OPINION NO. 72-062

Syllabus:

1. Section 2329.07, Revised Code, which provides that a judgment which is dormant for five years ceases to be a lien, applies to judgments in favor of the State as well as private parties.

2. Section 2329.07, Revised Code, declared applicable to judgments in favor of the State by amendment effective February

3, 1972, applies retroactively to such judgments rendered prior to such date.

3. Under Section 2329.07, Revised Code, a reasonable time to allow the State to avoid dormancy on judgments rendered prior to February 3, 1972, the effective date of the amendment of that Section, would be five years, since that is the time period allowable for avoiding dormancy on judgments rendered subsequent to that date.

To: Robert J. Kosydar, Tax Commissioner, Ohio Department of Taxation, Columbus, Ohio
By: William J. Brown, Attorney General, August 4, 1972

I have before me your request for my opinion, which provides as follows:

> "The 109th General Assembly enacted Amended Senate Bill No. 207, effective February 3, 1972. This enactment amends Sec. 2329.07 of the Ohio Revised Code to simply affirm that the previously existing provisions, declaring that a judgment which is dormant for five years ceases to be a lien, is applicable to judgments in favor of the state. The apparent purpose of the bill was to eliminate the need to search certain county records more than five years back.
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> The effect of the amendment on judgments rendered in favor of the state on and after February 3, 1972, is quite obvious. A question arises, however, with respect to judgments rendered prior to that date. My concern is of course centered on those judgments based upon taxes due to the state, notably in the sales tax area. I, therefore, respectfully request your advice and opinion in this matter and specifically as to whether or not such judgments rendered prior to February 3, 1972, cease to be liens if they have been or become dormant for five years."

The amended statute in question, Section 2329.07, Revised Code, as discussed in the aforementioned opinion request, states:

> "If neither execution on a judgment rendered in a court of record or certified to the clerk of the court of common pleas in the county in which such judgment was rendered is issued, nor a certificate of judgment for obtaining a lien upon lands and tenements is issued and filed, as provided in sections 2329.02 and 2329.04 of the Revised Code, within five years from the date of such judgment, or within five years from the date of issuance of the last execution thereon or the is-

suance and filing of the last such certificate, whichever is later, then such judgment shall be dormant and shall not operate as a lien upon the estate of the judgment debtor. If, in any county other than that wherein a judgment was rendered, such judgment has become a lien by reason of the filing, in the office of the clerk of the court of common pleas of such county of a certificate of such judgment as provided in such sections, and if no execution is issued for the enforcement of such judgment within such county, or no further' certificate of such judgment is filed in said county, within five years from the date of issuance of the last execution for the enforcement of said judgment within said county or the date of filing of the last certificate in said county, whichever is the later, then such judgment shall cease to operate as a lien upon lands and tenements of the judgment debtor within such county.

"This section applies to judgments in favor of the state."

The Supreme Court of Ohio has indicated, most recently in _Weiss v. Porterfield_, 27 Ohio St. 2d 117, 120 (1971), that a Legislative Service Commission Summary of a particular bill, while not decisive, is a strong source of persuasive authority as to the proper interpretation of legislative provisions. The court's position is buttressed by the fact that the Legislative Service Commission is an agency of the General Assembly itself.

The Legislative Service Commission Summary (hereinafter referred to as Summary) for Amended Senate Bill No. 207, which is now Section 2329.07, provides a stated purpose, i.e., aid purchasers of property and an implied curative purpose, i.e., end the uncertainty as to the application of Section 2329.07 to the State. It describes the enactment as one which:

"Expressly _affirms that an existing provision_ declaring that a judgment which is dormant for five years ceases to be a lien is _applicable to judgments in favor of the State_." (Emphasis added.)

It does not describe the enactment as one that extends an existing rule to a new situation, but, rather, as one which affirms the applicability of a present provision to a disputed situation.

The Summary, under the heading "comment",further clarifies the reason for the new legislation:

"The existing state of the law with respect to the applicability of section 2329.07 to judgments in favor of the state is not clear. _State v. Berry_, 9 Ohio App. 2d 72 (Highland Co. Ct. of App., 1966), holds that the common law maxim that no time runs against the state applies in Ohio and that statutes of limitation and dormancy of judgment statutes cannot bar an action by the state. However, it cannot be said

that the reasoning of the case could apply to all actions in favor of the state. Also, this case relies on case precedents, which indicate that statutes of limitation do apply to the state. At least one other Ohio appellate court has held that the dormancy of judgments section is not a true statute of limitations. Kline v. Falbo, 73 Ohio App. 417 (Belmont Co. Ct. of App., 1943). Adding to the position that the affected section applies to the state under existing law is a provision of section 5731.42 of the Revised Code which expressly declares that the dormancy of judgments section does not apply to inheritance tax liens - implying that it does apply to other judgments in favor of the state. This exception is not removed by the bill."

Under the heading "Purpose", the Summary provides:

"The purpose of the bill is to eliminate the need to search county records more than five years back to find any judgments in favor of the state which may be a lien on the real property whose title is being searched."

With this legislative history and purpose in mind, the question can still be argued whether or not the amended portion of Section 2329.07 should be given a retrospective or prospective application.

In a recent controversy involving the passing of a statute which waived the State's prior right to collect from an incompetent's family for the incompetent's maintenance, the court, in State, ex rel. Dept. of Mental Hygiene & Correction v. Eichenberg, 2 Ohio App. 2d 274 (1965), provided in its syllabus:

"1. Where private rights are not infringed, the Legislature of the state of Ohio may pass retrospective laws waiving or impairing its own rights. Such action does not violate Section 28, Article II of the Constitution of the state of Ohio.

"2. The state of Ohio by legislative enactment has the power to waive a cause of action which it had as a result of a claim arising out of a statute, even though it could not affect such rights as between citizens."

However, while it is now clear that a statute may be applied retroactively against the State, The Supreme Court of Ohio has made it clear that such an approach was an exception rather than the rule. In the case of State, ex rel. Sweeney v. Donahue, 12 Ohio St. 2d 84, 87 (1967), the Court provided:

"* * * While a statute which impairs only the rights of the state may constitutionally be given retroactive effect, State, ex rel. Dept. of Mental Hygiene & Correction v. Eichenberg, 2 Ohio App. 2d 274, such effect will not be given in the absence of a clear impression of legis-

> lative intention for retroactivity, Kelley v. Kelso & Loomis, 5 Ohio St. 198." (Emphasis added.)

It would seem that we have that "clear impression of legislative intention for retroactivity" in our present situation. The Bill was introduced because the existing law was uncertain. It consisted of only one sentence, "This section applies to judgments in favor of the State." The Summary clearly affirmed that the long-standing statutory rule concerning dormancy "is applicable to judgments in favor of the State." If we would interpret this new legislation in such a way as to not include those judgments rendered prior to February 3, 1972, the effective date of this legislation, we would defeat the purpose for the legislation. Our citizens would have to continue, for years to come, their search of county records for more than five years back to find judgments in favor of the State. This is directly contrary to the stated purpose of the legislation.

As we discussed before, the stated purpose for Amended Senate Bill No. 207 was to aid purchasers of property, not to relieve the judgment debtor. The Summary makes this point clear when under the heading "Content and Operation" it provides:

> "The bill declares that Section 2329.07 of the Revised Code applies to judgments in favor of the State. This section provides that when no attempt to realize on a judgment is made within five years after it is entered or when it has been at least five years since the last such attempt and a new certificate of judgment has not been filed, the judgment is no longer considered a lien on the judgment debtor's property.
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> "The operation of this section extinguishes only the lien, not the judgment itself. The state may still enforce the lien against the judgment debtor, but if he sells the property or another lien attaches after five years have passed, the buyer or new lienholder would have a right superior to the state's right. Under the bill the state could still maintain a priority lien by refiling a certificate of judgment once every five years."

Practical considerations, however, militate against retroactive application of this statute. There are currently 50,000 active files containing claims which have been reduced to judgments and are liens; and over 75,000 inactive files which also contain liens as concerns claims of this type. These liens represent to a large extent, the sole means of enforcement available to the State. None of the above 125,000 files are computerized. It is estimated that instantaneous application of Section 2329.07 against the State would destroy most of the liens in the inactive groups, and as the months go by, many of the older ones in the active files. A solution to the problem will take time, but can be accomplished so as to give effect to the intent of the legislation and be consistent with existing law. In effect, this legislation is shortening the period of limitations prior to dormancy. By analogy, we can refer to the rules which are applied when the legislature reduces the time period during which a claimant can exercise his

right to pursue a cause of action; or to a situation where the legislature reduces the time period during which one can enforce a judgment. In either case, if the legislature were to shorten the period to a time which has already run and thereby defeat an existing claim, it would be a violation of due process of law. In both situations, as concerns a cause of action and as concerns a judgment, the rule requires the "law making such change allow a reasonable time after it becomes effective for the exercise of his rights." See 34 O. Jur. 2d 493; Smith v. New York Central Rd. Co., 122 Ohio St. 45 (1930); Faller v. Massachusetts Bonding & Ins. Co., 7 Ohio L. Abs. 586 (1929); 32 O. Jur. 2d 203; Lash v. Mann, 141 Ohio St. 577 (1943); and Columbian Bldg. & Loan Co. v. Meddles, 33 Ohio L. Abs. 484 (1941).

In view of the large number of new claims processed by the State each month, approximately 900; in view of the large number of noncomputerized active files, approximately 50,000; and in view of the large number of inactive files which are still collectible, approximately 75,000; an attempt to arrive at a definition of "reasonable time" in this situation is difficult. It has been suggested, as an argument for prospective application only, that it will take the full five-year period allowed by the statute to organize a new filing system and establish the procedures and checks needed to insure that all needed certificates of judgment are refiled so that no liens are lost on those judgments rendered subsequent to the effective date of the legislation. In view of the large volume of State business, it would seem that the above estimate might well be correct, but it also seems true that if five years is a reasonable time as concerns a judgment rendered after February 3, 1972, a longer period of time would be unreasonable as concerns those judgments rendered prior to February 3, 1972, the effective date of this legislation. It is possible, of course, that appropriations cannot be secured soon enough to computerize these files so that the State interest can be protected. If this turns out to be the case, the Tax Commissioner can bring such circumstances before any court where the reasonableness issue may be raised. Once again, the law allows a reasonable time after it becomes effective for the exercise of one's rights.

If we refuse retrospective application of legislation which would exclude judgments rendered prior to its effective date, we would be harming the purchaser of property, not aiding him. He would have to continue his search of old county records or suffer the consequences. This legislation was enacted to limit the costly task of searching old county records. A retrospective application, coupled with the requirement that the State be given a reasonable time to protect and enforce its rights, seems to accomplish this goal. When the Legislative Service Commission Summary is so clear and complete, it can be a great aid in the proper interpretation of new legislation. As stated in Weiss v. Porterfield, supra, it is a strong source of persuasive authority.

It also must be restated that such an interpretation does not do any harm to the State that cannot be avoided. A five-year period, from the date of enactment, seems to be long enough to satisfy the needs of the law, and the needs of the State. After that, when the judgment becomes dormant, it can be revived. Section 2325.15, Revised Code. If the State is diligent, and wants to avoid dormancy, it can file a certificate of judgment once every five years, as any citizen must,

Section 2329.07, and thereby maintain the priority of the previously acquired lien.

Also, it is immaterial that the clear weight of case law, and the clear weight of administrative practice concerning application of the old dormancy provision, was contrary to the requirements of the new legislation. Certainly, either of the former can be changed by the latter. Neither does Section 1.58, Revised Code, force a different conclusion. It provides:

> "(A) The reenactment, amendment, or repeal of a statute does not, except as provided in division (B) of this section:
>
> "(1) Affect the prior operation of the statute or any prior action taken thereunder;
>
> "(2) Affect any validation, cure, right, privilege, obligation, or liability previously acquired, accrued, accorded, or incurred thereunder;
>
> "* * * * * * * * *."

But the fact of the matter is that "The right to enforce a judgment is not an absolute and unlimited right. The legislature has the power to regulate the exercise of such right and to limit the time within which it shall be exercised * * *." 32 O. Jur. 2d 203. Besides, given a reasonable period for transition, and with reasonable diligence, the judgments and liens of the State can be maintained, and if a judgment is allowed to become dormant, it can be revived. Section 2325.18, Revised Code.

In specific answer to your question it is my opinion, and you are so advised, that:

1. Section 2329.07, Revised Code, which provides that a judgment which is dormant for five years ceases to be a lien, applies to judgments in favor of the State as well as private parties.

2. Section 2329.07, Revised Code, declared applicable to judgments in favor of the State by amendment effective February 3, 1972, applies retroactively to such judgments rendered prior to such date.

3. Under Section 2329.07, Revised Code, a reasonable time to allow the State to avoid dormancy on judgments rendered prior to February 3, 1972, the effective date of the amendment of that Section, would be five years, since that is the time period allowable for avoiding dormancy on judgments rendered subsequent to that date.