3127.

NURSERY STOCK—ASSESSED AND TAXED AS PERSONAL PROPERTY IN NAME OF TENANT WHEN.

SYLLABUS:

Nursery trees and shrubs, commonly spoken of as nursery stock, which are planted and grown by a tenant on leased land for the purpose of thereafter removing and selling such property in the course of such tenant's business as a nurseryman, should be assessed and taxed as personal property in the name of such tenant.

COLUMBUS, OHIO, August 31, 1934.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Some time after I directed to you Opinion No. 2430, holding that nursery trees and shrubs, commonly spoken of as nursery stock which are planted and kept by the owner of the land in which they are growing, should be valued and assessed as a part of such land, you requested my informal opinion upon the question as to how and in whose name property of this kind should be assessed and taxed when the same is planted and grown by a tenant for years on leased land for the purpose of thereafter removing and selling such property in the course of his business as a nurseryman. Inasmuch as property in this state is required to be assessed and taxed in the name of the owner thereof, except in those cases where it is otherwise specially provided, the first question here presented in the consideration of that presented by you is with respect to the ownership of property of this kind under the facts above stated. It is quite obvious that with respect to property of this kind, the question of the ownership of such property is ordinarily and primarily one between the tenant and the owner of the land, and depends upon the further question whether such property is to be considered personal property or real property.

In determining the question whether particular kinds of property should be assessed and taxed as real or personal property, consideration should be given to the general distinguishing characteristics of such property, to the relationship in and by which the same is held and to applicable statutory provisions governing the question. And in this connection, it is to be noted that within constitutional limitations, it is within the power of the legislature to alter the common law classification of property for purposes of taxation. By Section 5322, General Code, relating to the taxation of property, the terms "real property" and "land" include not only land itself, but all buildings, structures, improvements and fixtures, of whatever kind thereon, and all rights and privileges belonging, or appertaining thereto. By Section 5325, General Code, the term "personal property," presented for purposes of taxation and so far as the question here is concerned, includes every tangible thing being the subject of ownership, which does not form a part or parcel of real property, as before defined.

As noted in my former opinion to you above referred to, trees and shrubs planted in a nursery garden for the purpose of cultivation and growth are, as a general rule, considered to be a part of the land in which they are grown, and as such to be real property. Touching the question here presented, the following is said in Thompson on Real Property, Vol. I, Section 102:

> "One claiming that trees and shrubs, whether growing naturally or planted and cultivated for any purpose, are not part of the realty, must show special circumstances which take the particular case out of the general rule; he must show that the parties intended that they should be regarded as personal chattels."

In the case presented by you, the nursery trees and shrubs were planted and cultivated by a tenant on leased land, for the purpose of thereafter severing the trees and shrubs from the land and selling the same in the course of his business as a nurseryman. And upon a consideration of the authorities and the principles therein discussed applicable to the question here presented, I am inclined to the view that upon the facts stated, these nursery trees and shrubs are to be considered as the personal property of the tenant who planted them for purposes of severance and sale in the course of his business. Schouler in his work on Personal Property (5th Ed.) Section 100, after recognizing the general rule that property of this kind while growing in the ground is to be considered as a part of the real estate, notes that "exceptions are admitted from deference to the mutual intention and contract of the parties concerned. * * * And hence, a gardener or nurseryman, who occupies premises under a lease, may, at the end of his term, remove and dispose of the trees and shrubs which he has planted in the course of his business." An early case on this question is that of *Miller* vs. *Baker,* 1 Metcalf, 27, decided by the Supreme Court of Massachusetts in 1840. In that case, the particular question presented was whether trees, shrubs and plants rooted in the soil of a nursery garden were to be considered personal property subject to conversion, in an action by the plaintiff who had obtained title to the property by a bill of sale from one Senior, who as a tenant had planted such trees, shrubs and plants for purposes of severance and sale. The court in its opinion in this case said:

> "The question whether the fruit trees, shrubs, and plants, rooted in the soil of the nursery garden, can be properly denominated personal chattels, and as such be embraced in the present action, is attended with more difficulty. Questions as to what is personal estate and what appertains to the realty have more usually arisen in cases of conflicting claims between the heir and the executor or administrator, or between landlord and tenant, and these have been not unfrequently cases of much nicety in properly applying the principles of law. As respects the cases between landlord and tenant, the leaning of the courts in modern times has been to give a rather liberal construction in favor of the right of the tenant to remove property placed by him upon the land.
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> Taking the question restricted to the case before us, it seems to us that the plaintiff is entitled to retain his verdict for the entire damages found by the jury, as well for the plants and trees rooted in the soil, as for the greenhouse and pot plants. The plaintiff acquired by his bill of sale the interest of Senior in the fruit trees, shrubs, and plants rooted in the soil, to the same extent that he enjoyed it. What was the interest of Senior, and what were his rights, as to this species of property? He was in the occupation of the land, in the soil of which these trees and plants were growing, as a nursery garden, by the consent of the owner of the land, and occupying the land for this special object. The permission to occupy the land for a nursery garden was necessarily a permission to cultivate these productions for the purpose of sale and transfer,

at pleasure, to other places. The products of this garden may, therefore, as regards the interest of Senior, be well considered to be articles of trade and sale, and the right to remove them from time to time would seem to be unquestionable. The case of a purchaser under Senior of certain fruit trees and plants, acquiring a title only to the trees and plants, and the use of soil for their nourishment, without the right of general occupation of the nursery grounds for a nursery, may present perhaps a still clearer case of personal chattels.

* * *

The plaintiff had the right of removal of these products; they were to him articles of trade and merchandise, and the right to cultivate them, for the purpose of removal, was the extent of his interest in the nursery garden; and having this species of property, and this restricted interest in the soil, we think he may be allowed to treat them as personal chattels, and to recover their value as against a wrongdoer who should be guilty of a conversion of them, by taking them into his possession and excluding the owner from the lawful exercise of his rights over them. The reported cases to which we were referred by the counsel, do not furnish any direct adjudication upon the point we have been considering."

In the case of *Coombs* vs. *Jordan,* 3 Bland's Chancery Reports (Md.) 284, 312, the court in its opinion said:

"A tenant who is a nurseryman or gardener, may remove trees, shrubs, etc. All these things, although attached to the realty, are regarded as personal chattels in favour of creditors; and therefore are not affected to the prejudice of the tenant or his creditors, by a lien consequent upon a judgment against the landlord; but may be taken under an execution against the tenant by whom they were put upon the land. But they are only considered as chattels in favour of the tenant and his creditors during the term; for, after that time, if left upon the land, they become parcel of the inheritance. And they are only considered as chattels when placed upon the land by a tenant; for, if put there by the owner of the fee simple, they are then considered as parcel of the realty. As, however, there seems to be as yet no clear and well settled principles of law laid down in relation to what are commonly called fixtures, each case must depend on its own peculiar circumstances."

In the case of *Price* vs. *Brayton,* 19 Ia. 309, where it was held that nursery trees planted by the owner of real estate become a part of the realty, and pass as such to a purchaser in the foreclosure of a mortgage executed by such owner, the court said that "a different rule would apply as between landlord and tenant, if the trees were planted by a tenant for purposes of trade." Likewise, in the case of *Smith* vs. *Price,* 39 Ill. 28, it was held that although as between vendor and vendee, fruit trees and ornamental shrubbery, grown upon lands for nursery purposes, would be considered a part of the freehold and would pass with a sale of the land, such trees and shrubbery would be held to be personal property as between landlord and tenant. Among other cases supporting this view, with respect to the question here presented, is the early case of *Maples* vs. *Millon,* 31 Conn. 598.

I am of the opinion therefore, by way of answer to the question submitted by you, that upon the facts stated, the nursery stock referred to is to be con-

sidered as personal property of the tenant. And inasmuch as under the facts stated, this property, under the provisions of Section 5325-1, General Code, is property used in business by the owner, the same is clearly taxable as personal property in the name of such owner.

Respectfully,
JOHN W. BRICKER,
Attorney General.

3128.

CIVIL SERVICE—EMPLOYE MAY BE TRANSFERRED FOR 90 DAYS FROM ONE POSITION TO ANOTHER IN SAME DEPARTMENT.

SYLLABUS:

An employe in the classified civil service, may be transferred for a period of ninety days or for a longer period from one position to a similar position within the same department, regardless of the objections of such employe.

COLUMBUS, OHIO, August 31, 1934.

The State Civil Service Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—This will acknowledge receipt of your request for my opinion which reads as follows:

> "Section 1-(a) of Rule X of the rules and regulations of this Commission provides, as follows:
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> > 'Transfer of a person holding a position in the competitive classified service who has served the required probationary term, may be made for a period not exceeding thirty days, from one position to a similar position of the same class, grade and character of work, and having the same pay, within a department without notice to the Commission, but this shall not be construed as limiting the power of the head of an institution in making such assignments of the officers therein as he may deem advisable.'
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> It is quite clear that the permanent transfer of a classified employe against his will could not be accomplished, but the question presents itself from one of the state departments of the temporary transfer in the positions of Branch Office Manager from the city of Cleveland to the city of Cincinnati, and vice versa, which it appears to the appointing authority for good and sufficient reasons and for a temporary period only, to be very necessary and important, and for the good of the service.
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> If, after a full explanation of the situation by the Department Director, the State Civil Service Commission is satisfied that such temporary transfer is clearly for the good of the service, can same be put into effect for a period of not to exceed three months, regardless of the objection of the incumbents. The permanent status and location of