2975

1. TAXES—REAL ESTATE—STATE OF OHIO NOT LIABLE —PROPERTY WITHIN MUNICIPALITY—STATE ACQUIRED PERPETUAL EASEMENT FOR HIGHWAY PURPOSES.

2. NO AUTHORITY IN LAW FOR ENTRY OF ESTATE REPRESENTED BY SAID EASEMENT ON TAX LIST AND DUPLICATE—TRACT OR PARCEL INVOLVED SHOULD BE RETAINED ON TAX LIST UNDER NAME OF OWNER OF SERVIENT ESTATE.

3. LAND DESCRIBED MAY NOT BE EXEMPTED FROM TAXATION AS "PUBLIC PROPERTY USED EXCLUSIVELY FOR PUBLIC PURPOSES"—DUTY OF COUNTY AUDITOR TO REASSESS VALUE OF SERVIENT ESTATE AT TRUE VALUE IN MONEY—DIMINUTION IN VALUE TO FEE OWNER—PUBLIC EASEMENT ESTABLISHED—SECTION 5548 ET SEQ., G. C.

4. LAND DESCRIBED—NO AUTHORITY, SECTION 5671 G. C. FOR APPORTIONMENT OF TAXES THEREAFTER LEVIED, NOR FOR APPORTIONMENT OF LIEN FOR ACCRUED TAXES—NO LIABILITY FOR ACCRUED TAXES ATTACHES TO STATE

SYLLABUS:

1. The state of Ohio is not liable for real estate taxes on property within a municipality over which the state has acquired a perpetual easement for highway purposes.

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.

4. Where the state of Ohio has acquired a perpetual easement for highway purposes over lands lying within the limits of a municipality, there is no authority under the provisions of Section 5671, General Code, for the apportionment of taxes thereafter levied against such land nor for the apportionment of a lien for accrued taxes thereon; and no liability with respect to accrued taxes attaches to the state in such case.

Columbus, Ohio, August 25, 1953

Hon. S. O. Linzell, Director, Department of Highways
Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"On July 27, 1950, the State Department of Highways filed for record two easement deeds in the county of Cuyahoga. As a part of the consideration for said easements certain amounts of money were placed in escrow for the purpose of paying the real estate taxes and assessments on the property over which said easements were taken. The amounts placed in escrow were determined by prorating the amount due and owing for said taxes and assessments to the day said easements were filed for record.

"Upon tender of the money the Auditor of Cuyahoga County refused to accept same on the ground that he lacked statutory authority to accept a partial payment of real estate taxes and maintained that the full amount of the existing lien for taxes must be paid. The Auditor further maintains that the Department of Highways should pay the balance of the existing tax lien.

"The money set aside as a partial payment is still being held

in escrow. As the Auditor has refused to accept this money and the Title Company holding the money does not want it, the problem arises of who is liable for the real estate tax on the said property, the State of Ohio or the owner of the fee.

"While the foregoing is the exact question in point there are a number of questions concerning this situation on which we would like your opinion not only to answer the current problem but to guide our actions in the future acquisitions of easements for highway purposes within municipalities.

"Therefore will you please give us your opinion on the following specific questions:

"1. Is the State of Ohio liable for real estate taxes on property within a municipality over which it has acquired a perpetual easement for highway purposes?

"2. Is the owner of the underlying fee liable for real estate taxes on property within a municipality over which the State of Ohio has a perpetual easement for highway purposes?

"3. May real property within a municipality over which the State of Ohio has a perpetual easement for highway purposes be exempted from taxation?

"4. If real property within a municipality over which the state of Ohio has a perpetual easement for highway purposes may be exempted from taxation, how much of the lein for real estate tax existing at the time of the acquisition of the easement by the State of Ohio must be paid?

"5. If real property within a municipality over which the State of Ohio has a perpetual easement for highway purposes may not be exempted from taxation may the value of the underlying fee be reduced to zero on the tax duplicate?

"6. If the value of the underlying fee of real property within a municipality over which the State of Ohio has a perpetual easement for highway purposes may be reduced to zero for tax purposes, how much of the lien for real estate tax existing at the time of the acquisition of the easement by the State of Ohio must be paid?"

It is provided in Section 2583, General Code, that "each tract, lot or parcel of real estate" shall be entered by the county auditor on the general tax list and duplicate in the names of the owners. For taxation purposes the term "real estate" is defined in Section 5322, General Code, as follows:

"The terms 'real property' and 'land' as so used, include not only land itself whether laid out in town lots or otherwise, 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."

There appears to be a marked scarcity of decisions in Ohio on the question of what is comprehended by the language "and all rights and privileges belonging or appertaining thereto," as used in this section. In Cincinnati College v. Yeatman, 30 Ohio St., 276, the syllabus reads in part as follows:

> "* * * 2. When, in consideration of a gross sum in advance, an estate for years, renewable forever, is granted in realty, it is real and not personal property, within the meaning of the tax laws of Ohio." * * *

In Opinion No. 1852, Opinions of the Attorney General for 1921, p. 124, the syllabus reads:

> "An ordinary lease for a term of years is not a separately taxable interest in land under the property taxation laws of this state."

In this opinion the writer, after noting the provisions of numerous of the pertinent real property tax statutes, said, p. 127:

> "The foregoing is not a complete catalogue of the sections which might be referred to, but it is believed that nothing material to the present inquiry has been omitted. The only exceptions to the general principle above laid down which are made expressly by the statutes cited, are the cases of mineral rights in land, which are to be separately assessed, and lands held under lease for a term exceeding fifteen years belonging to exempt owners (Section 5330). It has been held, however, that the effect of Section 8597, above quoted, together with the other sections which have been mentioned, is to make permanent leasehold estates, renewable forever, equivalent to freehold estates for the purpose of taxation. This is not really an exception to the rule laid down, but is equivalent merely to saying that the permanent lessee is to be treated as the owner rather than the owner of the technical fee or ground rent. In this respect the decision is merely in line with sections 5680 and 5688, above quoted, which impose the duty of paying taxes upon owners of life estates. No similar duty is imposed by law upon lessees of ordinary estates for years; hence the practice, departed from in the case about which you inquire, of inserting a covenant to pay taxes in such leases. Even if there were such a section, however, it would not affect the ques-

tion raised by you, which is as to whether or not there should be separate assessments of the interest of the lessee and the interest of the owner in fee, respectively.

"It may be repeated, then, that save as to mineral rights, etc., and with the exception based upon the case of Cincinnati College v. Yeatman, 30 O. S. 276, which was peculiar in that the perpetual leasehold therein involved was such that it made a horizontal division of the tract instead of a perpendicular one, *there is to be no separation of an entire tract for the purpose of the assessment of real property taxes.*" (Emphasis added.)

If the rule stated in the emphasized portion of the quotation above is accepted as correct, it would appear that the estate represented by a public road easement could not be regarded as a separate "tract, lot or parcel of real estate" as this language is used in Section 2583, supra. In this connection it may be observed that the owner of the fee which is subject to a public road easement enjoys property rights to some considerable extent in addition to the mere possibility of reverter. Thus in 25 American Jurisprudence, 432, 433, Section 135, we find the following statement:

"Where the fee is in the abutting owner, his title is not a contingent interest or a mere expectancy, but is a present subsisting ownership of the fee. He has full dominion and control over the land, and all the rights of an absolute owner of the soil, subject only to the easement and servitude in favor of the public. He may use the land for his own purposes in any way not inconsistent with the public easement, and is entitled to all profit and advantage which may be derived therefrom. But his right in the street or highway as a highway in so far as respects the right of passage and travel thereover is simply equal to and in no sense greater than that of the general public."

The Ohio decisions are uniformly in accord with this view. See Telephone Co. v. Watson Co., 112 Ohio St., 385; Daily v. State, 51 Ohio St., 356; Railroad Co. v. O'Harra, 48 Ohio St., 343; Railroad Co. v. Williams, 35 Ohio St., 168; and many others.

It is true that virtually all of the Ohio decisions in which the rights of the fee owner have been considered have dealt with land located beyond the limits of a municipal corporation, but I do not regard this circumstance to be of any moment since you indicate that the public way was acquired in the instant case by "easement deeds". It is true, also, that the decisions often mention the distinction between country highways and

streets within municipal corporations, pointing out that in the latter case "the fee * * * rests in trust in the municipality * * *." See Telephone Co. v. Watson Co., supra, p. 389. This result in the case of municipal streets, however, necessarily flows from the several statutory provisions by which the property is acquired for street purposes. In the chapter on the powers of municipal corporations to appropriate property for specified public use, including use for street purposes, for example, we find the following provision in Section 3691, General Code:

> "Upon the payment or deposit, by the corporation, of the amount assessed, as ordered by the court, an absolute estate in fee simple shall be vested in such corporation, unless a lesser estate or interest is asked for in the application, in which case such lesser estate or interest as is so asked for shall be vested."

In the instant case it is quite clear, because the property in question was acquired by "easement deeds," that the mere fact that it is located within a municipal corporation would not result in the extinguishment of the legal ownership of the fee in the grantor in such deeds.

In Section 5561, General Code, we find the following provision:

> "The county auditor shall deduct from the value of such tracts of land, as provided in the next preceding section, 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."

This section, by its express terms, is not applicable in the instant case where the lands involved lie within the limits of a municipal corporation, but this section is, nevertheless, of considerable significance in the present inquiry. It may be observed that under the provisions of Section 5548, General Code, it is the duty of the county auditor, as the assessor of real property, to fix valuations of individual tracts of real property at true value in money. This section was first enacted in Senate Bill No. 177, 82nd General Assembly, 107 Ohio Laws, 29. In the same act Section 5561 was enacted in its present form.

It is quite plain that if the public road easement should be considered such a separate estate, or tract of real property as would require it to be entered on the tax list in the name of the new owner, then there would have been no necessity for the provision noted above in Section 5561, for the provisions of Section 5548, General Code, would have required a revaluation of the fee owner's tract at the time the original tract was subdivided

for entry on such tax list. The significance of Section 5561 in this respect was noted in Opinion No. 4611, Opinions of the Attorney General for 1932, p. 1042, in the following language:

> "It is self evident that land over which a perpetual easement has been granted, for highway purposes, does not come within any of these classes unless it be 'public property used exclusively for any public purpose.' Section 5351, General Code, enacted pursuant to this constitutional provision, in so far as material, reads:
>
> " '* * * public property used exclusively for a public purpose shall be exempt from taxation.'
>
> "There is little doubt that when land is used for a public highway it is used for a public purpose. It is not so clear that where an easement is granted to the state for highway purposes the land becomes 'public property' within the meaning of Section 2, Article XII, of the Constitution. Section 5561, General Code, makes specific provision for the deduction in valuation where land is used as a public highway. Such section reads:
>
> " 'The county auditor shall deduct from the value of such tracts of land, as provided in the next preceding section, lying outside of muncipal corporations, the amount of land occupied and used by a canal or used as a public highway, at the time of such assessment.'
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> "It is hardly probable that the legislative intent was to include highways within the meaning of Section 5351, General Code, for if such intent had existed no reason would have existed for the enactment of Section 5561, General Code, supra. It is never to be presumed that the legislature intended to enact a meaningless statute and Section 5561, General Code, would clearly have been meaningless if land used for public highway purposes had been intended to be included within the meaning of Section 2, Article XII, or Section 5351, of the General Code."

For these reasons it seems clear that the Legislature, by the enactment of Section 5561, General Code, recognized that where a public road easement is acquired, the entire tract remains on the tax duplicate in the name of the fee owner; and I conclude, therefore, that such is the result in the instant case. In this situation it clearly becomes the duty of the county auditor, under the provisions of Section 5548, General Code, to reassess such entire tract so as to reflect its current value to the fee owner. Whether in such process the new valuation is precisely an amount equal to its prior valuation less the loss occasioned by the granting of the easement is a matter for the judgment of the auditor. Technically speaking, of course, it is not possible to "reduce to zero" the value of the property

conveyed, for it is not this tract separately, but the value of the whole tract which is to be reassessed.

With respect to exemption of property over which the state has acquired a perpetual highway easement, it is sufficient to note, in view of the conclusions already stated, that although such property is almost entirely "used for a public purpose," it is not publicly owned. The problem is thus one of valuation rather than exemption as pointed out in my opinion No. 2840, dated July 17, 1953; and this is so even though the provisions of Section 5561, General Code, are not directly applicable in the situation.

In the matter of the real estate tax lien existing at the time of the acquisition of the easement, we may note the following provisions in Section 5671, General Code:

> "The lien of the state for taxes levied for all purposes, in each year, shall attach to all real property subject to such taxes on the day preceding the second Monday in April, annually, and continue until such taxes, with any penalties, interest or other charges accruing thereon, are paid; but taxes, assessments, penalties, interest or other charges may be apportioned in case of transfer of a part of any tract or lot of real estate, in which case the lien of such taxes, special assessments, penalties, interest or other charges shall extend to the transferred part or parts and the remaining part only to the extent of the amounts allocated to such respective parts. All personal property subject to taxation shall be liable to be seized and sold for taxes. The personal property of a deceased person shall be liable, in the hands of an executor or administrator, for any tax due on it from the testator or intestate.
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> "Taxes charged on any tax duplicate, other than those upon real estate specifically as such, shall be a lien on real property of the person charged therewith from the date of the filling of a notice of such lien, as provided by law."

Because of the conclusion already stated that the acquisition of a public road easement does not involve the division of the property involved for the purposes of entry on the tax list, it is clear that we are not concerned with a "transfer of a part of any tract or lot of real estate" and there would thus appear to be no authority for an apportionment of the lein as provided for in this section. In this situation we may properly observe the provisions of Section 5762, General Code, to ascertain the effect of the existing tax lien as to the highway easement. This section reads:

> "The county auditor on making a sale of a tract of land to

> any person, under this chapter, shall give such purchaser a certificate thereof. On producing or returning to the county auditor the certificate of sale, the county auditor, on payment to him by the purchaser, his heirs, or assigns, of the sum of one dollar and twenty-five cents shall execute and deliver to such purchaser, his heirs, or assigns, a deed therefor, in due form, which deed shall be prima facie evidence of title in the purchaser, his heirs, or assigns. When a tract of land has been duly forfeited to the state and sold agreeably to the provisions of this chapter, the conveyance of such real estate by the county auditor shall extinguish all previous title thereto and invest the purchaser with a new and perfect title, free from all liens and encumbrances, except taxes and installments of special assessments and reassessments not due at the time of such sale, and except such easements and covenants running with the land as were created prior to the time the taxes or assessments, for the non-payment of which the land was forfeited, became due and payable."

This reference to "easements * * * created prior to the time the taxes * * * became due and payable" might indicate that in the case of a tax sale the state's easement would be extinguished, but it must be remembered that "the state is not bound by the terms of a general statute unless it be expressly so enacted." State ex rel Parrott v. Board of Public Works, 36 Ohio St., 409.

It is to be noted that the statutes relating to appropriation of state highway easements, Section 1178-37, et seq., General Code, make no provisions for the payment by the director of accrued taxes, nor do they require the court to make an order with respect thereto.

For all of these reasons, therefore, I conclude that no liability attaches to the state with respect to accrued taxes on land over which the state acquires a highway easement.

Accordingly, in specific answer to your inquiry, it is my opinion that:

1. The state of Ohio is not liable for real estate taxes on property within a municipality over which the state has acquired a perpetual easement for highway purposes.

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.

4. Where the state of Ohio has acquired a perpetual easement for highway purposes over lands lying within the limits of a municipality, there is no authority under the provisions of Section 5671, General Code, for the apportionment of taxes thereafter levied against such land nor for the apportionment of a lien for accrued taxes thereon; and no liability with respect to accrued taxes attaches to the state in such case.

Respectfully,

C. WILLIAM O'NEILL

Attorney General