There being no other provision for its taxation, the conclusion is that it is not taxable at all. A more accurate way of putting it, however, would be to say that its value is reached through the appraisement of the land itself. The appraiser does not estimate the value of the whole land and subtract therefrom the value of the leasehold; but he shuts his eyes to the fact that there is a lease, under circumstances like those described by you.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1853.

BANKS AND BANKING—UNCERTIFIED CHECKS OUTSTANDING ON TAX LISTING DAY MAY NOT BE DEDUCTED FROM ACTUAL BANK BALANCE OF THE DRAWER FOR PURPOSE OF TAXATION.

Uncertified checks outstanding on tax listing day may not be deducted from the actual bank balance of the drawer in arriving at his "moneys in bank" for the purpose of taxation.

COLUMBUS, OHIO, February 11, 1921.

HON. ROBERT E. MARSHALL, *Prosecuting Attorney, Sidney, Ohio.*

DEAR SIR:—Receipt is acknowledged of your letter of recent date requesting the opinion of this department, as follows:

> "On April 8, 1920, A had in bank to his credit a sum of money and issued and delivered on said date his checks, one to B for $1,880.00 and the other to C for $900.00 in payment of accounts that he owed them. This transaction was in absolute good faith in payment of goods bought by A of B and C. Taxes attached on April 11, 1920, and before the checks had been presented by B and C at the bank for payment, or in any event before they got back to the bank on which they were drawn. The question is should A return for taxation the $2,780.00 for which he had issued checks to B and C?
>
> When we ask this question we are aware of the decision in Insurance Company vs. Hynicka, 5 O. N. P. (N. S.) 255, but think this case is clearly distinguished from the Insurance Company-Hynicka case in that in the case about which we are inquiring the checks were actually issued and delivered, whereas in the Insurance case the checks had simply been written and had never been torn from the check book, sent out or delivered.
>
> We should very much appreciate hearing from you on the matter?"

Whether you have correctly interpreted the facts in *Insurance Co.* vs. *Hynicka,* the case cited, is doubted. It is true that the opinion of the superior court, reported in 5 N. P. (N. S.) 255, uses the following language:

> "The checks drawn were not used, and the drawing of them did not therefore deplete the balance or in any way affect moneys on hand."

In another place in the same opinion, however, the court speaks of the checks as "outstanding checks."

The reasoning of the court lays no stress upon the fact that the checks were not actually issued on tax listing day. The following language makes this apparent:

> "There is no question made as to the fact that the money was in the bank, and the facts leave no reasonable doubt that the money was on deposit subject to check by the company. The company alone could make the demand, and therefore it would follow under the provisions above quoted that the amount on hand subject to check should have been returned for taxation.
>
> * * * * * *
>
> The banks did not guarantee the payment of the checks drawn, and *there is no evidence of certification.* Therefore it was, that the court below held that the insurance company should be taxed upon the balances that were in bank subject to check upon the dates on which the state, under the statute, impressed its lien upon personalty. * * * This would be so whether the checks were given for the payment of bona fide debts or outstanding obligations of the company, or for loans which the company had determined to make but had not completed, or matters which were in process of completion. * * *"

But whatever doubt might exist as to the facts and the reasoning of the court from the report given in 5 N. P. (N. S.) 255 is resolved by examination of the opinion of Hoffheimer, J., at the special term, reported in 4 N. P. (N. S.) 297. Her an elaborate statement of facts is made, from which the following is quoted:

> "The question whether defendant was justified in reducing amounts in bank by deducting therefrom the outstanding checks, is dependent for its answer upon two other questions: First. Were there outstanding checks as a matter of fact? Second. Assuming that there were some outstanding checks, as matter of law, were such checks properly deductible from defendant's local balances? The 'checks' in question fall within *four* distinct classes, and the stipulation sets out these so-called checks by tables (see pp. 11 and 12 of the stipulation). * * *"
>
> (The court first considers the checks listed in tables 3 and 4, and finds that: "The evidence shows that these checks, as a matter of fact, never left the home office of the company.")
>
> "Taking up next the checks in Table 1. If we assume that these checks were actually issued by defendant company, the evidence shows that they had not been presented and paid on the tax days in question.
>
> * * * * * *
>
> We come now to consider the checks in Table 2. There are two reasons why the alleged outstanding checks in this class cannot be held to have reduced the deposits in the local banks. First. The checks were countermandable, precisely as were the checks in Table 1. Second. The checks were not *'outstanding,'* as a matter of fact. (The checks in question were drawn on New York banks, but an agreement of local banks to pay these checks was alleged. The court considers the effect of the agreement and holds that it was not equivalent to a certification.)

Further, in dealing with this class of checks Judge Hoffheimer points out that the evidence showed that they were not in the hands of the payee or his agent at tax listing time. But this is done obviously for the purpose of rebutting the claim that by reason of the arrangement between the New York bank and the local banks the checks were virtually certified. The argument is that even if they be regarded

as certified checks they could not reduce the amount on deposit in the local banks, because they had not reached the hands of the payees or their agents.

It is thus apparent that the checks listed in one of these tables (Table 1) were in exactly the same situation as the checks described in your letter. On pages 310 and 311 of 4 N. P. (N. S.) will be found Judge Hoffheimer's discussion of these facts:

> "The law * * * requires that if a person has money on deposit subject to his demand—by that is meant legal demand—he must return the same for taxation. That the money was in the banks is conceded. It is not sufficient, in order to avoid taxation on a bank deposit, to merely issue checks thereon, because a check is nothing more than an order on the fund, 'payable instantly on demand.' It is simply an *executory promise* to pay the sum specified in the check according to the terms thereof. The mere giving of the check, is not an assignment *pro tanto* of the fund. It follows, therefore, that until the check is *presented or paid or the bank in some way committed to the holder or payee* the promise may be recalled. That is to say, the drawer may countermand up to the last moment. Up to that time the funds are subject to the drawer's legal demand.
>
> (The court here cites numerous authorities and goes on in part as follows:) * * *
>
> "Now, we know the local banks were in no sense committed to the payment of these particular checks. They were not certified, nor were they presented for payment on or before the tax days in question. In *Ambach vs. Sims, Treasurer,* the precise question was determined. In that case, Bigger, J., charged the jury as follows:
>
> 'Some evidence has been introduced as to certain balances in the bank to the credit of the defendant, but the defendant testified that he had given checks against these amounts. The law in such cases is that money in bank subject to be drawn out on the check of a person depositing, is taxable so long as it remains in bank subject to his order, and the giving of checks, unless they were cashed, would not exempt it from taxation.'
>
> The jury found for defendant. On error, the circuit court of Franklin county * * * reversed the judgment but sustained the above charge, and in the judgment the court said:
>
> 'The verdict and judgment below should have been in favor of the plaintiff as to the taxes upon the balances said to have been in bank subject to the check of the defendant on the dates on which the taxes upon personalty became a lien.'
>
> (The above case is unreported, but the printed record of the supreme court proceedings is before me).
>
> Affirmed by Supreme Court 71 O. S. 545.
>
> So, that, even if the checks were bona fide and given for outstanding obligations, it would make no difference, because debts are not deductible from bank deposits (Payne vs. Watterson, 37 O. S. 131). * * *"

I am unable to distinguish the facts and reasoning of the court as quoted from the opinion of Judge Hoffheimer from the question which you present. It will be observed that the court at general term affirmed the judgment of this special term, saying at page 259 of 5 N. P. (N. S.):

> "We have not gone into an extended discussion of the facts appearing in

the various tables, but the principle involved is, in our judgment, *applicable to the entire situation* as developed by the facts before us."

The facts were necessarily the same in all the courts because the case was heard on a stipulation of the parties as to the facts.

It is therefore the opinion of this department that A should return for taxation the sum of money on which he had issued checks to B and C, such checks not being certified or presented for payment prior to tax listing day.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1854.

MUNICIPAL CORPORATIONS—ORDER OF SALE OF MUNICIPAL BONDS.

1. *Municipal bonds to be sold by the financial officers of a municipality, should be first offered to the trustees of the sinking fund of said municipality, secondly to the state liability board of awards (now the industrial commission), and thirdly to the board of commissioners of the sinking fund of the city school district prior to their offering at public sale.*

2. *Sale of such bonds other than to the trustees of the sinking fund of the city, the industrial commission or the board of commissioners of the sinking fund of the city school district should be to the highest bidder and advertised as provided in section 3924 G. C.*

COLUMBUS, OHIO, February 11, 1921.

The Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Receipt is acknowledged of your communication under date of January 19, 1921, requesting an opinion on the following:

> "We are enclosing herewith question submitted by the city auditor to the city solicitor at Lorain, Ohio, and in view of the provisions of section 4169 G. C., we respectfully request your written opinion upon the following matter:
>
> Question 1. May the financial officers of a municipality, when they have bonds for sale, sell such bonds to the council of the municipality for the purposes set forth in section 4169 G. C., previous to offering to the sinking fund of the city, of the school district, the state liability board of awards and advertising for bids?
>
> Question 2. If not, may they be sold to the council before advertising for bids?"

The letter enclosed from the city auditor of Lorain, reads as follows:

> "Some time ago, the council acting as cemetery trustees, was given the sum of $5,000.00 by the department of public service from the cemetery fund to invest and hold in trust for the benefit of the cemetery. Some time afterwards the council passed a resolution authorizing the clerk of council to purchase $5,000.00 worth of deficiency bonds of the city, which