moral indifference to the court and respectable members of the community, and to the just obligations of the position held by an officer; * * *"

The case of *Rose* vs. *Baxter,* 7 O. N. P. (N. S.) 132, arose in the Court of Common Pleas of Franklin County, Ohio, and was an injunction proceeding to enjoin the revocation of plaintiff's license to practice medicine. In denying the injunction the court said:

"Gross immorality is a term which has been used and has received adjudication at the hands of a great many courts. The word 'gross' does not mean great, or big, or excessive, necessarily, but rather such a wilful, flagrant and shameful quality with respect to the office involved as renders the officer unfit to hold his license and authority to act. Sometimes the expression is found, under the law, 'gross misbehavior.'"

Adopting the definition of "gross immorality" as laid down by the court in the *Rose* vs. *Baxter* case, supra, as a proper definition of the words "grossly immoral conduct," and applying the same to the statement of facts submitted by you, I am inclined to the opinion that if it can be shown that Dr. S.———— is generally indulging in the kind of practice you point out, deliberately, and knowing that some of his diagnoses are wrong and are made for the purpose of getting more money out of his patients, the dental board would be justified in revoking his license.

Should the dental board desire to take action, it must be remembered that it must clearly appear that Dr. S.———— is making wrong diagnoses wilfully, and with knowledge that they are wrong, as distinguished from mistakes in diagnosis. It is common knowledge that physicians often differ greatly in diagnosis and the same is undoubtedly true of dentists.

It must also be borne in mind that Section 1327, General Code, gives a dentist whose license has been revoked or suspended a right to appeal to the Common Pleas Court of his county and that the judgment of the Common Pleas Court may be reviewed upon proceedings in error in the Court of Appeals. Unless, therefore, the board is satisfied that the facts are such that if the case were carried to the Common Pleas Court on appeal that court would reach the same judgment as the board, I would advise against the proceeding.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1740.

CANAL LEASE—INSERTION OF CLAUSE IN PROPOSED LEASE TO DAYTON CANAL LANDS TO RAILROAD COMPANY, DISCUSSED.

SYLLABUS:

1. *In view of the provisions of Section* 5330, *General Code, a perpetual leasehold renewable forever in abandoned canal lands owned by the State is not clearly assessable under the general laws of the State for municipal improvements benefiting the property held under such leasehold as will for that reason justify the exclusion from the lease of a clause which incorporates an agreement on the part of the lessee*

to pay lawful assessments made against the leased property for municipal improvements which benefit such property.

2. *The Department of Public Works has no authority under the provisions of the Act of March* 25, 1925 (111 *O. L.* 208) *to incorporate in a perpetual lease renewable forever on abandoned canal lands executed under the authority of said Act, a clause providing that assessments paid by the lessee during the fifteen year period between reappraisals shall be deducted from the new appraised value of the leasehold in the event that such new appraised value is in excess of the existing value of such leasehold under the former appraisement.*

COLUMBUS, OHIO, February 21, 1928.

HON. RICHARD T. WISDA, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge receipt of a recent letter from you in which it is stated that The Toledo and Cincinnati Railroad Company (Baltimore and Ohio Railroad Company) holds a lease on canal lands in and through the city of Dayton, Ohio, and that acting under the provisions of an act of the Legislature passed on March 25, 1925, (111 O. L. 208), the same being an act to abandon for canal purposes a portion of the Miami and Erie Canal, said railroad company has made application for permission to surrender its present leasehold and take a new lease on said canal lands under the provisions of said act.

From your communication it appears that a new lease to said railroad company on said canal land in and through the city of Dayton has been drafted by your department. This new lease, which is one for ninety-nine years, renewable forever, provides for re-appraisement at the end of each fifteen year period. The proposed new lease contains further the following clause which is likewise a part of the existing lease, to-wit:

> "The party of the second part hereto, for itself, its successors and assigns, hereby agrees to pay, according to benefits, any legal street assessments, and other assessments for municipal improvements, that may be levied against the canal property herein leased, by the City of Dayton, the same as if the said second party, its successors or assigns, owned the fee to said leased land."

You state that the railroad company, through its counsel, has asked that this clause be omitted from the new lease, claiming that the railroad company is liable under the general statutes for such assessments. As to this you say that the provisions of Section 5330, General Code, create some doubt in your mind with respect to the correctness of the contention made by counsel for the railroad company. As I understand your position it is that the railroad company should pay its proportionate share of the cost of the improvement made by the city of Dayton, according to the benefits that may accrue to its property from such public improvement, and that unless it clearly appears that the leasehold interest and property of the railroad company is liable under the laws of this State for assessments levied against such interest and property by the city of Dayton, on account of public improvements constructed and made by such city, the clause above quoted should be made a part of this new lease.

You likewise state that the railroad company is insisting that if this clause above quoted is retained in the lease, that there should be an additional clause inserted that will enable the railroad company to deduct the cost of any assessments levied against the leased property when a reappraisement is made at the end of each

fifteen year period, and that they have submitted the following clause which they desire to have inserted in said new lease:

> "In the event that lessee pays the assessments during the fifteen-year periods between re-appraisals, the amount paid for assessments shall be deducted from the new appraised value only in the event that the new appraised value is in excess of the existing value."

My opinion is requested generally as to the merits of the contention of the railroad company, and more particularly whether or not it is necessary that some covenant incorporating an agreement on the part of the railroad company to pay legal assessments levied by the city of Dayton on account of public improvements benefiting the property of said railroad company should be inserted in this lease. In the consideration of the questions here made it may be observed that the exemption from assessments and other forms of taxation enjoyed by the State and its political subdivisions with respect to lands owned by them does not extend to the leasehold interest of a tenant of such lands. *Trimble* vs. *Seattle,* 231 U. S. 683; *Bentley* vs. *Barton,* 41 O. S. 410; *Zumstein* vs. *Consolidated Coal and Mining Company,* 54 O. S. 264; *Chicago* vs. *University of Chicago,* 302 Ill. 455.

Assessments, however, cannot be levied against any property without competent statutory authority providing therefor; and responsive to the question submitted by you, our inquiry is as to whether under the statutes of this State there is clear and unquestioned authority on the part of the municipality to assess a leasehold interest of this kind on account of municipal improvements benefiting the property held under a lease of this kind. Unless otherwise provided by statute it is the rule of this state that taxes and assessments are levied upon the corpus of real property and not upon the titles by which the same may be held. *Village of St. Bernard* vs. *Kemper,* 60 O. S. 244. Touching this question however, Section 3897, General Code, provides:

> "Special assessments shall be payable by the owners of the property assessed personally, by the time stipulated in the ordinance providing therefor, and shall be a lien from the date of the assessment upon the respective lots or parcels of land assessed. * * *"

In the case of the Village of *St. Bernard* vs. *Kemper,* supra, it was held that a lessee in possession of real property under a lease for ninety-nine years renewable forever, the property standing in his name for taxation, is so far the owner of such property as to authorize him to sign a petition for a street improvement under what is now Section 3836, General Code; and that in such case it is not necessary that the lessor sign such petition in order to authorize an assessment against the corpus of the property. If the holder of a perpetual leasehold is the owner of the property covered by the lease within the meaning of Section 3836, General Code, and under said section is authorized to sign a petition for an improvement, and thereby authorize an assessment against the corpus of the property covered by the lease, I see no reason why the holder of such perpetual leasehold should not be considered an owner within the provisions of Section 3897, General Code, and as such be personally liable for any municipal assessments levied against property held under such perpetual lease. *Clements* vs. *Norwood,* 2 O. N. P. 274. This view is supported by a consideration of the nature of perpetual leasehold interests for taxation and other purposes. Touching the question with respect to the nature of perpetual leasehold interests for purposes of taxation, it will be noted that Section 5322, General Code, reads as follows:

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

In the case of the *Ralston Car Company* vs. *Ralston,* 112 O. S. 306, 313, the court in its opinion says:

"Section 5322, General Code, appearing under the title 'Taxation,' defines the term 'real property,' and that section has been so construed in the case of *Cincinnati College* vs. *Yeatman,* Aud., 30 Ohio St., 276, as to include permanent leases and to require the grantee of such a lease to return the property covered thereby for taxation. * * *"

Under Section 8597, General Code, permanent leaseholds, renewable forever are subject to the same law of descent as estates in fee; and under Section 11655, General Code, permanent leasehold estates renewable forever are subject to the payment of the debts of the person holding such permanent leasehold estate, and the same are liable to be taken on execution and sold the same as other lands and tenements.

However, as noted in your communication, the provisions of Section 5330, General Code, make the question of the liability of the railroad company under the lease here in question one of considerable doubt. This section so far as it pertains to the question at hand, provides as follows:

"Whenever lands belonging to the state, a municipal corporation, religious, scientific or benevolent society or institution, whether incorporated or unincorporated, or to trustees for free education only, or held by the state in trust, are held under lease for a term of years renewable forever and not subject to revaluation, such lands shall be considered, for all purposes of taxation, as the property of the lessees and shall be assessed in their names. Whenever school and ministerial lands are held under perpetual lease subject to revaluation, the interest of such lessees in such lands shall be subject to taxation. In determining the value for purposes of taxation of such leasehold interest, the true value in money of the land shall be ascertained, the annual rent reserved in the lease shall be capitalized on a six per centum basis and that sum deducted from the true value of the land in money; the result so obtained plus the value of all of the improvements upon such land shall be the appraised taxable value of such leasehold interest.

Whenever such school or ministerial lands are held under lease for terms of years renewable forever, whether subject to revaluation or not, such lands shall for all purposes of special assessment for improvements benefiting such land be considered as the property of the lessee. Whenever such lands are held on leases for terms not renewable forever, such lands shall be subject to special assessments benefiting such lands, which shall be paid out of the annual rents accruing to the trust."

Under the provisions of this section, it will be noted that lands belonging to a state, and held under a lease for a term of years renewable forever, *and not subject to revaluation,* shall be considered for all purposes of taxation as the prop-

erty of the lessee, and shall be assessed in the name of such lessee. The property covered by the lease here in question is subject to revaluation at the end of each period of fifteen years during the currency of the lease, and does not, therefore, as to taxation come within the provisions of Section 5330, General Code, above quoted. Inasmuch as assessments are a species of taxation, or in any event are laid under the taxing power granted by the Legislature, it would seem that the power of a municipal corporation to levy assessments against the holders of perpetual leaseholds renewable forever, would, under the provisions of this section, be likewise limited to those which are not subject to revaluation. This view would seem to be supported by the further provisions of said Section 5330, General Code, in that by said provisions whenever school or ministerial lands are held under lease for a term of years renewable forever, such lands, whether subject to revaluation or not are to be considered for all purposes of special assessments for improvements benefiting such land, as the property of the lessee. This section contains no provision of like kind with respect to perpetual leaseholds renewable forever in lands of the state other than school and ministerial lands.

With respect to the construction and application of the provisions of Section 5330, General Code, to perpetual leaseholds of the kind here in question, certain language in the opinion of the court in the case of *Zumstein* vs. *Consolidated Coal and Mining Company,* supra, is of interest. In that case the court had under consideration Section 2733, Revised Statutes, which in an amended form is now said Section 5330, General Code. Said Section 2733, Revised Statutes, provided as follows:

> "All lands held under lease for any term exceeding fourteen years, and not subject to revaluation, belonging to the state or any municipal corporation, or to any religious, scientific or benevolent society, or institution, whether incorporated or unincorporated, or to trustees for free education only, and school and ministerial lands, shall be considered for all purposes of taxation as the property of the person or persons holding the same, and shall be assessed in their name."

In this case the court held that lands owned by a municipal corporation and leased for more than fourteen years, not subject to revaluation, were under the provisions of said Section 2733, Revised Statutes, taxable only to the extent of the lessee's interest therein. Touching the question of the liability of the underlying fee, owned by the city of Cincinnati, to taxation, the court in its opinion, among other things, says:

> "The term 'lands,' when not restricted in meaning by related provisions, includes all interests therein. There are, however, considerations which indicate that the term is used in a restricted sense in Section 2733. By the terms of the section, it does not apply to lands held under leases for terms shorter than fourteen years nor to those held for longer terms, if by the stipulations of the lease the lands are, as between the lessor and lessee, subject to revaluation. These conditions to the application of the section can have no meaning if the object of the Legislature was to impose a tax upon the fee. The value of the fee could not be at all affected by the duration of the lease, nor by stipulations for revaluation. These conditions are, however, important in providing for the taxation of the lessee's interest in such lands. They indicate that in the opinion of the Legislature in leases for a shorter term, the rent reserved would be the

substantial equivalent of the rental value, and that in the cases of leases for a longer term, but stipulating for revaluation, the rent reserved and the rental value would be made substantially equal by such revaluation. The result in either case would be, that the lessee's interest would not be of substantial value."

Attention is called to the observation made by the court in its opinion to the effect that in the case of a long term lease with a stipulation for revaluation, the rent reserved and the rental valuation would be made substantially equal by such revaluation, with the result that the lessee's interest would not be of substantial value for purposes of taxation. If this observation is well taken with respect to taxation generally, it would likewise be pertinent with respect to the matter of assessments against leasehold interests of this kind, where lands covered by such leases are subject to revaluation.

However, the form of the question submitted by you, considered in connection with your declared attitude with respect to the matter of incorporating into the new lease of the Toledo and Cincinnati Railroad Company the clause above noted, obligating said company to pay legal assessments imposed by the city of Dayton on account of public improvements benefiting said railroad company, does not require me to express any definite opinion as to whether, aside from such provision in the lease, said leasehold interest of the railroad company would be liable for such assessments.

For the purposes of your question, it is sufficient to note that the leasehold interest of said railroad company is not so clearly liable to assessment under the general statutes of this state, as to justify said railroad company or its counsel in the contention that the clause and the covenant above referred to should for this reason be omitted from the lease. In this connection I may observe that the efficacy of a covenant of this kind to impose upon the railroad company a liability for municipal assessments which would not otherwise exist, is not beyond question.

In the case of *Caldwell* vs. *City of Columbus,* 37 W. L. B., 270, (56 O. S. 759) it was held that where a purchaser of a lot which was subject to an assessment assumed the payment of the same by appropriate language to that end in the deed which was delivered to him, he could not afterwards contest the legality of such assessment in whole or in part; and that it would be assumed that such assessment was taken into consideration in determining the purchase price for the lot, nothing in the deed appearing to the contrary. However, in the case of *Walsh* vs. *Sims,* 65 O. S. 211, it appeared that property was purchased at an administrator's sale while a street improvement was in progress, but before such improvement was completed. The deed was likewise delivered prior to the completion of the work on the street improvement, and three or four months before the passage of the assessing ordinance. It was held that the purchaser would not be estopped to contest the assessment on the grounds that it was in excess of special benefits, because of a recital in the deed that: "all street assessments and sewer assessments are to be paid by the said purchaser and grantee." The court in its opinion in this case says:

"It is not reasonable to assume that the parties intended that any assessment should be paid beyond that which the city had a lawful right to make, and the vendee is not here insisting upon any defense which the vendor might not himself have made. The case is different from one where a debt of the vendor had existed. None did exist against the vendor. A charge was to be made upon his property, but he had, as yet,

received no benefit, and no personal obligation had been incurred, nor could such debt be imposed prior to the taking effect of the assessing ordinance and at that time the vendor was not the owner of the property. That the statute provides that the lien of the assessment shall attach from the date of the contract is not of importance; it in no way justifies an illegal assessment, or estops the owner to make the question after the assessment ordinance is passed. * * *"

In the case of *Waldschmidt* vs. *Bowland, 27* O. C. C. 782, it was held that where the recital in a deed assuming the payment of street assessments, does not specify any particular assessment for the improvement of any particular street, it could not be said that the assumption expressed in the deed relates to and covers an assessment for a street improvement, ordered but not assessed at the time of the delivery of the deed; and that such purchaser is not estopped from contesting the assessment on the ground of lack of special benefit.

Here again, however, there is nothing in your communication which requires me to express any categorical opinion upon this particular question. It is enough to say that no reason is apparent to me why you should not if you so desire, insert in the lease the clause here in question obligating the railroad company to pay according to benefits assessments levied against it for public improvements, especially in view of the fact that it has been your consistent policy to require a clause of this kind in railroad leases.

With respect to the other proposed clause above quoted which you say the railroad company desires to have inserted in the lease in the event that the other clause hereinbefore considered is retained, I can say that without regard to any equity that may attend the claim of the railroad company that assessments paid by it for improvements, which effect an increase in the appraised value of the leasehold, should be deducted from the amount of the increase in the appraised value of such leasehold on subsequent revaluation, there is nothing in the law which authorizes a deduction of assessments so paid to be made from any such subsequent appraisement of the leasehold. The appraisement on the leasehold to be made at the expiration of each period of fifteen years in the term of the lease is to be made in the same manner as the original appraisement, (111 O. L. p. 211, sec. 12). That is, at each of said appraisements the leasehold is to be appraised at its true value of money without deductions of any kind.

I am of the opinion therefore, that you are not authorized to insert in said proposed lease to The Toledo and Cincinnati Railroad Company the clause requested by said railroad company.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1741.

COUNTY TREASURER—SHORTAGE IN ACCOUNTS — RIGHTS OF SURETY COMPANY DISCUSSED—AUTHORITY OF STATE TREASURER TO RECEIVE CHECK FROM SURETY COMPANY DISCUSSED

SYLLABUS:

Where it does not appear that a defaulting county treasurer has at any time failed to pay into the state treasury monies ascertained to be due the state in the