

4804.

APPROVAL, LEASE TO LAND IN HARMONY TOWNSHIP,
CLARK COUNTY, OHIO, FOR STATE GAME REFUGE
PURPOSES—ELLIE MEREDITH.

COLUMBUS, OHIO, October 16, 1935.

HON. L. WOODDELL, *Commissioner, Division of Conservation, Columbus, Ohio.*

DEAR SIR:—You have submitted for my examination and approval a certain lease No. 2317, executed by one Ellie Meredith of Harmony Township, Clark County, Ohio, to the state of Ohio, on a parcel of land in said township and county, containing 726.25 acres of land. By this lease, which is one for a term of three years, this land is leased and demised to the state solely for state game refuge purposes; and it is noted in this connection that acting under the provisions of Section 1435-1 and other related sections of the General Code, the Conservation Council, acting through you as Conservation Commissioner, has set this property aside as a state game and bird refuge during the term of said lease.

Upon examination of this lease, I find that the same has been properly executed and acknowledged by said lessor and by the Conservation Council acting on behalf of the state through you as Commissioner.

I am accordingly approving this lease as to legality and form as is evidenced by my approval endorsed upon the lease and upon the duplicate copy thereof, both of which are herewith returned.

Respectfully,

JOHN W. BRICKER,
Attorney General.

4805.

TAX AND TAXATION—LIEN OF INHERITANCE TAXES
UNDER SECTIONS 5336 AND 5348-3, G. C., PRIORITY OVER
JUDGMENT CERTIFICATES.

SYLLABUS:

1. *Sections 11656 and 11656-2 of the General Code, as amended and enacted, respectively, by the the recent act of the 91st General Assembly, 116 O. L., 274, 277, do not change or otherwise affect the existing provisions of sections 5336 and 5348-3, General Code, which fix the lien of inheritance*

taxes at the time of the succession on the death of the decedent and which continue the lien until the tax is paid.

2. *The filing of judgment certificates in the common pleas court under the authority of section 11656 and 11656-2 of the General Code and in the manner therein provided, will not give to the lien of judgments thus certificated priority over the lien of inheritance taxes on successions to the property affected by such judgment liens, notwithstanding the fact that the judgments may be certificated under these sections and become a lien upon the property prior to the time that a transcript of the order of the probate court determining the inheritance taxes on the succession to such property is filed with the clerk of the common pleas court, for the purpose of collecting such taxes by execution issued on the transcript.*

COLUMBUS, OHIO, October 17, 1935.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—This is to acknowledge the receipt of your recent communication which reads as follows:

“The proximity of the effective date of amended sections 11656 and 11656-2 of the General Code prompts us to ask your opinion as to whether said sections will in any way change the effective time at which a lien fixes upon the property in estates to insure the payment of inheritance taxes (section 5336, G. C.) or the enforcement of the same in the collection of the tax (section 5348-3, G. C.).

The specific questions we are proposing for answer are:

1. Will said amended sections change the fixing of the lien at the date of death and its effective span until the tax is paid?
2. Will said amended sections give a priority to other liens over the tax lien where the certificate is filed with the clerk of the common pleas court subsequent to the date of death, but prior to the filing of a lien certificate by the prosecuting attorney to allow foreclosure of the tax lien as provided by section 5348-3 of the General Code?”

The questions presented in your communication require a consideration of the effect of the provisions of sections 11656 and 11656-2, General Code, as said sections are amended and enacted, respectively, in and by Amended Senate Bill No. 26, which was enacted by the 91st General Assembly and which went into effect April 30, 1935, upon sections 5336 and 5348-3, General Code, which respectively provide for the lien of inheritance taxes and provide a method for their collection after the determination of such inheritance taxes and after the liability for the payment of the same has accrued.

Under the provisions of section 5332 and other related sections of the General Code, inheritance taxes are levied upon the successions to any property passing in trust or otherwise for the use of a person, institution or corporation in the cases designated in said sections. Section 5336, General Code, referring to the inheritance taxes provided for by section 5332 and related sections, provides that such taxes "shall be due and payable at the time of the succession, except as herein otherwise provided, but in no case prior to the death of the decedent". This section further provides:

"Such taxes shall be and remain a lien upon the property passing until paid, and the successor and the executors or administrators of the general estate of the decedent, and the trustees of such property shall be personally liable for all such taxes, with interest as hereinafter provided, until they shall have been paid as hereinafter directed. Such an administrator, executor or trustees having in charge or in trust for distribution any property the succession to which is subject to such taxes, shall deduct the taxes therefrom, or collect the same from the person entitled thereto. He shall not deliver, or be compelled to deliver, any specific legacy or property, the succession to which is subject to said taxes, to any person, until he shall have collected the taxes thereon. He may sell so much of the estate of the decedent as will enable him to pay said taxes in like manner as he would be empowered to do for the payment of the debts of the decedent."

Liability for the payment of taxes upon successions to property does not accrue, of course, until such taxes and the amount thereof have been determined by the probate court under the authority conferred upon him by section 5345, General Code, which provides that from the report of the appraisal of the estate of the decedent and other evidence relating to such estate before the probate court, "such court shall forthwith upon the filing of such report, by order entered upon the journal thereof, find and determine, as of course, the actual market value of all estates, the amount of taxes to which the succession or successions thereto are liable, the successors and legal representatives liable therefor; and the townships or municipal corporations in which the same originated".

Section 5348-3, General Code, referred to in your communication, provides a remedy, concurrent with others, perhaps, for the collection of such taxes after liability for the payment of the same has accrued. This section provides as follows:

"If, after the expiration of eighteen months from the accrual of any tax under this subdivision of this chapter, such tax shall

remain unpaid, the auditor of state shall notify the prosecuting attorney of the proper county, in writing, of such failure or neglect. If the determination of the tax has been delayed for more than one year after the accrual thereof such notice may be issued at any time after six months from the date of the order determining such tax. Such prosecuting attorney shall thereupon apply to the probate judge in the name of the county auditor on behalf of the state for a transcript of the order fixing the tax. Such transcript shall be filed in the office of the clerk of the common pleas court of the county, and the same proceedings shall be had with respect thereto as are provided by section 11659 of the General Code with respect to transcripts of judgments rendered by justices of the peace and mayors, except that the prosecuting attorney shall not be required to pay the costs thereof accruing at the time of filing the same. Thereupon the same effect shall be given to such transcript for all purposes as is given to such transcripts of judgments of justices of the peace or mayors filed in like manner. Provided, however, that nothing in this section shall be construed to affect the date of the lien of such taxes on the property passing, nor to divest such lien before the payment of such tax in the event of failure to sue out execution within the period prescribed by section 11663 of the General Code."

It will be noted that this section provides that after such taxes remain unpaid for the time therein indicated after the accrual of the same, the prosecuting attorney shall file in the office of the clerk of the common pleas court a transcript of the order of the probate judge fixing and determining such taxes. It further provides that after such transcript is filed the same proceeding shall be had with respect thereto as is provided by section 11659, General Code, with respect to the filing with the clerk of the common pleas court of transcripts of judgments rendered by justices of the peace or mayors of municipal corporations. And the further provision of section 5348-3, General Code, is that the same effect shall be given to transcripts of orders made by the probate judge determining inheritance taxes as is given to such transcripts of judgment of justices of the peace or mayors filed in like manner, with the exception "that nothing in this section shall be construed to affect the date of the lien of such taxes on the property passing, nor to divest such lien before the payment of such tax in the event of failure to sue out execution within the period prescribed by section 11663 of the General Code." The provision of section 5348-3, General Code, just quoted, suggests a consideration of the provisions of section 11661, 11662 and 11663, General Code, relating to transcripts of judgments rendered by justices of the peace and mayors' courts filed in the office of the clerk of the common pleas court as

provided for by section 11659, General Code, all of which sections of the General Code were in force at the time of the enactment of section 5348-3, General Code, but all of which have been amended or repealed by the act of the 91st General Assembly in and by which sections 11656 and 11656-2, General Code, were, respectively, amended and enacted. Section 11661, General Code, provided as to the time when judgments covered by transcripts filed in the office of the clerk of the common pleas court under the provisions of section 11659, General Code, became effective as liens against the property of judgment debtors. Section 11662, General Code, provided for the issue of execution on any such judgment after the filing of the transcript, and section 11663, General Code, provided that if execution on a judgment, a transcript of which had been filed, as provided for by section 11659, General Code, was not sued out within five years from the date of the judgment, such judgment would become dormant, and cease to operate as a lien upon the estate of the judgment debtor. It will thus be seen that section 5348-3, General Code, by force of its own provisions and by reason of its adoption of the provisions of section 11659 and other related sections of the General Code, above referred to, provides a remedy for the collection of inheritance taxes by the sale of property upon execution.

Sections 11656 and 11656-2, General Code, as the same are amended and enacted in Amended Senate Bill No. 26, enacted by the 91st General Assembly, 116 O. L., 274, 277, do not in any way refer or apply to inheritance taxes or to the collection thereof. These sections provide for the required procedure whereby judgments, whether they be rendered by courts of general jurisdiction or by justices of the peace, municipal courts or other inferior courts, may be made effective as a lien upon the lands and tenements of the judgment debtor; and in each case the judgment is made a lien upon the lands and tenements of the judgment debtor by filing in the office of the clerk of the common pleas court a certificate of such judgment, executed in the manner required by the statute.

Although, as above noted, section 11659 and the other related sections above referred to, relating to the filing of transcripts of judgments rendered by justices of the peace and by mayors' courts and providing for executions on such judgments against the property of the judgment debtor, were repealed by the act of the 91st General Assembly recently enacted, such repeal did not affect the provisions of these sections in so far as they were adopted and made a part of section 5348-2, General Code, as a remedy therein provided for the collection of inheritance taxes.

It is a well established rule of statutory construction that where a statute is incorporated in another and later statute by reference, the effect of such reference is the same as if the provisions of the former statute were rewritten in the latter, for all of the purposes of the later statute; and the amendment or repeal of the former statute thus referred to does not repeal

or otherwise affect its provisions so far as they have been incorporated in the act which is not repealed. Touching this question, Endlich, in his work on *Interpretation of Statutes*, 492, says:

“Where the provisions of a statute are incorporated by reference in another and the earlier statute is afterwards repealed, the provisions so incorporated obviously continue in force so far as they form part of the second enactment.”

This rule is supported by the decisions rendered by the courts of this State on this question. *Ludlow vs. Johnston*, 3 O., 553, 572; *Stoner vs. Pittsburgh C. C. & St. L. R. R.*, 9 O. N. P. (N. S.), 337; *Lembo vs. State*, 14 O. D. N. P., 384. In the case of *Ludlow vs. Johnston*, supra, the court in its opinion says:

“When in one statute a reference is made to an existing law, in prescribing the rule or manner in which a particular thing shall be done, or for the purpose of ascertaining powers with which persons named in the referring statute shall be clothed, the effect, generally, is not to revive or continue in force the statute referred to, for the purposes for which it was originally enacted, but merely for the purpose of carrying into execution the statute in which the reference is made. For this purpose the law referred to is, in effect, incorporated with and becomes a part of the one in which the reference is made, and so long as that statute continues, will remain a part of it, and although the one referred to should be repealed, such repeal would no more affect the referring statute than a repeal of this latter would the one to which reference is made.”

It follows from the considerations above noted and discussed that the remedy for the collection of inheritance taxes provided by section 5348-3, General Code, by the filing of a transcript of the order of the probate court fixing and determining such taxes and by execution issued on such transcript provided for by section 5348-3, General Code, and by the provisions of section 11659 and other related sections incorporated by reference therein, remains unchanged and unaffected notwithstanding the repeal of these sections of the General Code as they read at the time of the enactment of section 5348-3, General Code. And inasmuch as there is nothing in the provisions of sections 11656 and 11656-2 of the General Code, as the same are amended and enacted, respectively, in the recent act of the 91st General Assembly, which in any way repeals or even refers to or in any manner affects the provisions of section 5336, General Code, which provides for the lien of inheritance taxes on successions to property until such taxes are paid, or which repeals or other-

wise affects the provisions of section 5348-3, General Code, which likewise provide for the lien of such taxes, and further provide a remedy for their collection, it follows, further, by way of specific answer to the questions presented in your communication, that sections 11656 and 11656-2 of the General Code, as amended and enacted, respectively, by the recent act of the 91st General Assembly, above referred to, do not have the effect of changing or otherwise affecting existing provisions of law which fix the lien of inheritance taxes at the time of the succession on the death of the decedent and which continue the lien until the tax is paid. It is to be further concluded, by way of more specific answer to your second question, that the filing of judgment certificates in the common pleas courts under the authority of sections 11656 and 11656-2 of the General Code and in the manner therein provided, will not have the effect of giving the lien of judgments thus certificated priority over the lien of inheritance taxes on successions to property affected by the several liens, notwithstanding the fact that judgments may be certificated under these sections and become a lien upon the property prior to the time that a transcript of the order of the probate court determining the inheritance taxes on the succession to such property is filed in the common pleas court, for the purpose of collecting such taxes by execution to be issued on such transcript.

Respectfully,

JOHN W. BRICKER,
Attorney General.

4806.

COUNTY COMMISSIONERS—UNAUTHORIZED TO USE PROCEEDS OF GASOLINE EXCISE TAXES FOR PURCHASE OF PASSENGER AUTOMOBILE.

SYLLABUS:

The county commissioners may not use the proceeds of gasoline excise taxes levied for road construction and repair purposes, for the purchase of passenger automobiles even though it is contemplated that after acquisition such passenger automobiles will be used solely in connection with such road work.

COLUMBUS, OHIO, October 17, 1935.

HON. D. H. JACKMAN, *Prosecuting Attorney, London, Ohio.*

DEAR SIR:—Your letter of recent date is as follows: