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Taxation

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consistent with the common law rule that a bailee's possessory interests were suffcient to support trespass or trover.

The Supreme Court, however, held that the provisions of Section 4505.04 and the authority of *Mielke v. Leeberson*[19] necessitate a holding that "the mere possession of an automobile no longer carries with it any right or interest in that automobile which a court can recognize." Quaere: is it now necessary in an action for damages to one's automobile to allege in his petition therefor the existence of a Certificate of Title in his name and to prove the same on trial? It begins to appear so.

Fair Trade Law Weakened

Finally, in our discussion of significant cases in the Law of Sales in Ohio during the year 1958, we note that the Supreme Court declared unconstitutional[20] that Section of the Ohio Fair Trade Act[21] which prohibits those who are not parties to a price-fixing contract between the producer of a trade marked commodity and another from selling such commodity for less than the price stipulated in such contract.

Since the validity of such acts was upheld by the United States Supreme Court[22] in 1936, many states have followed that decision, but, of course, they are by no means required to do so. The Ohio Supreme Court got in line with what appears to be a growing majority. Citing "the light of present day conditions," the "anticompetitive price fixing" effect and "the constitutional right of the owner of property to dispose of it as he pleases," the court held that Section 1333.06 "represents an unauthorized exercise of the police power in a matter unrelated to the public safety, morals or general welfare, delegates legislative power to private persons . . . and is invalid."

SAMUEL SONENFEILD

TAXATION

Jurisdiction

An ordinance of the City of Franklin, Ohio, enacted in 1957 sought to impose an excise tax upon the use of water and sewage service provided by the city. It took the form of a tax of 50% of the amount of the

19. 150 Ohio St. 528, 83 N.E.2d 209 (1948).

20. Union Carbide & Carbon Corp. v. Bargain Fair, Inc., 167 Ohio St. 182, 147 N.E.2d 481 (1958). Also discussed in CONSTITUTIONAL LAW section, *supra* and TRADE REGULATIONS section, *infra.*

21. OHIO REV. CODE § 1333.06.

22. Old Dearborn Distrib. Co. v. Seagram-Distillers Corp. 299 U.S. 183 (1936).

user's bill for water and sewage service. It was designed to provide revenues for the General Fund of the City. A user refused to pay this tax and an affidavit was prepared and warrant for arrest was issued. Upon a demurrer to the affidavit charging the offense, the trial court[1] held that the ordinance was invalid as contrary to the United States and Ohio Constitutions, and the statutes of Ohio concerning the charges for sewage and water services supplied by municipal corporations. The trial court appears to have based its determination of invalidity upon three primary grounds: (1) that this ordinance was an evasion of the 10 mill limitation on property taxed according to value imposed by Article XII, Section 2 of the Ohio Constitution and its implementing legislation; (2) that it was a contravention of the statutes which prohibit the use of sewage and water rental funds for general municipal purposes;[2] and (3) that this ordinance denied equal protection of the laws to the residents of Franklin because the burden of the tax would fall upon users of these municipal services whereas the benefits would extend to all persons, including persons who supplied their own water service, e.g., private wells, to which the tax did not apply.

This decision is adverse to municipal fiscal policy, and if ultimately affirmed, closes the limited excise tax field now considered available to the municipal corporation. Briefly, the ordinance purports to levy an excise tax on the consumer's use of two municipal services: sewage and water. The method of using a percentage of the charge for commodity or service used is orthodox.

The limitations of Article XII, Section 2 of the Ohio Constitution on the percentage of a municipal tax applies only to a tax on property levied in accordance with value, and it need be uniform only as to real property. The implementing statute applies the "10-mill limitation"[3] to all taxable property levied on each dollar of tax valuation.[4] Article XII, Section 2, however, does not apply to the imposition of excise taxes under Article XII, Section 10 and examples of such taxes include privilege and occupation levies.[5]

The Supreme Court of Ohio in *Hoefner v. City of Youngstown*[6] recognized that a municipal ordinance levying a percentage of the net rate charged for gas, electrical energy, telephone service, and water is an

1. City of Franklin v. Harrison, 153 N.E.2d 467 (Ohio Mun. Ct. 1957).
2. OHIO REV. CODE §§ 729.52, 743.05.
3. OHIO REV. CODE § 5705.02.
4. Bennett v. Evatt, 145 Ohio St. 587, 62 N.E.2d 345 (1945) applied this rule to intangible investments.
5. Saviers v. Smith, 101 Ohio St. 132, 128 N.E. 269 (1920).
6. Haefner v. City of Youngstown, 147 Ohio St. 58, 68 N.E.2d 64 (1946).

excise tax. This ordinance imposed the tax upon the consumer and it was to be added to his utility bill similarly to the scheme of collection set out in the City of Franklin ordinance considered in the principal case. The Youngstown ordinance was held invalid, however, because the state legislature had already pre-empted the field.

It is settled law in Ohio that a municipality may levy and collect an excise tax for local purposes so long as it is not precluded by state legislation.[7] There is no problem of pre-emption[8] in the *City of Franklin* situation. The state excise tax on[9] gross receipts of public utilities which invalidated the local excise tax on the *City of Youngstown* case does not apply to utility services supplied by a municipal corporation.[10] The power to impose the excise on municipal sewer and water service charges existed independently and apart from the limitations of Article XII, Section 2 and implementing legislation. The passage of the ordinance was not an evasion or circumvention of the "10-mill limitation."

Since the enactment of an excise tax for local purposes on the privilege of using municipal sewer and water service is within the legislative power of a municipal corporation, such an action does not represent a diversion of sewer and water rates contrary to statute. The ordinance is truly an excise tax on the privelege of using a municipal service whereas sewer and water rates are not taxes,[11] though subject to state regulation.[12]

The third basis for invalidity of the City of Franklin ordinance in the opinion of the court was the denial of equal protection of the laws under the 14th Amendment. A point is made of the fact that self-suppliers of water are not taxed but will nevertheless be entitled to share equally in the benefits of the general fund of the city along with the users of the city water service. State and local governments have much freedom in choosing the subjects of excise taxation, and the United States Supreme Court has sustained classifications which have a reasonable basis.[13] Participation of persons in the benefits of tax proceeds who did

7. State, *ex rel.* Zielonka v. Carrel, 99 Ohio St. 220, 124 N.E. 134 (1919); Haefner v. City of Youngstown, 147 Ohio St. 58, 68 N.E.2d 64 (1946).

8. There is an excellent analysis of this troublesome problem by Glander and Dewey, *Municipal Taxation — A Study of the Pre-emption Doctrine,* 9 OHIO ST. L.J. 72 (1948).

9. OHIO REV. CODE § 5727.38.

10. OHIO REV. CODE, § 5727.05 exempts municipal corporations from making any return or paying any excise or franchise tax of fee under ch. 5727.

11. In Alter v. Cincinnati, 56 Ohio St. 47, 67, 46 N.E. 69, 71 (1897), the opinion states "water rents are not, strictly speaking, taxes, and certainly not taxes on property to be regulated under article twelve of the Constitution."

12. Cincinnati v. Roettinger, 105 Ohio St. 145, 137 N.E. 6 (1922).

13. Heisler v. Thomas Colliery Co., 260 U.S. 245 (1922).

not share in the taxation which produced the public funds has not been a basis for invalidating the tax on those who did. There appears to be a reasonable basis for classification between users and non-users of municipal water service.

While it is true that Article I, Section 2 of the Ohio Constitution also provides a guaranty of equal protection of the laws and it has been held that this is an implied limitation on the imposition of excise and franchise taxes,[14] the Ohio courts recognize that the legislative body has wide discretion in classification for tax purposes, and that this discretion will not be disturbed unless the classification attempted results in so great a discrimination against members of the same class as to deny them equal protection of the laws.[15]

A court of appeals had no comparable difficulty in sustaining a municipal admissions tax ordinance in *Smack & Snack, Inc. v. City of Mayfield Heights*.[16] It affirmed a judgment sustaining an amended ordinance which specifically applied to "golf driving ranges," the admission charge applying only to the privilege of using the individual bucket of golf balls. The state "admissions" tax had been repealed, thus removing any direct pre-emption of the field, and there was no express or implied limitation on the levying of excise taxes of this character by municipalities for the purpose of raising revenue for purely local purposes.

Exemptions

Four Supreme Court decisions dealt with a variety of problems including the exemption of federally owned real estate, of state owned real estate occupied by structures which were designed for use by and used by lessees operating concessions along the Ohio Turnpike, and of municipal railway systems, and municipal off-street parking facilities.

In *County of Franklin v. Lockbourne Manor, Inc.*,[17] the applicant for tax exemption was a lessee of property which belonged to the United States and which was operated as a housing development in connection with the Lockbourne Air Force Base. The sole interest of the lessee was its 75-year lease of the housing project, though under its lease it was obligated to construct the buildings which became U.S. property. As soon as the project was completed, the county auditor placed the real property on the county tax duplicate, and the lessee applied for exemption. The

14. Southern Gum Co., v. Laylin, 66 Ohio St. 578, 64 N.E. 564 (1902).

15. State *ex rel.*, Struble v. Davis, 132 Ohio St. 555, 9 N.E.2d 684 (1937); Gulf Refining Co. v. Evatt, 148 Ohio St. 228, 74 N.E.2d 351 (1947).

16. 78 Ohio L. Abs. 423, 149 N.E.2d 253 (Ohio Ct. App. 1958).

17. 168 Ohio St. 286, 154 N.E.2d 147 (1958) .

Board of Tax Appeals found that the taxes upon the leasehold interest were illegally assessed and granted the exemption. The Supreme Court affirmed this decision, indicating that the United States could not be taxed without its consent and that it had consented only that state and local taxes could be levied on the lessee's interest created by leases under the statute authorizing the construction of the project. Since the state of Ohio has not attempted to tax leaseholds, no tax was properly levied.

In 1956, the Ohio Turnpike Commission requested the Board of Tax Appeals to exempt all of its property along the entire length of the Turnpike from the tax lists and duplicates of the counties in which the toll road is situated and for the remission of taxes and penalties for the years 1954 and 1955. This request was granted in its entirety by the Board. The auditor of Cuyahoga County appealed and specifically challenged the reasonableness and lawfulness of the Board's findings that the portions of the service plazas in Cuyahoga County leased or rented to private corporations are used exclusively for turnpike purposes and therefore legally exempt from taxation. The decision necessarily turned upon the general statute[18] exempting state property used exclusively for a public purpose and the special statute[19] exempting the Turnpike Commission from any taxes or assesments upon any turnpike project or upon any property acquired or used by the Commission under its statutory authority. The Supreme Court affirmed the Board and held that the lease of facilities to private corporations which might derive a profit from their operation did not change the controlling fact that the entire project is owned by the public and is devoted essentially to an exclusive public use.[20]

In 1943, the City of Cleveland acquired its transit system and made application for exemption of the real and personal property used in the system. The Board of Tax Appeals granted the exemption, but on appeal the Supreme Court reversed the Board, holding that there was a lack of constitutional authority to exempt the real property and that the legislature had in fact not exempted the personal property.[21] In 1957 the City of Cleveland again made application to exempt from taxation the real and personal property used by it in the operation of its mass transportation system. On the authority of the 1945 decision of the Supreme Court, the Board of Tax Appeals denied the application. In doing this the Board was relying upon an authority which the present majority of

18. OHIO REV. CODE § 5709.08.

19. OHIO REV. CODE § 5537.20.

20. Carney v. Ohio Turnpike Commission, 167 Ohio St. 273, (1958).

21. Zangerle v. City of Cleveland, 145 Ohio St. 347, 61 N.E.2d 720 (1945). See discussion in MUNICIPAL CORPORATIONS section, *supra.*

the Supreme Court would not accept, for without material comment on the intervening decisions of the Court, it reversed the Board.[22] Thus without expressly overruling its 1945 decision, the court in effect had overruled the position taken in that instance. An important move in this direction was taken in the Columbus "reservoir" decision[23] which held that land owned by the city which was used to contain water to be sold and distributed by it to its residents and to the residents of its suburbs was public property used exclusively for a public purpose. In the principal case the court again holds that "public purpose" is not restricted to purely governmental activities but includes proprietary undertakings. Since the property for which exemption was requested was used solely for the mass transportation of people in and around Cleveland, that was a use exclusively for a public purpose even though a charge is made for the service and a profit might result from the charge. It is significant that the majority opinion states that, for tax exemption purposes, public-owned mass transportation systems should be treated like other municipally owned utilities, including waterworks, light and gas plants.

In the off-street parking exemption case argument before the Supreme Court, the City of Columbus urged that the proprietary nature of the enterprise did not take it out of the public purpose classification. The Supreme Court agreed with this[24] position. It decided, however, that the issue of tax exemption could not be determined under the general exemption statute in this instance, but must be decided under the policy of the special statute under which the legislature had authorized municipal corporations to establish and operate off-street parking facilities. This section expressly denied tax exemption to real estate acquired for the operation of such parking facilities.[25] It made no difference that the City of Columbus had acquired this property under authorization of its charter rather than under the state statute. A city may not avoid the legislative policy against tax exemption of off-street parking facilities by acquiring real property for an identical use in the exercise of its home rule power, thereby attempting to claim exemption under the general exemption statute.[26]

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22. City of Cleveland v. Board of Tax Appeals, 167 Ohio St. 263, 147 N.E.2d 663 (1958). See MUNICIPAL CORPORATIONS section, *supra.*

23. City of Columbus v. County of Delaware, 164 Ohio St. 605, 132 N.E.2d 747 (1956). Justice Taft in writing the opinion for the court sought to distinguish this fact situation from the 1945 situation in the *Cleveland Transit System* decision.

24. City of Columbus v. County of Franklin, 167 Ohio St. 256, 147 N.E.2d 625 (1958).

25. OHIO REV. CODE § 717.05.

26. In State *ex rel.*, Gordon v. Rhodes, 156 Ohio St. 8, 100 N.E.2d 225 (1951) the court had decided that off-street parking facilities could be acquired under home

PERSONAL PROPERTY

Tangibles

The determination of the proper classification of tangible property for personal property assessment creates perennial controversies. A few years ago the question of the proper classification of machinery used in the preparation of frozen dessert[27] resulted in a holding that the machinery was used in manufacturing and should be assessed under the 50% rule. Recently the matter of the proper classification of coin vending machines which dispensed carbonated-beverage drinks and hot coffee was settled in favor of "use in manufacturing."[28] As in the case of the frozen dessert machine which produced a palatable frozen product, these dispensing machines mixed the ingredients of their respective products and dispensed them to the buyer as a finished ready-to-drink product. The Tax Commissioner had contended that these machines were used in merchandising and should therefore be assessed under the 70% rule.

In *Adams v. Bowers*,[29] the taxpayers, owners and operators of a scrap-iron yard, used a 10% rate (i.e. 10 year depreciation period) in valuing their scrap iron yard equipment for purposes of the personal property tax. The Tax Commissioner had previously promulgated a 5% depreciation rate (20-year life) for personal property used in the scrap-metal industry, and in this case he reduced the rate thereby increasing the assessment for each of the prior three years. On appeal to the Board of Tax Appeals this decision was affirmed. The Supreme Court in turn affirmed the Board's decision, holding that it was neither unreasonable nor unlawful for the Board to apply a rate of depreciation on the scrap-iron yard equipment based on a 20-year life. Obviously the taxpayer had failed to produce evidence of the unreasonableness of 20-year life as applied to the specific property involved.

Three cases determined the validity of assessments upon the producer of wheat which was stored either in grain elevators or on the farm pursuant to the producer's note and loan agreements made prior to the January 1 tax-listing day for personal property and which were not listed by the taxpayer. The first case was concerned with whether the taxpayers were the owners of wheat stored under note and loan agreements

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rule powers, but the principal decision indicates that "the uniform operation of all laws of a general nature provision" of OHIO CONST. Art II, § 26 renders it impossible to allow a municipality acquiring real estate through home rule powers to claim exemption of the real estate of its parking facility under OHIO REV. CODE § 5709.08.

27. Jer-Zee, Inc. v. Bowers, 163 Ohio St. 31, 125 N.E.2d 195 (1955).

28. Canteen Co. v. Bowers, 167 Ohio St. 337, 148 N.E.2d 684 (1958).

29. 167 Ohio St. 389, 148 N.E.2d 920 (1958).

owned and held by the Commodity Credit Corporation. Tht other two cases were concerned with the Revised Code definition of "used"[30] as amended in 1955 to exclude agricultural products in storage which are subject to control of the United States government and which are to be shipped on order of the United States government. The Supreme Court held in all three cases that agricultural products placed in storage as security for the producer's note and loan agreement owned and held by the Commodity Credit Corporation are not property of the producer taxable under the Revised Code[31] in its original form or as amended in 1955.

Ten other appeals from the Board of Tax Appeals were consolidated in *Grennell Corp. v. Bowers*[32] and involved the application of the "held in storage" provisions of the Revised Code[33] as they existed prior to the 1955 amendment.[34] Because of the major change in meaning of "storage" in the "used" definition of personal property effected in 1955, a detailed discussion of the decisions of these appeals does not seemed warranted.[35]

Intangibles

Two Supreme Court decisions dealt with the matter of documents or other written agreements concerning real property being intangible personal property taxable as intangibles and not evidence of an interest in land excepted from the intangible property tax.[36] In the first of these

30. OHIO REV. CODE § 5701.08.

31. OHIO REV. CODE § 5701.08. Goodrich v. Bowers, 167 Ohio St. 403, 149 N.E.2d 248 (1958). The three cases consolidated in this decision are Maddox, Goodrich and Grener. In the preceding discussion the Maddox case is referred to as the "first case." The "last two cases" refer to the Goodrich and Grener appeals which are concerned with taxes due January 1, 1956 and involve a construction of OHIO REV. CODE § 5701.08 as amended in 1955.

32. 167 Ohio St. 267, 147 N.E.2d 657 (1958).

33. OHIO REV. CODE § 5709.01 provided that all personal property located and used in business in this state, regardless of the residence of the owners, was subject to taxation. The definition of "used" in § 5701.08 included personal property stored or kept on hand as material, parts, products or merchandise and excluded nonresident's merchandise if held in a storage warehouse for storage only.

34. The definition of "used" as set out in OHIO REV. CODE § 5701.08 since the 1955 amendment now excludes only "merchandise or agriculture products shipped from outside of this state and held in this state in a warehouse or a place of storage for storage only and for shipment outside of this state."

35. The court held that personal property cannot under the former definition of used be considered as held for "storage only" in any of the following instances: (1) where it is located at the place where it is to be used in manufacturing; (2) where it is located at the place where it was manufactured into a product; (3) where it is located at the place from which it is in effect to be delivered by the taxpayer directly to a customer.

36. OHIO REV. CODE § 5701.06 (C) (1).

cases the evidence of the property interest was an interest-bearing contract for the sale of real estate. The court held this contract taxable under the intangible tax.[37] A majority of the court were of the opinion that a contract for the sale of land carrying an interest charge is an interest-bearing obligation for the payment of money[38] and not exempt from tax.

In the other case the taxpayer owned a block of stock in a corporation which owned an apartment building. There were four separate apartments in this building and the stock was divided into four blocks which were owned by the four occupants. A majority of the court were of the opinion that each shareholder in effect bought an interest in real estate for the sole purpose of occupying a portion of it as a home and that there was not investment in a profit-sharing venture. These shares of stock[39] were not investments as defined in the statute,[40] and therefore not taxable.

In *Society for Saving v. Bowers*,[41] the Supreme Court of the United States held invalid as a tax on the bank, a statute which purported to tax the ownership interests of the depositors in mutual savings banks, the capital of which is not divided into shares or which have no capital stock. After this decision the Ohio General Assembly amended[42] the applicable statutes[43] seeking to supply the deficiencies of the former statutes by specifically taxing the ownership interests of the depositors of these institutions, expressly assessing these interests as distinguished from the capital or property of the institution, by authorizing the institutions which pay the tax to deduct the amount from the deposits, and by creating a lien on behalf of the institution and the state upon the depositors' ownership interests.

In *Second Federal Savings and Loan Ass'n of Cleveland v. Bowers*,[44] the Supreme Court sustained an assesment against the "ownership interests of the depositors" based upon the surplus (reserve) and undivided profits without the deduction of the value of federal securities owned by

37. Smilack v. Bowers, 167 Ohio St. 216, 147 N.E.2d 499 (1958).

38. OHIO REV. CODE § 5701.06 (B).

39. Justus v. Bowers, 167 Ohio St. 384, 148 N.E.2d 917 (1958).

40. OHIO REV. CODE § 5701.06 (A).

41. 349 U.S. 143 (1955). See discussion, 1955 Survey, 7 WEST. REV. L. REV. 328 (1956).

42. 126 Ohio Laws, pt. 2, p. 12.

43. OHIO REV. CODE §§ 5709.02, 5719.09, 5719.10, 5725.04, 5725.07.

44. 168 Ohio St. 65, 151 N.E.2d 223 (1958). In affirming the decision of the Board of Tax Appeals, the Supreme Court's opinion stated that the General Assembly had expressly supplied all of the deficiencies which the United States Supreme Court found in the then existing statutes.

the Association, thereby upholding the validity of the newly refurbished taxing provisions. The Association had in its 1957 return listed no book value of capital employed because it held federal securities of a value in excess of the capital employed.

Sales and Use Taxation

In 1952 the Ohio Supreme Court[45] held that mats, engravings, etchings, half-tones and similar materials purchased by a business concern and then delivered by it without charge to a newspaper publisher for incidental use in newspaper advertisements concerning its merchandise were not used directly in making retail sales within the exemption provisions of the sales tax statute.[46] The identical question was again presented to the court through an appeal from a Board of Tax Appeal's denial of exemption to sales of the same kind of materials for the same purpose. In *Zinc Engravers v. Bowers*,[47] the court reversed the decision of the Board of Tax Appeals as being unreasonable and unlawful, and held that these items were used directly in making retail sales. Another issue presented on this appeal concerned the detail with which a blanket certificate of exemption filed by the purchaser with the vendor must describe the exempted articles. The court stated that a longhand identification of the material under which exemption might reasonably be claimed meets the statutory[48] requirement of indicating that the sale is not legally subject to the tax.

Two decisions reviewed the action of the Board of Tax Appeals in assessing property under the Ohio use tax. In both cases the taxpayer was claiming an exemption[49] based on the direct use of property in manufacturing or processing. An unsuccessful attempt was made to persuade the Supreme Court to accept the "integrated plant" theory of use in determining the exemption of the component parts of a batching plant as the term is used in the ready-mix concrete business. The court again refused to accept this theory and applied the test of actual use "during and in the manufacturing or processing period."[50] Thus such items as ingredient storage bins, the conveyor, and a lift truck used in handling ma-

45. Elder & Johnston Co. v. Glander, 156 Ohio St. 445, 103 N.E.2d 392 (1952). See the third paragraph of the syllabus.

46. OHIO REV. CODE § 5739.01 (E) (2).

47. 168 Ohio St. 43, 151 N.E.2d 226 (1958).

48. OHIO REV. CODE § 5739.03.

49. OHIO REV. CODE § 5741.01(C)(2). This definition is identical with the sales tax definition set out in § 5739.01(E)(2).

50. Youngstown Building Material & Fuel Co. v. Bowers, 167 Ohio St. 363, 149 N.E.2d 1 (1958).

terials were not used during the processing and consequently not exempt. On the other hand, steam generators which were used in cold weather to heat water used in mixing and to provide live steam for better mixing ingredients were used during the processing period and were therefore exempt.

A court of appeals decision dealt with the exemption[51] of coal mining machinery for an Ohio mine which was used primarily for producing commercial grades of coal and slack for sale in the open market but which was also used for the production of slack to be supplied to a co-subsidiary. In holding the decision of the Board of Tax Appeals unreasonable in sustaining a use tax assessment on the mining machinery, the court of appeals [52] determined that the exemption applied where the principal purpose in the operation of the mine was the production of higher grades of coal for sale at a profit.

Inheritance Taxation

In *In re Estate of Sherick*,[53] the Supreme Court determined the class to which a succession belongs which comes by way of the so-called "Half-and-Half" statute.[54] Under the facts of this case the succession was to identical realty which had passed by will from the successor's father to his stepmother who had died intestate and without issue. In such a situation the son and only lineal descendant of his father took a one-half interest in this identical real property. In reversing the court of appeals and the court of probate, the Supreme Court held that the succession came from the relict spouse, the stepmother, and not from the father. Under the inheritance tax statute this placed the succession in the highest or fourth class as to tax rates.[55]

Another decision[56] determined that the executors of a decedent who had succeeded to a life estate under the terms of a will and had paid an inheritance tax based upon a life expectancy of approximately 10 years could not secure a refund when the decedent life tenant actually enjoyed the limited interest for only four years and eleven months. The court

51. See OHIO REV. CODE § 5741.01(C)(2). There is also an identical definition under sales tax § 5739.01(E)(2).

52. Pittsburgh Plate Glass Co. v. Bowers, 104 Ohio App. 325, 148 N.E.2d 706 (1956).

53. 167 Ohio St. 151, 146 N.E.2d 727 (1957).

54. OHIO REV. CODE § 2105.10.

55. OHIO REV. CODE § 5731.12. While not an issue in the present case, it necessarily follows that a succession under the "half-and-half" statute from a step-parent who has not "adopted," the child of the predeceased spouse falls outside the three exempt classes and this successor is not entitled to any exemption under § 5731.09.

56. *In re* Hough's Estate, 152 N.E.2d 561 (Ohio P. Ct. 1958).

held that there was no abridgement, defeat or diminution of the decedent's limited estate within the meaning of the statute.[57] Unless the life estate is terminated prior to the valuation of the estate and determination of the tax,[58] the death of the life tenant prior to an actuarially determined life expectancy upon which the valuation is based does not affect the amount of the inheritance tax on that succession.

A court of appeals decision dealt with the applicability of the charitable exemption provisions as applied to a succession to an out-of-state children's home which provided a foster home for a substantial number (over one third of its group) of children from Ohio, and about 90% of this care was uncompensated. The court applied a rule of strict construction and held that this home, located in Indiana, did not qualify as a public charity carried on in substantial part within Ohio.[59] Nor could the "home" qualify as an "institution of learning" or a "public hospital."[60]

Two decisions related to the problem of the deductibility of debts of the estate: In *In Re Shaaf's Estate*,[61] realty co-owned by decedent and her surviving spouse was subject to a note and mortgage signed by both. In determining the inheritance tax only one-half of the amount of the debt was allowed as a claim against the estate. The executor excepted to this determination, and upon hearing the exception the probate court held that the full amount of the claim against the realty could be allowed against the estate. At the same time the court determined that the right of contribution from the survivor of one-half of the amount due should be listed as an asset of the estate.

The other case involved the determination of the inheritance tax upon a succession consisting of non-probate assets, a portion of which the successor used to pay certain obligations of the estate, including funeral expenses. The successor-widow contended that the use of non-probate assets to pay the valid debts of the estates rendered the succession valueless to that extent and therefore to the extent that the succession was used to pay debts it should not be subjected to that tax. The Supreme Court held[62] that the tax applied to the right to receive the property, and when

57. OHIO REV. CODE § 5731.23.

58. The only statutory exception to the determination of value under OHIO REV. CODE § 5731.23 is provided by § 5731.27 which substitutes the actual amount paid or payable to the life tenant or annuitant when the duration of the estate or annuity has become fixed prior to the determination of the tax.

59. OHIO REV. CODE § 5731.09 sets forth all the exemptions.

60. *In re* Parish's Estate, 153 N.E.2d 409 (Ohio Ct. App. 1958).

61. 152 N.E.2d 177 (Ohio P. Ct. 1956). The full amount of the indebtedness secured by the joint note and mortgage was $60,000, and the claim constituting an asset of the estate was listed at $30,000.

62. *In re* Estate of Chadwick, 167 Ohio St. 373, 149 N.E.2d 5 (1958).

there is no legal liability of the successor to use the non-probate assets to pay the debts of the decedent, the amount of the debts actually paid may not be deducted from the value of the succession.[63]

Municipal Income Taxation

A non-resident owner of rental property located in the City of Columbus brought an action for a declaratory judgment seeking to hold the municipal income tax invalid as to profits from the realty rentals. In the court of appeals[64] one of the principal contentions of the taxpayer was that tax on the income from real property was in effect a property tax, and since the state had already levied a tax on the real estate, it had thereby pre-empted the field.[65] In affirming the judgment of the trial court,[66] the court of appeals held that a municipality had the power to levy an income tax under its power to levy excise taxes to raise revenue for purely local taxes,[67] that the state had not pre-empted this field of taxation,[68] and that the tax was not discriminatory against non-residents.

Appeals From the Board of Tax Appeals

Under the Ohio Statute,[69] if the reviewing court decides that the Board of Tax Appeals' decision is unreasonable or unlawful, it shall reverse and vacate the decision or modify it and enter final judgment in accordance with the modification. This appeals provision is equally ap-

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63. In the dissenting opinion of Judge Taft there is a strenuous argument that the inheritance tax reaches only the beneficial interest of the successor. The nonprobate assets included $10,000 of joint and survivorship U. S. bonds, and the minority contended the $500 exempt from administration, all the expenses of administration, funeral expenses, and the widow's allowance be deductible from the gross value of these assets before determining the value for the succession tax.

64. Benua v. City of Columbus, 152 N.E.2d 550 (Ohio Ct. App. 1958).

65. This argument was predicated upon the famous U. S. Supreme Court case of Pollock v. Farmers' Loan and Trust Co., 157 U.S. 429 (1895), holding that a tax on the rents or income of real estate is a direct tax under the federal constitution. The court of appeals properly pointed out that the Supreme Court had held in New York *ex rel.* Cohn v. Graves, 300 U.S. 308 (1937) that the receipt of income by a resident is a taxable event, even though the income be received from real estate located in another state.

66. The trial court opinion is reported in Benua v. City of Columbus, 147 N.E.2d 148 (Ohio C.P. 1957).

67. For this the court relied upon Haefner v. City of Youngstown, 147 Ohio St. 58, 68 N.E.2d 64 (1946).

68. Angell v. City of Toledo, 153 Ohio St., 179, 91 N.E.2d 250 (1950) was considered strong authority against preemption. Ohio Finance Co. v. City of Toledo, 163 Ohio St. 81, 125 N.E.2d 731 (1955) was properly distinguished on its facts and the nature of the property (intangibles).

69. OHIO REV. CODE § 5717.04.

plicable to taxpayers and any other person affected by the Board's decisions, including public agencies. A recent Supreme Court decision[70] reversed the Board's determination in an allocation order which concerned the proceeds of the classified property taxes to be allotted to the cities, the county and the public libraries in Ross County. The Supreme Court found that the Board had acted both unreasonably and unlawfully in making the allocations in question.

Two Code sections,[71] authorizing appeals to the Board of Tax Appeals, vest a discretion in the Board to make "such investigation concerning the appeals as it deems proper." In a recent case, the Board affirmed an order of the Tax Commissioner determining the value of appellant's common stock for intangible personal property tax purposes. During the course of the hearing before the Board, it developed that the interested parties failed to present evidence on one important factor often used in determining value. The Board's entry indicates that it resorted to its "broad investigatory powers" to supply this deficiency, and the entry further indicates that it used the results of this investigation in arriving at its affirming decision. This evidence was not set out in the record certified by the board to the court of appeals. The Board's action regarding this apparently significant evidence was highly prejudicial and amounted to a denial of due process. Its decision was therefore unlawful and the cause was remanded to the Board for revaluation.[72] It is clear from this decision that the "broad investigational powers" vested in the Board do not authorize the Board to consider evidence not set out in the record. Knowledge to the appellant of the alleged facts together with an opportunity to explain or refute them is essential prior to a decision of the Board.

Priority of Federal Tax Lien

Under federal law the general lien[73] of the United States for taxes arises at the time the assessment is made.[74] This general lien is valid, even without its filing by the proper United States official, against all other liens, except those mentioned in the federal statute: mortgagees, pledgees, purchasers, and judgment creditors.[75] In *Shott v. Peoples Bank*,[76]

70. Board of Trustees v. Ross County Budget Comm'n, 168 Ohio St. 108, 151 N.E.2d 260 (1958).

71. OHIO REV. CODES §§ 5717.01 (appeal from county board of revisions) and 5717.02 (appeals from the final determination of the tax commissioner).

72. Decker v. Board of Tax Appeals, 103 Ohio App. 493, 146 N.E.2d 127 (1957).

73. INT. REV. CODE OF 1954, § 6321.

74. INT. REV. CODE OF 1954, § 6322.

75. INT. REV. CODE OF 1954, § 6323.

76. 105 Ohio App. 80, 151 N.E.2d 47 (1957).