"Without passing upon the advisability of the adoption of the proposed law and without passing upon the constitutionality of same, but pursuant to the duties imposed upon me under the provisions of Section 4785-175, General Code, I hereby certify that the attached summary is a fair and truthful statement of the proposed law. HERBERT S. DUFFY, Attorney General."

SUMMARY

The proposed amendment to the law of Ohio, Section 6064-15, provides that the owner of a D-3 and/or D-5 permit in addition to being permitted to sell spirituous liquor and wine at retail by the individual drink in glass and from the container for consumption on the premises where sold only at tables where meals are served as now provided by the present law, shall be permitted to sell spirituous liquor and wine in containers and original packages of not less than sixteen ounces or more than thirty-two ounces for consumption off the premises, and that all such spirituous liquor shall be purchased from the Ohio Department of Liquor Control at a discount of twenty percent (20%) from the original retail selling price as maintained in state stores and agencies, and for a penalty for violation of selling for less than said retail price.

Respectfully,

HERBERT S. DUFFY,
Attorney General.

3453.

LAND LEASED FOR TERM OF YEARS—FILLING STATION—WHERE BUILDING ERECTED BY LESSEE STIPULATED TO BE NOT A PART OF REALTY—TERMS BINDING BETWEEN LESSOR AND LESSEE—LAND AND BUILDING CARRIED ON TAX DUPLICATE AS "REAL ESTATE" OR "LAND"—SEE SECTION 5322 G. C.—TAX ADJUSTMENT BETWEEN LESSOR AND LESSEE—NOT FOR TAXING AUTHORITIES—STATUS OF PERMANENT LEASE, RENEWABLE FOREVER—RULE DIFFERENT—SUCH LEASEHOLD REALTY.

SYLLABUS:

1. *Where land is leased for filling station purposes for a term of*

years and the lease contains a stipulation that the building erected by the lessee shall not become a part of the realty, is binding as between the lessor and lessee, it does not bind the taxing authorities of the State of Ohio.

2. *The land and building should be carried on the real estate duplicate as "real estate" or "land", as provided by Section* 5322, *General Code.*

3. *The adjustment of the taxes on such real estate is a matter for the lessor and lessee and not for the taxing authorities and if the lessee attempts to remove such buildings from the real estate before all taxes charged against the particular real estate during the existence of the lease are fully paid, such attempted removal should be enjoined.*

4. *The remedy in such case is the foreclosure of the State's lien for taxes.*

5. *If the lease was in fact a permanent lease renewable forever, a different rule would obtain, as such a leasehold is realty in Ohio, and the county auditor upon proper application would be required to adjust the taxes as provided by Section* 2573, *General Code, in accordance with the rule laid down by the Supreme Court of Ohio, in the case of Cincinnati College vs. Yeatman, Auditor, O. S.* 276.

COLUMBUS, OHIO, December 28, 1938.

HON. PAUL D. MICHEL, *Prosecuting Attorney, Marion, Ohio.*

DEAR SIR: I am in receipt of your recent communication, as follows:

> "Will you please furnish this office with your written opinion of the following question; to-wit:
>
> There have been carried on the tax duplicate of Marion County, Ohio, many charges 'for building only.' This is especially true where oil companies have leased the land from the record owners by lease in which it is agreed that the building so erected by the lessee shall not become a part of the realty.
>
> Now we have a building which is delinquent in the approximate amount of $500.00. The question which confronts this office is as to how to proceed to collect this delinquent tax. Is it by foreclosure of the tax lien or do we proceed to obtain personal judgment, as for personal property tax, and levy an execution?
>
> It appears to this office that the building should have been charged as personal property rather than real estate. The fact remains, however, that it has been carried on the real estate

duplicate and has been charged with the regular rate of tax assessed on real estate."

Your inquiry is one of common concern. It involves the valuation of real estate for purposes of taxation. It has become an almost universal practice for oil companies to lease vacant land, construct buildings thereon and stipulate in the lease that the building or buildings as the case may be, are to remain the separate property of the lessee and such lessee shall have the right and authority to remove same when the lease expires.

This is a private arrangement between lessor and lessee, but do the taxing authorities, under the laws of Ohio have to search the real estate records for qualified or conditional interests in real estate and value land and structure separately and distinctly for the convenience of hundreds of lessors and lessees throughout Ohio?

If that were true we would have to add another department of state, or at last create a new bureau. It was a maxim of the common law that, "He who owns the land, owns from the center of the earth to the sky." Frankly, I do not know that there has been any departures from this rule in so far as the State is concerned with the real estate of its citizens for purposes of taxation.

It is quite true that there is a modernistic tendency to convert solids into liquids, so as to obtain an easier flow. The State has no objection to such conversion as between individuals—at least it has not legislated against it—but surely the process can not be carried to the extent of converting real estate into personal property for purposes of taxation, and mayhap evasion. The Constitution of Ohio, Section 2, Article XII, provides that, "Land and improvements thereon shall be taxed by uniform rule according to value."

Section 4 of Article XII, provides: "The property of corporations now existing or hereafter created, shall forever be subject to taxation, the same as the property of individuals."

It follows as a necessary corollary that lands and improvements thereon belonging to corporations shall be taxed by uniform rule, according to value.

True, we have some specific rules for determining real estate values, such as forest lands, mineral lands, oil and gas producing lands, and lands belonging to public utilities—but aside from these specific rules, there is one general rule to the effect that while the land and improvements thereon are valued separately, the tax charge on the general tax duplicate is made against the land.

It seems to me that when Sections 5320 and 5322, General Code, are construed together, the conclusion that must be reached is dispositive of your question. These sections are found under Title I of our Civil Code,

the subject of which is *Taxation.* Section 5320, General Code, is the first section of the first chapter of this title, and reads as follows:

> "The word 'person' as used in this title, includes firms, companies, associations and corporations; words in the singular number include the plural number and words in the plural number include the singular number; and words in the masculine gender include the feminine and neuter genders."

Section 5321, General Code, has been repealed, effective June 30, 1931, but I quote it, however, on the theory of noscitur a sociis viz:

> "The terms 'personal tax' and 'tax on personal property' as so used, include all taxes excepting only the tax on real estate, specifically as such."

Section 5322, General Code, provides as follows:

> "The terms 'real property' and 'land' as so used, include not only land itself, and all growing crops, including deciduous and evergreen trees, plants and shrubs with all things contained therein, but also, unless otherwise specified, all buildings, structures, improvements and fixtures of whatever kind thereon, and all rights and privileges, belonging or appertaining thereto."

Sections 5320 and 5322, supra, are definitive sections, and Section 5321, was a definitive section during its lifetime. Section 5320, supra, after referring to the words sought to be defined, uses the language "as used in this title." Section 5321, supra, sets out the particular words and they are followed with the words "as so used."

Section 5322, supra, employs the terms "real property" and "land" *as so used.* As so used where? Section 5320, supra, furnishes the answer with the additional words, "in this title." "This title" deals with taxation generally.

Epitomizing the terms "real property" and "land" as used in Section 5322, supra, includes everything *in* the land and *on* the land, *unless otherwise specified.*

Whether it is platted or unplatted land, the answer is the same.

Under virtue of Section 5548, General Code, each county is made the unit for assessing real estate for taxation purposes and the county auditor is constituted the official assessor of all real estate in his county for purposes of taxàtion, and he is authorized to employ experts to furnish him with the facts relative to the description, location, chararter

and dimensions of buildings and other improvements and such other circumstances reflecting upon the value of such real estate as will aid the county auditor in fixing its true value in money.

Section 2583, General Code, provides in part as follows:

> "On or before the first Monday of August annually, the county auditor shall compile and make up in tabular form and alphabetical order, separate lists of the names of the several persons, companies, firms, partnerships, associations and corporations in whose names real property has been listed in each township, city, village special district or separate school district or part of either in his county, placing saparately in appropriate columns opposite each name, the description of each tract, lot or parcel of real estate, the value of each tract, lot or parcel and the value of the improvements thereon, if any. * * *"

This further provides in substance that the county auditor shall prepare such list in duplicate and on or before the first day of October, he shall deliver one of such lists to the county treasurer. It is a matter of common knowledge that the list delivered to the treasurer is known as the treasurer's duplicate and from it he prepares his real estate tax receipts according to the form prescribed by the Tax Commission of Ohio. Examine these receipts. You will find a terse description of the real estate, the value and total tax. You will find no separate valuation for buildings or other structures.

Under the facts set out in your communication, the building should not have been treated as personal property. It should have been carried on the real estate duplicate and was properly assessable as real estate and your remedy is the foreclosure of the State's lien for taxes.

It might be contended that this opinion runs counter to the case of *Cincinnati College* vs. *Yeatman, Auditor,* 30 S. 276, upon a careful perusal of the case it will be readily seen that such contention is not tenable, however, a brief discussion of the case is deemed apropos.

The College was the owner of a tract of ground in the city which for the most part was occupied by a structure designated as the "Cincinnati College Building." The College executed to the Young Men's Mercantile Library Association what the parties termed and regarded as a lease. This lease is set out in full in Volume 22, Ohio State Report, Page 469.

I will quote from the statement of the case, beginning at Page 277, such provisions of the so-called lease, as in my opinion are essential to an intelligent discussion of the legal principles established by the syllabus

with an eye single to their applicability or non-applicability to the questions herein submitted, viz:

> "That the college as a party of the first part, in consideration of ten thousand dollars, paid in advance by the association, party of the second part, and in pursuance of a previous contract, devised and leased to the association all those certain appartments in the Cincinnati College Building occupying the entire front of the second story of said building, one hundred and forty feet in length and fifty feet deep; habendum to said association, its successors and assigns for the full term of ten thousand years renewable forever on the same terms and the same privileges and provisions herein contained * * * *. The lessees to keep their rooms in repair; to keep $10,000 insured and the lessor a sufficient amount in addition to secure all parties against loss and in case the building is destroyed by fire or other casualty covered by the insurance, the lessor to rebuild as it was before, with the same rights to the lessee in the new building as the old, the insurance money received by the lessee to be used in rebuilding."

There was a provision as to payment of taxes in the so-called lease, but the court said the liability to pay taxes attached, regardless of the provision, inasmuch as the transaction amounted to a sale of an interest in real estate.

An application was made to the county auditor by the college to transfer to the Young Men's Mercantile Association the real estate so purchased, under virtue of Section 1 of an Act, the reference to which is 67 O. L., 105. This Section, in so far as its salient provisions are concerned, is in every respect, except such as concerns mineral lands, similar to our present Section 2573, General Code.

The court thereupon quoted several sections of Swan and Critchfields statutes to establish the law that permanent leasehold estates renewable forever were in fact real estate and should be taxed as such and further cited:

Section 2, Second Swan & Critchfield, 1439, as follows:

> "The terms 'real property' and 'land' wherever used in this act, shall be held to mean and include not only the land itself, whether laid out in town lots or otherwise, but also all buildings, structures and improvements, and other fixtures of whatever kind thereon, and all rights and privileges belonging or in any way appertaining thereto."

The section above quoted is similar in general aspects to our present Section 5322, General Code, herein quoted.

The county auditor refused the application of the college to transfer the real estate to the Young Men's Mercantile Association. An action in mandamus was brought against him to compel him to make the transfer and the court very properly stated in the dictum "The relator has the statutory right to be relieved from the payment of taxes on property it does not own and has conveyed to another * * *," and the writ was allowed.

I fail to see wherein this case has any applicability to short-term leases.

The adjustment of the taxes is a matter for the lessor and lessee, and not for the taxing authorities, and if the lessee attempts to remove the building from the real estate before all taxes charged against the particular real estate during the existence of the lease attempted are fully paid, such removal should be enjoined.

Respectfully,

HERBERT S. DUFFY,

Attorney General.

3454.

FEES—MUNICIPAL COURT—POLICE COURT—COMMON PLEAS—JUROR—SECTION 1746 G. C.—PROVIDES SCHEDULE OF FEES CLERK POLICE COURT SHOULD CHARGE—COSTS TO SUMMON AND IMPANEL JURY NOT JURY FEE—SEPARATE ITEM.

SYLLABUS:

1. *The amount of fee which should be paid to a person serving as juror in the Police Court of the City of Cleveland Heights is the same as that paid to jurors in criminal cases in the Court of Common Pleas of Cuyahoga County.*

2. *The schedule of fees which the clerk of such police court should charge is as provided for in Section 1746, General Code.*

3. *The clerk of such court should file the transcript of the docket or journal entries, as well as such original papers as are necessary to exhibit the error complained of in the court to which an appeal is taken.*

4. *Costs of summoning and impanelling a jury may not be included as a jury fee. However, the costs should be treated as a separate item and*