taxation to which it looks forward, and in security for which the temporary tax is exacted, is to take place, or may take place, in the estate of the person successions from whom are being taxed.

Matter of Howe, 83 N. Y. Supp. 825; 176 N. Y. 570;
Matter of Burgess, 204 N. Y. 265;
Matter of Clarke, 78 N. Y. Supp. 869.

But because of the decisions commented upon in the earlier portion of this opinion, it came to be held that the *possibility* that the power might not be exercised, or that the effect of its exercise might be waived by beneficiaries entitled to the estate covered by it in the absence of its exercise, was a contingency the happening of which might give rise to successions in the estate of the donor; so that this possibility should be taxed immediately at the highest possible rate. Matter of Burgess, supra.

But in Ohio, the statute, assumed to be constitutional, makes the estate subject to a power always a succession in the estate of the donee and never a succession in that of the donor. That being the case, the authority of the earlier New York decisions is sufficient to support the conclusion that no tax under section 5343 is to be assessed. The section commences with a condition implicit in the words "When, upon any succession," and this condition is not satisfied because there is no "succession" in the estate under determination.

In a letter accompanying the formal request for opinion the Commission states that apprehension is felt in some quarters lest successions to which paragraph 4 of section 5332 is applicable may escape inheritance taxation, especially where the donor and the donee of the power are both non-residents. This apprehension may be well founded on practical grounds. Legally, however, there should be no fear, as the question is to be determined when it arises in the estate of the donee of the power; and if at that time the property is located in Ohio, it will be taxable. State vs. Probate Court, 124 Minn. 508; In re Warden, 157 N. Y. Supp. 1011; and Walter vs. Treasurer, 221 Mass. 600.

Of course, where the property consists of intangibles and the donor was a resident of Ohio who created the power by will and vested it in a donee who is a non-resident of Ohio, the result is that the succession does escape the Ohio inheritance tax; but conversely if the donor of the power with respect to similar property was a non-resident so that no Ohio taxation could be predicated upon any succession in his estate but the donee is a resident and exercises the power of appointment, especially by will, it will become a succession taxable in Ohio. Moreover, questions of this sort are most likely to be met with respect to real estate, as to which there is not so much danger of practical evasion or avoidance.

Respectfully,
JOHN G. PRICE,
Attorney-General.

3238.

DELINQUENT REAL ESTATE—WHEN CERTIFIED TO AUDITOR OF STATE AS DELINQUENT—TAXES AND PENALTIES NOT PAID FOR FROM SUCCESSIVE YEARS—NON-PAYMENT OF ASSESSMENTS NOT SUFFICIENT—WHEN COUNTY TREASURER AUTHORIZED TO INCUR EXPENSES OF PREPARING ABSTRACT OF TITLE—WHEN TAXED AS COSTS—SEARCH TO DETERMINE PROPER PARTIES BY COUNTY TREASURER'S ASSISTANTS.

Land may not be certified to the Auditor of State as delinquent under section 5718 of the General Code unless the taxes and penalties thereon have not been paid for four successive years after it has been originally certified as delinquent; the non-payment of assessments during such period is not sufficient.

The county treasurer is impliedly authorized to incur expenses necessary in bringing the action provided for by section 5718 of the General Code; and if the preparation of an abstract of title for the purpose of ascertaining who are proper parties is in fact necessary, such expense is authorized and may be paid in the first instance out of the county treasury on the allowance of the county commissioners. By subsequent court order under section 5713 of the General Code the expense of making such abstract may be taxed as costs, which when made from the sale of the premises are to be paid into the county treasury.

Where the prepartion of an abstract is not necessary but some search of the records or other ascertainment of facts is necessary for the purpose of determining who are the proper parties, such services should be performed by deputies, or assistants employed by the county treasurer under the county officers' salary law.

COLUMBUS, OHIO, June 20, 1922.

HON. JOHN R. KING, *Prosecuting Attorney, Columbus, Ohio.*

DEAR SIR:—Your letter of recent date requests the advice of this department as follows:

> "Under section 5722 it is provided that the state, by the Attorney-General, may bring its action for foreclosure of any delinquent lands upon which the taxes, assessments, penalties and interest have not been paid for a period of four years, in the county in which the land therein described is situated, etc. Assuming, however, that the prosecuting attorneys of the several counties, in which lands are situated upon which taxes, assessments, penalties and interest have not been paid for a period of four years, will be designated by the Attorney-General to collect such taxes, assessments, penalties and interest, and anticipating the necessity for bringing in this county some four hundred suits as provided in sections 5704 to 5727 of the General Code, we have several questions which we desire to submit to you for decision, and which are of general interest throughout the state.
>
> 1. Throughout the act the words 'taxes, assessments, interest and penalties' are referred to. Is it the duty of the county auditor to certify to the State Auditor, under Section 5718, all tracts of land, lots, etc., upon which assessments alone have been unpaid for four consecutive years? By assessments we mean such as street assessments, etc., which are unpaid, but the general taxes have been paid and concerning which taxes there are no delinquencies. In other words, must there be a delinquency in the payment of the general taxes charged against such real estate before the Auditor is required to certify the delinquency to the auditor of state?
>
> 2. It is apparent that a search of the records must be made for parties interested in the premises. Section 5713 provides that there shall be taxed by the court as costs in the foreclosure proceedings instituted on the certification 'the cost of an abstract or certificate of title to the property described in said certification, if the same be required by the court, to be paid into the general fund of the county treasurer.' The lien for taxes, being prior to all other liens except costs, it might be said that no other parties interested in the lands, save the owners thereof, are necessary parties, but it

seems to us that in order to convey a good title to the premises, all parties of interest must be known and joined as parties, the same as the practice which now obtains in foreclosure proceedings on mortgages or other liens. Few purchasers could be found who could or would pay anything for the premises unless all parties interested were brought before the court and their rights determined therein. Therefore, it seems necessary to have the abstract prior to instituting the suit. Is there authority to employ an abstracter prior to bringing suit? If so, by whom may he be employed and from whence will he be paid?"

This department is unable to agree with the assumption in the first paragraph of your letter to the effect that section 5722 of the General Code governs all the foreclosure proceedings provided for by section 5718.

Enclosed will be found copies of several opinions of this office dealing with these statutes, one of which you will observe is responsive to this question.

The answer to your first question is to be sought for throughout the whole chapter of which the sections mentioned by you are a part. Section 5705 of the General Code provides as follows:

"Delinquent lands as defined in this act shall mean all lands upon which the taxes, assessments and penalties have not been paid for two consecutive semi-annual tax paying periods."

This section leaves the exact answer to your question somewhat in doubt. The phrase "taxes, assessments and penalties" occurring therein can be read either distributively or cumulatively. However, section 5706 and succeeding sections, which was amended 109 O. L. 247, and which regulates the rates of advertising, contains the following sentence:

"A greater sum than one-half of the taxes and penalties, due on any tract, lot or part of lot, shall not be allowed for advertising such tract, lot or part of lot."

This sentence is followed by the following:

"Such property shall not be published in a list as delinquent, if the taxes, assessments, and penalty thereon have been paid before the twentieth day of December."

So that it is apparent that the word "taxes" as used in the first of these two sentences does not include assessments; hence, it would seem that if all taxes and penalties thereon had been paid on a given tract or lot of land, but some special assessments charged thereon were unpaid, the section fails to provide for any limitation for advertising.

Again, section 5706 enacted as the third section of the original act, and possibly repealed by implication when section 5706, as partially quoted above, was enacted 108 O. L. Pt. 1, p. 405, uses the words "taxes and penalties charged thereon agreeable to law," although the phrase "taxes, assessments and penalties" is used in the same section.

Section 5708, being section 5 of the original act, provides as follows:

"Before advertising such list of delinquent lands and lots, the county auditor shall compare it with the duplicate in the office of the county

treasurer, and strike therefrom all lands or town lots upon which the taxes, assessments and penalty of the preceding year, with the taxes and assessments of the current year, have been paid, and advertise the remainder as provided in this chapter."

From this language it would seem reasonably inferable that the non-payment of assessments only would make land delinquent. So that thus far we have intimations in both directions.

Section 5712, which is somewhat lengthy, provides for the making of the original delinquent land tax certificate

"for each tract of land * * * on which the taxes, assessments and penalty have not been paid, describing * * * the amount of taxes, assessments and penalty thereon due and unpaid."

Here again we have the same question.

Then comes section 5713 which provides as follows:

"The state shall have a first and best lien on the premises described in said certification, for the amount of taxes, assessments and penalty, together with interest thereon at the rate of eight per cent per annum, from the date of delinquency to the date or redemption thereof, and the additional charge of twenty-five cents for the making of said certification, and sixty cents for advertising. *If the taxes have not been paid* for four consecutive years, the state shall have the right to institute foreclosure proceedings thereon, in the same manner as is now or hereafter may be provided by law, for foreclosure of mortgages on land in this state, and there shall be taxed by the court as costs in the foreclosure proceedings instituted on said certification, the cost of an abstract or certificate of title to the property described in said certification, if the same be required by the court, to be paid into the general fund of the county treasurer."

Observe here the significant change of expression. The lien covers "the amount of taxes, assessments and penalty" with interest, but the right of forclosure is predicated upon the non-payment of taxes only, and it is impossible to suppose that the legislature intended to use this word in a sense broad enough to include all the other words employed in the preceding sentence.

Section 5717 of the General Code provides as follows:

"No proceedings in foreclosure, under this act, shall be instituted on delinquent lands, unless the taxes, assessments, penalties and interest have not been paid for four consecutive years."

Here again we have a very ambiguous expression. If this enumeration of unpaid charges is to be read cumulatively, then if the assessments were paid but the taxes were not, no proceedings in foreclosure could be instituted, which would be a direct contradiction of section 5713. But if the clause be read distributively, the same consequence follows. In other words, we have in section 5713 a declaration of the right to institute foreclosure proceedings if the taxes have not been paid for four years; and in section 5717 the declaration that no proceedings shall be instituted unless the taxes, assessments, penalties and interest have not been paid for four years. No way has been found to reconcile these two statements taken literally. But it is possible to reconcile them if they are read as follows:

"If the taxes have not been paid for four years there shall be a right of foreclosure, but no proceedings in foreclosure shall be instituted unless the taxes (together with the other charges carried on the duplicate against the delinquent lands), have not been paid for four consecutive years."

Then comes section 5718 which is the section mentioned by you. It provides in part as follows:

"It shall be the duty of the county auditor to file with the Auditor of State, a certificate of each delinquent tract of land, city or town lot, at the expiration of four years, upon which the taxes, assessments, penalties and interest have not been paid for four consecutive years."

This section, it will be observed, merely follows one of the forms of expression which has been used in the preceding sections.

In connection with all these sections, sections 5678 and 5679 may be referred to. It will not be necessary to quote these sections. They provide for the charging of the penalty on account of delinquency in the payment of real estate taxes. They contain no reference to assessments.

Section 3892 of the General Code is one of the sections dealing with special assessments, and, generally speaking, governs such assessment made by municipal corporations. It provides as follows:

"When any special assessment is made, has been confirmed by council, and bonds, notes or certificates of indebtedness of the corporation are issued in anticipation of the collection thereof, the clerk of the council, on or before the second Monday in September, each year, shall certify such assessment to the county auditor, stating the amounts and the time of payment. The county auditor shall place the assessment upon the tax list in accordance therewith and the county treasurer shall collect it in the same manner as other taxes are collected, and when collected pay such assessment to the treasurer of the corporation, to be by him applied to the payment of such bonds, notes or certificates of indebtedness and interest thereon, and for no other purpose. For the purpose of enforcing such collection, the county treasurer shall have the same power and authority as allowed by law for the collection of state and county taxes."

This section is older in point of time than the sections immediately under examination. In and of itself it does not create a lien in favor of the municipal corporation or of the state. But this is provided for by section 3897 of the General Code, the first sentence of which provides as follows:

"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 parcls of land assessed."

This lien, however, is a lien in favor of the municipal corporation. It is not the state's lien, while the sections immediately under examination, and particularly section 5713 above quoted, confer a lien on the state for the assessments as well as the taxes. But where the taxes have been paid one of the questions which arises in connection with your inquiry is whether the state's lien provided for by section

5713 attaches on account of the non-payment of assessments. The presumption would be to the contrary, as there would be no reason for giving the state a lien for the purpose of collecting a charge which is primarily a personal liability in favor of a municipal corporation, though vested for collection purposes in the county treasurer. Railway Co. vs. Bellaire, 67 O. S. 297.

Similar observations might be made with respect to other assessment statutes, but it is not believed to be necessary to pursue the subject further. The purpose of the certification to the Auditor of State and the proceedings under Section 5718 is to secure the foreclosure of the lien. Section 5713 shows that this purpose can be accomplished only "if the taxes have not been paid for four consecutive years." For this reason principally, and for others which have perhaps been suggested in the foregoing discussion, it is the opinion of this department that the state's claim for taxes is the essential thing, and where the state has no such claim for taxes, it has no lien for assessments. So that if the taxes and penalties have been paid, but the assessments have not been paid, the procedure outlined in section 5718 of the General Code is not to be followed.

Your second question it is believed must be answered by a consideration of section 5713 which has been quoted, and which contains the provision stated in your question. It will be observed that the cost of an abstract or certificate of title can only be taxed as costs in a foreclosure proceding if the same is required by the court; but that when so required and taxed, the costs when recovered are to be paid into what is designated as "the general fund of the county treasurer" by which it is supposed the legislature meant the general county fund. The inference would then be that in cases in which the court had required the preparation of an abstract, the county treasurer who is the proper party plaintiff would be authorized to procure preparation of an abstract and to advance compensation to the abstracter out of the general county fund as an expense of his office, securing reimbursement from the costs in the case. Your question, however, is as to whether or not the county treasurer is authorized to employ an abstracter for the purpose of preparing foreclosure proceedings and ascertaining proper parties, before such actions are brought, and to pay for the services of the abstracter out of the general county funds in advance of any order or requirement of the court.

No express statutory authority to make this expenditure of public moneys has been found. This lack of express statutory authority, however, does not constitute a sufficient basis for final answer to your question; for we still have to deal with the question as to whether the power and indeed the duty of the county treasurer to bring a foreclosure proceeding and make the proper parties carries with it by implication the authority to incur this expense out of public moneys.

At the outset, it is to be observed that whatever implied power is found must reside in the county treasurer upon whom the duty of filing the petition is imposed by section 5718 of the General Code. It is true, as has been held in one of the other opinions, copies of which are herewith enclosed, that the prosecuting attorney must represent the county treasurer in such actions, and that in practice the burden of ascertaining who are proper parties, etc., would be most appropriately cast upon the prosecuting attorney. That is to say, the examination of the title for the purpose of ascertaining what persons are shown thereby to have some color of claim to an interest in the premises which are the subject of the foreclosure action is a legal problem. However, the inference from section 5713 is that the county treasurer is to make the expenditure in the first instance when the court requires the preparation of an abstract. So that it is reasonable to assume that whatever implied power to encumber the public moneys may be found would, as stated, have to

reside in the county treasurer, though the actual expense might be incurred under the direction of the prosecuting attorney.

If such implied power exists, it must be derived from the express power to bring suit. It has been held that an express power to sue and be sued gives rise to an implied power to employ counsel and pay him compensation out of public funds where the circumstances were such that the statutes did not provide for furnishing legal counsel. Board of Education vs. Board of Education, 4 O. App. 165. In the present case, of course, the law furnishes legal counsel for the county treasurer, but it also requires him to bring a suit of this character and to make the necessary parties without providing an express reimbursement of the expenses necessarily incurred in ascertaining who are the proper parties. Formerly, of course, the county treasurer would have brought such action as this in a sense in his own right, being entitled to retain for his own use the collection fees. Since the passage of the county officers' salary law, however, fees are for the use of the county, and the law, sections 2977 to 3004, inclusive, contains no express authority to receive reimbursement for expenses, save with respect to the sheriff and the prosecuting attorney.

We have then this situation: The county treasurer is required to bring a foreclosure proceeding making the necessary parties. No part of the proceeds of a successful action will inure to his personal advantage; such fees as he may receive for collection will inure to the benefit of the county. In order to prepare his cases properly it is necessary for him to have an abstract or a search of the records made. The expense of such service is not properly chargeable to the expense fund of the prosecuting attorney because in the event that an allowance of such expense is made as costs, it inures to the benefit of the county treasurer. Therefore, it must either be held that there is no authority at all for incurring the expense, in the absence of an order of court made after the action is brought, or it must be held that the power to charge the public funds with this expense resides with the county treasurer by necessary implication. Having regard to the consequences of the two possible interpretations, it is the opinion of this department that the implied power exists, and that the county treasurer is authorized to make the employment (though in practice of course the work should be done under the supervision of the prosecuting attorney); and that payment for such service should be made out of the county treasury on the warrant of the county auditor and the allowance of the county commissioners as a claim against the county. Then if the court requires the abstract to be made and orders the cost thereof to be taxed in the costs of the case, the abstract already made may be furnished under such order of the court, and the general county fund may be reimbursed out of the costs when collected.

It may be that there is some doubt as to the propriety of the procedure just suggested in all of its details. But there is in the opinion of this department no doubt that the treasurer whose duty it is to bring the suit and to ascertain for the use of the prosecuting attorney all the facts upon which the prosecuting attorney must base his action may by his official force, secured and established in the regular way, discharge these duties. In other words, it must be conceded that the treasurer would be in the line of his duty if he should personally by examination of records or personal interview ascertain the facts on the basis of which the legal conclusion as to who would be the proper parties would be predicated. What he could lawfully do himself he could delegate to a deputy, clerk or assistant. Therefore, it seems to follow that by designating one of his regular deputies, clerks or assistants to search the records, etc., or, within the allowance made by the county commissioners, by appointing a special deputy, clerk or assistant to do this work,

the treasurer could secure whatever information might be necessary in a given case. This would seem to be an unquestionably lawful procedure for ascertaining the facts which have to be disclosed. It is perhaps a little less convenient than the procedure first above outlined, in that ordinarily, at least, the compensation of deputies, assistants or other employes of a county office is a salary payable monthly (see Section 2981, General Code), though it is not clear that this is required. So that it might be somewhat impracticable to determine the exact cost of making an abstract by the use of a regular county employe in the cases in which by subsequent order of court the cost of making such abstract is allowed as a part of the costs of a case. This may not, however, afford in practice as much difficulty as may at first sight appear; while it is rather clear that the method now under discussion has the merit of unquestioned legality.

It may be added that from a strictly technical point of view a distinction might be drawn between the service of ascertaining the facts through a search of the records, etc., and the preparation of a formal abstract. In the first place, it seems doubtful to this department that a formal abstract would be necessary in all cases, while it is reasonably clear that some slight service of the former character would be necessary in any case. In the second place, the preparation and delivery of an abstract is not an unmixed personal service, inasmuch as something has to be prepared and delivered, whereas services of the former character are clearly the same kind of services as would be rendered by any assistant or deputy in a county office. It has therefore seemed impracticable to this department to attempt to draw a hard and fast line and to say that all services that might conceivably be required or deemed necessary are as a matter of law in the category of such services as must be provided for through the employment of deputies, assistants, etc., under the county officers' salary law. It does seem clear, however, that a considerable proportion—perhaps the greater part—of the services that will in practice be found necessary in order to enable the prosecuting attorney to make the proper parties, will be such services as can, and therefore should, be performed by regular deputies and assistants.

Respectfully,
JOHN G. PRICE,
Attorney-General.

3239.

APPROVAL OF SYNOPSIS FOR PROPOSED LAW TO PROVIDE FOR OLD AGE PENSIONS.

COLUMBUS, OHIO, June 20, 1922.

HON. GEORGE B. OKEY *and* HON. TIMOTHY S. HOGAN, *Columbus, Ohio.*

GENTLEMEN:—This department has received from you a synopsis of a proposed law to be submitted to the General Assembly, in form entitled:

> "A bill to provide for the payment, by the state, of pensions to aged persons under certain conditions,"

which said synopsis reads as follows:

"Synopsis of Proposed Law.

> To provide for the payment, by the state of Ohio, of pensions to persons of the full age of sixty-five years or upwards, while in the state of Ohio,