1282.

TIMBER—TAX VALUATION—COUNTY AUDITOR SHALL APPORTION VALUES OF LAND AND TIMBER WHEN DEED OF CONVEYANCE IS PRESENTED.

SYLLABUS:

1. *The county auditor, when there is presented to him a deed of conveyance of all the standing timber on a tract of land, with satisfactory proof of the value of said timber as compared with the whole valuation of said land and timber as charged on the duplicate, should divide and apportion the aggregate values of said land and timber, according to the relative value of the separate interests.*

2. *This rule applies even though it appears by the terms of the conveyance, otherwise absolute in form, that the title of the grantee to the timber will be defeated as to any timber not cut and removed in five years from date of deed.*

COLUMBUS, OHIO, November 21, 1927.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—This will acknowledge receipt of your recent communication which reads:

> "Recently the commission has been called upon to advise a number of auditors as to their powers and duties with regard to a division of the tax value of a tract of land owned by A when there is presented to them a deed of conveyance whereby A conveys to B all the timber standing thereon.
>
> To state the matter directly, in such a case may the auditor proceed to divide and apportion the aggregate value of the real estate according to the relative value of the interests held by the owner of fee and the owner of the standing timber, as is permitted under Section 5563 of the General Code where the fee of soil and the title of minerals are vestd in different individuals?
>
> Would your answer to the above question be changed if it should appear by the terms of the conveyance (otherwise absolute in form) that the rights of the grantee should become void as to any timber he shall not have cut and removed within five years from the date of the deed?"

In considering timber as a subject for taxation it has been held in a number of decisions and so provided in some statutes that the interest of one person in standing timber on the soil of another is separately assessable as an interest in real estate. This conclusion would seem, however, to depend in considerable degree upon the terms of the instrument or agreement under which the interest arose. If it were such as to give to the vendee title to the timber the conclusion would apply. If on the other hand, no title passed, and the vendee merely secured a right to go upon the land to cut timber, this right would not be separately assessable for taxation. See 17 Ruling Case Law, page 1166, Section 79.

In Cooley on The Law of Taxation, Vol. 2, Section 558, it is said:

> "* * * the separate estates which different persons may own in the same land, such as where one owns the surface, another the timber growing

on it, and still another the mineral underground, may each be subject to taxation."

Section 567 of the same work reads as follows:

"Standing timber is assessable as part of the realty and not otherwise, except that where the land is owned by one person and the timber by another, the latter is assessable to the owner of the timber."

The ownership of timber standing and growing on land is an interest in the land itself and assessable as realty. See *Globe Lumber Co.* vs. *Locket,* 30 *So.* 902.

Section 5322 of the General Code, defines real property and land for the purposes of taxation as follows:

"The terms '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."

Section 2573, relating to the transfer of property to the name of a purchaser before record, reads as follows:

"On application and presentation of title, with the affidavits required by law, or the proper order of the court, the county auditor shall transfer *any land or town lot, or part thereof,* or minerals therein or mineral rights thereto, charged with taxes on the tax list from the name from which it stands *into the name of the owner, when rendered necessary by a conveyance, partition, devise, descent or otherwise.* If by reason of the conveyance or otherwise, *a part only of a tract or lot,* or minerals therein, or mineral rights thereto, as charged in the tax list is to be transferred, the person desiring the transfer shall make satisfactory proof of the value of such part compared with the value of the whole, as charged on the tax list, before the transfer is made. * * *"

This section does not apply to cases where timber or coal has been taken from the land, but only to cases where there has been a separation by sale or otherwise of the surface of the land. *Johnson* vs. *Lacey,* 11 O. C. C. (N. S.) 411.

The purpose of the state in providing that the valuation of the part so transferred, and of the part which is not transferred shall be determined, is to fix the proportion of the taxes so charged which each part of said tract is to bear. *Williamson* vs. *Lewis,* 2 O. N. P. (N. S.) 1.

Before the auditor of a county can be required to transfer real property from the name from which it stands charged on the duplicate, to the name of the party to whom it has been assigned or conveyed, evidence of the title of the party to whom the transfer is to be made must be presented to the auditor; and where the transfer is to be of only a part of such property, satisfactory proof must also be made to the auditor of the value of such part as compared with the valuation of the whole as charged on the duplicate. *Cincinnati College* vs. *LaRue,* 22 O. S. 469.

The decision of your question depends upon the interpretation to be placed upon the language of Section 2573 quoted, supra, wherein the auditor is directed to transfer "any land or town lot or part thereof." Specifically, may the standing timber be

considered as a part of the land so that the presentation of evidence of title thereof as separate from the land, make it mandatory upon the auditor to effect the transfer?

The argument may properly be advanced that this only authorizes a vertical severance of the land and does not comprehend any horizontal transfer. The answer to this contention, however, is found in the case of *Cincinnati College* vs. *Yeatman,* 30 O. S. page 276. The court on page 282 states as follows:

> "But it is said that said Section 13 only makes it the duty of the auditor to make such transfer of land or town lot or part thereof, and that the transfer demanded is not of a lot, nor part of it, but of a part of a building, bounded by horizontal lines. In short, that no transfer can be made of part of real property, not divided by vertical lines.
>
> We apprehend, that the building, whenever it is a permanent improvement, is land within the meaning of the law, for the purposes of taxation, and that the words 'part thereof' may be applied to it, as well as the lot on which it stands, and may consist of a part, by metes and bounds, or definite description of a separate part, or of an individual aliquot part of the whole, provided the conveyance in terms conveys a title and ownership in the estate which is liable to be assessed."

In that case was involved the duty to transfer title to an apartment in a building, the apartment having been conveyed by long term lease. This decision apparently disposes of the question so far as involves the right to make a horizontal severance of a parcel of land. Obviously, growing timber constitutes a part of the land and comes under this decision. An absolute conveyance thereof would make it the mandatory duty of the auditor to effect the transfer upon presentation of proper evidence of title. Specific authority as to the right to create a separate estate in timber from the soil is found in later language of the above quoted case on page 282, as follows:

> "Thus, if the owner of land grants the trees growing thereon to another and his heirs, with the right to cut and carry them away at his pleasure, forever, the grantee acquires an estate in fee in the trees, with an interest in the soil sufficient for their growth, while the fee in the soil remains in the grantor. *Clapp* vs. *Draper,* 4 Mass. 34; *Knotts* vs. *Hydrick,* 12 Rich. 314."

The sole remaining question is whether a provision of the transfer that it should become void if the grantee shall not have cut and removed the timber within five years in any way affects the right to have the transfer made. In other words, is this such a conveyance as comes within the meaning of Section 2573 of the Code? From your statement, the conveyance, aside from the five year limitation, is otherwise absolute in form. The title to the timber is therefore entirely conveyed, subject, however, to be defeated by a condition subsequent. Under the circumstances, I am of the opinion that there is such a conveyance of the timber in this instance as will make it the duty of the auditor to effectuate the transfer. As stated in American Digest, 1894, page 1386, Section 123:

> "Standing timber is an interest in land that may be acquired by deed, and the fact that it must be removed within a definite period does not prevent title to the timber from vesting in the grantee."

The county auditor, therefore, when there is presented to him a deed of conveyance of all the standing timber on a tract of land, with satisfactory proof of the value of said timber as compared with the whole valuation of said land and timber as charged on the duplicate, should divide and apportion the aggregate values of said land and timber, according to the relative value of the separate interests.

This rule applies even though it appear by the terms of the conveyance (otherwise absolute in form) that the rights of the grantee should become void as to any timber not cut and removed in five years from date of deed.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1283.

FENCES—LAND OWNERS MAY BE COMPELLED TO BUILD AND KEEP UP ONE HALF OF A PARTITION FENCE UNLESS SUCH FENCE BE OF NO BENEFIT TO THEIR LANDS.

SYLLABUS:

1. *By the terms of Sections* 5908, *et seq., General Code, land owners must build partition fences, unless such fences will be of no benefit to their lands.*

2. *Under the provisions of Sections* 5908, *et seq., General Code, an owner of lands capable of being cultivated, which have to some extent been under cultivation and which in the future may be cultivated, may be compelled to build and keep up one-half of a partition fence, notwithstanding the fact that such owner has removed from such farm and is trying to sell the same. If such owner does not build and keep up that portion of the fence required of him, the township trustees may have it built and certify its cost to the tax assessing officials to be placed upon the tax duplicate and collected as ordinary taxes, as provided by said sections of the General Code.*

COLUMBUS, OHIO, November 22, 1927.

HON. R. D. WILLIAMS, *Prosecuting Attorney, Athens, Ohio.*

DEAR SIR:—Receipt is acknowledged of your communication of recent date requesting my opinion as follows:

> "Lee Township is a township in Athens County. A owns a farm in Lee Township of approximately eighty acres. A formerly lived upon and cultivated this farm. A few years ago A moved to Barberton and has continuously since been trying to sell this farm. Very little of A's farm has been cultivated since he moved off of it. The public highway runs through this farm and about thirty-seven acres lies on one side of this road and approximately forty-three acres on the other. This road was formerly fenced on both sides but the fence along the road and on the side which the thirty-seven acre piece abuts has heretofore decayed and due to lack of repair, has heretofore become and is now worthless and constitutes from a practical standpoint, no fence at all. There was a little hay cut last season from this thirty-seven acre tract and perhaps a small amount of corn raised thereon. Whether any of this thirty-