

2377.

TAX AND TAXATION—"LENGTH OF ROAD" INTERPRETED—SECTION 5445, GENERAL CODE, DISCUSSED.

SYLLABUS:

The phrase "length of road" as used in Section 5445 of the General Code means the distance between termini of the railroad regardless of the number of tracks, side tracks, switches and turnouts composing the road.

COLUMBUS, OHIO, July 21, 1928.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—You have requested my opinion as to the proper interpretation of the words "length of road" as used in Section 5445 of the General Code of Ohio. This section provides as follows:

"When a street, suburban or interurban railroad or railroad company has part of its road in this state and part thereof in another state or states, the commission shall take the entire value of such property, moneys and credits of such public utility so found and determined, in accordance with the provisions of this act, and divide it in the proportion the length of the road in this state bears to the whole length thereof, and determine the principal sum for the value of the road in this state accordingly, equalizing the relative value thereof in this state."

This section is a part of the group of sections beginning with Section 5415, General Code, relating to the taxation of railroads and other public utilities. These sections show that for the purpose of determining the value for taxation purposes, of the property of interstate railroads in Ohio, this state has adopted what is generally known as the unit rule. That is, determination of the value of all the property belonging to the railroad, both in and out of the state, and apportioning a part thereof to Ohio, on a mileage basis. The unit rule is also used to some extent in determining the apportionment of the property of railroad companies to the various counties and subdivisions in the state.

Your question does not require any discussion of the method of apportioning the value of railroad property to the counties and subdivisions in the state, except in so far as the provisions relating thereto may afford assistance in determining the meaning which the Legislature intended to attach to the words "length of road" as used in Section 5445, *supra*.

For this purpose your attention is called to the provisions of Section 5422 of the General Code, which prescribes the contents of the annual statement to be filed by railroad companies with your commission. This section provides *inter alia* as follows:

"In the case of * * * railroad companies, such statements shall also give:

(a) The whole length of their lines and the length of so much of their line as is without and is within this state, including branches in and out of the state, which shall include lines and branches such companies control and use under lease or otherwise.

(b) The railway track in each county in the state, through which it runs; giving the whole number of miles of road in the county, including the

track and its branches and side and second tracks, switches, and turnouts therein and the true and actual value per mile of such railway in each county, stating the valuation of main track, second or other main tracks, branches, sidings, switches and turnouts, separately. * * **

Sections 5428, 5429 and 5430 of the General Code provide for the apportionment of the road in Ohio among the various subdivisions in the state and in these sections is found the reason for the requirement of paragraph 13 (b) of Section 5422, General Code, supra, that the valuation of main track, second or other main tracks, branches, sidings, switches and turnouts, in the state should be stated separately. It will be noted at this point that paragraph 13 (a) of said Section 5422, General Code, which has reference to the entire road within and without the state does not contain this requirement.

Attention is also called to the fact that in paragraph 13 (b) of Section 5422, General Code, supra, when the Legislature desired to use language which would embrace the entire trackage of a railroad they used the term "railway track"; whereas, in Section 5445, General Code, in establishing the basis for the apportionment of railroad property as between Ohio and other states, they used the phrase "length of road".

In addition to this distinction made by the Legislature itself in the group of sections under discussion, it is helpful to examine other sections of the General Code referring to railroads. A number of such sections are found in Subdivision 1 of Division II, Title IX of the General Code. Particular attention is called to Section 8745 of the General Code, which provides as follows:

"Any railroad company may maintain and operate, or construct, maintain and operate a railroad, with such main tracks, not exceeding six and such side tracks, turnouts, offices, depots, round-houses, machine shops, water tanks, telegraph lines, and other necessary appliances, as it deems necessary, between the points named in its articles of incorporation, commencing at or within, and extending to or into any city, village, or place named as a terminus of its road."

It will be observed that in this section the Legislature has used the word "railroad" and the word "road" interchangeably. As used in this section, the term "road" clearly contemplates the distance between termini and recognizes that such road may consist of a number of main tracks with side-tracks and turnouts.

In many other sections of this subdivision of the Code, the word "road" is used in the same way. I refer to provisions such as the reference to changes of lines or termini as found in Section 8747, General Code; changes of route, as provided in Section 8750, General Code; the extension of the road into other states as found in Section 8756, General Code; the appropriation of land, as provided in Section 8759, General Code.

When the usual and ordinary meaning of the word "road" as applied to a railroad is considered, coupled with the use of the word by the Legislature itself in other sections of the General Code, there would seem to be no reason for interpreting the phrase "length of road" to mean the "length of track" or to conclude that the Legislature intended this apportionment to be made upon an all track basis, rather than upon the basis of the distance between the termini of the road.

The use of the unit rule for the taxation of railroads has been under consideration by the courts in a number of cases. This method of assessment was sustained by the Supreme Court of the United States in the case of *Railway vs. Backus*, 154 U. S. 421, and several other cases. However, the court has been careful to point out that in approving the use of the rule as a general proposition, they were not saying that its application in a given case with proper evidence in the record might not be objectionable. It is settled that the state has the power to tax the instrumentalities employed in interstate

commerce but of course any system of taxation which resulted in one state taxing the property which really is located in another state and subject to taxation there, would not be sanctioned by federal courts. It is conceivable that the system adopted by Ohio whether the phrase "length of road" be interpreted as being the distance between termini or as meaning the length of all tracks might result in such a situation. I am not therefore attempting to say that either method is impervious to attack, but merely that your commission should apply this section in the sense in which the Legislature has apparently used it.

I am therefore of the opinion that the phrase "length of road", as used in Section 5445, General Code, means the distance between the termini of the road, regardless of the number of tracks, sidetracks and turnouts comprising the road.

Respectfully,

EDWARD C. TURNER,
Attorney General.

2378.

INSANITY—FAILURE TO NOTIFY JUDGE OF PLEA AS REQUIRED BY SECTION 13608, GENERAL CODE—NO BAR TO SUCH DEFENSE AT TRIAL.

SYLLABUS:

1. *Where an accused is charged with murder in the first degree or other crime, failure or refusal of the attorney for such accused to notify the judge of the court in which the defendant is to be tried, in writing, of the defendant's intention to defend on the ground of insanity, as provided in Section 13608, General Code, does not bar the defendant from making such defense at the trial.*

2. *It would be prejudicial error to exclude testimony offered by the defendant, showing or tending to show lack of mental capacity.*

COLUMBUS, OHIO, July 21, 1928.

HON. ISAAC E. STUBBS, *Prosecuting Attorney, Cambridge, Ohio.*

DEAR SIR:—This will acknowledge receipt of your letter of recent date, as follows:

"We have an indictment against a prisoner for murder in the first degree under Section 12400. We have reasons to believe that the defendant's counsel will try to follow the procedure in the Remus case. We are sure that they expect to make the plea of insanity.

Since the amendment of Section 13608, which went into effect July 27, 1927, can a defendant make the defense of insanity and introduce evidence under that defense if his attorney fails and neglects to notify the Judge in writing of his intention to make such defense at or before the arraignment or calling for trial of the defendant so indicted.

If the attorney for the defendant in this case follows the steps provided by Section 13608 we will have no difficulty. If he does not notify the Judge in writing as provided by that section and then insists on the right to introduce evidence of insanity as a defense, would it be error to exclude such testimony? This is our question and it seems to me to be a serious one.

The case of *Fenney vs. State*, 16 O. A. R. 517, was decided July 10, 1922, and the crime committed February 27, 1921, and of course was long before the