highway easement from the county tax list and tax duplicate.

Columbus, Ohio, August 28, 1963

Honorable Geo. Cleveland Smythe
Prosecuting Attorney
Delaware County
Delaware, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“An easement for S.R. 1 was appropriated by the State through a 63 acre farm. The area in the easement consisted of about 12 acres leaving 38 acres northwest of S.R. 1 and 13 acres southeast thereof.

“The owner of the farm has died testate leaving the portion northwest of the freeway to one set of devisees and the portion southeast thereof to another group of devisees.

“New surveys have been prepared for said respective tracts exclusive of the area in the freeway. Upon the

transfer thereof said 12 acres in the freeway area will be left on the Tax Duplicate in the name of the deceased owner.

“Is there any method whereby said 12 acres may be removed by the Auditor from the tax duplicate?”

I infer from this request that neither the estate fiduciary nor the heirs at law of the decedent have made any attempt to have the record ownership of the said twelve acres on the tax list and duplicate transferred from the decedent to the heirs at law.

Although there are no reported cases on this issue in Ohio, the question has arisen several times in this office under the analogous provisions of the General Code; and since the legislature did not intend to change the substantive law when it enacted the Revised Code, Section 1.24, Revised Code, these opinions based on the General Code are controlling. See *State v. Kotapish*, 171 Ohio St., 349 at 352.

Your attention is directed to Opinion No. 4611, Opinions of the Attorney General for 1932, at page 1042, wherein my predecessor in office stated in the syllabus:

5713.04
 “When a landowner has granted a perpetual easement over land outside of a municipality for public highway purposes the value of such land when used and occupied as a public highway, by virtue of the provisions of Section 5561, General Code, must be deducted from the value of the grantor’s land by the county auditor at the time he assesses the remaining property for taxation.”

This conclusion was based on the fact that although the *principal value* of the real property passed to the State when it acquired the highway easement, the property did not become tax exempt as public property used for any public purpose within the meaning of Section 2, Article XII of the Ohio Constitution and the taxing provisions of the General Code. Therefore, it was determined that the property should remain on the tax duplicate in the name of the owner of the fee, subject to Section 5561, General Code, now incorporated into Section 5713.04, Revised Code, which provides:

“* * *

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“The county auditor shall deduct from the value of such tracts of land lying outside of municipal corporations

the amount of land occupied and used by a canal or used as a public highway at the time of such assessment.”

A like question was later considered in Opinion No. 2975, Opinions of the Attorney General for 1953, at page 365, and the conclusions of the 1932 opinion were followed. The second and third branches of the syllabus read:

“2. Where the state of Ohio has acquired a perpetual easement for highway purposes over land lying within the limits of a municipality, there is no authority in law for the entry of the estate represented by such easement on the tax list and duplicate, but the tract or parcel involved should be retained on such tax list under the name of the owner of the servient estate.

“3. Where the state of Ohio has acquired a perpetual easement for highway purposes over land lying within a municipality, such land may not be exempted from taxation as ‘public property used exclusively for public purposes’; but in such case it is the duty of the county auditor, under the provisions of Section 5548, et seq., General Code, to reassess the value of the servient estate at its true value in money, and so as to reflect the diminution in value to the fee owner resulting from the establishment of such public easement.”

In determining whether to apply the provisions of Section 5713.04, Revised Code, the controlling factors are an acquisition of an easement by the State of Ohio, by either appropriation or voluntary deed, over private property for highway purposes. As pointed out in the 1953 opinion, *supra*, at page 369, the fact that land within a municipality was involved is not controlling, rather it is the nature of the interest acquired by the State of Ohio and the purpose of the acquisition. Furthermore, it is likewise of no importance that the record owner on the tax duplicate is deceased, because the imposition of the tax on the land imposes no personal obligation on the owner to pay the taxes because of mere record ownership, Opinion No. 5841, Opinions of the Attorney General for 1943, at page 89; rather, the real property taxes become a lien on the land.

The Board of Tax Appeals had occasion to consider the situation referred to in your inquiry in deciding an exemption matter in 1952. (See In the matter of several applications for tax exemp-

tion for real property filed by the State of Ohio, Case No. 21356 *et seq.* It made this observation therein :

“And the owners of the fee likewise cannot secure from the Board a tax exempt status for the real property covered by the easement. The real property is not publicly-owned property, but is privately-owned property; and the privately-owned property used for public purposes may not be exempted from taxation under our present laws even though used exclusively for said public purposes.

“The applications, therefore, are denied.

“As a suggestion to the Highway Department and to the County Auditors in the State, it appears to the Board of Tax Appeals that the value of land such as is here involved should be reduced to zero by the County Auditor under the provisions of Section 5561, General Code, * * *”

Therefore, it is my opinion, and you are accordingly advised, that there is neither constitutional nor statutory provision for the county auditor to remove land subject to a highway easement from the county tax list and tax duplicate.

Respectfully,
WILLIAM B. SAXBE
Attorney General