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## APPROVAL, CONTRACTS FOR HIGHWAY IMPROVEMENT IN FRANKLIN AND LICKING COUNTIES, OHIO.

COLUMBUS, OHIO, March 2, 1933.

HON. O. W. MERRELL, *Director of Highways, Columbus, Ohio.*

185.

## REAL ESTATE APPRAISERS—JUDICIAL SALE—COMPENSATION LIMITED TO SUM OF ONE DOLLAR PER DAY—COURT MAY SET HIGHER FEE.

## SYLLABUS:

1. Section 3006, General Code, by reason of the irreconcilable inconsistency of its provisions with those contained in Section 11714, General Code, supersedes the provisions of such latter section, in so far as it purports to fix the compensation for appraisers of real estate sold as on execution.

2. By virtue of the provisions of Section 3006, General Code, appraisers of real estate in a judicial sale as on execution are entitled as compensation for their services to the sum of one dollar per day.

3. Since appraisers of land in foreclosure sales are required to be appointed by the officer making the sale, Section 3006-1, General Code, grants no authority to a court of common pleas to fix a higher rate of compensation therefor.

COLUMBUS, OHIO, March 3, 1933.

HON. RAY B. WATERS, *Prosecuting Attorney, Akron Ohio.*

DEAR SIR:—I am in receipt of your request for opinion, which reads in part, as follows:

“The Sheriff of Summit County says that he is having considerable trouble in getting appraisers to appraise real estate in foreclosure actions under the present scale of paying appraisers one dollar each per parcel of real estate appraised, and has asked that this office request from your office, an opinion as to his authority or to the court’s authority in setting appraisers’ fees. General Code Section 11714 sets the fee at fifty cents per day. General Code Section 3006 names a fee of two dollars per day in certain kinds of appraisal, and Section 3006-1, gives the court authority in certain cases to set the fee of appraisers.

\* \* \* \* \*

Under this system the Sheriff informs me that sometimes the appraisers have to drive from ten to fifteen miles and spend time in finding the parcel of land in question, and that they do not receive enough to pay for their trouble.

\* \* \* \* \*

Your opinion on this matter will be of valuable assistance to us.”

Your inquiry is specifically concerning appraisal fees accruing in a sale arising out of an action for the foreclosure of a mortgage.

Since the statutes governing the conduct of a sale in the foreclosure of mortgages are not particularly clear, it might be well to refer briefly to the development of the method of conducting those sales as contained in the decisions of the Supreme Court. The procedure in a foreclosure sale in Ohio is defined more by judicial decision than by statute. In so far as such sales are governed by statutory law, they are governed by the statutes concerning sales as on execution.

In *Wiles vs. Baylor*, 1 Ohio 509, the court held that the policy of the Ohio law required all equity sales of real estate to be made in accordance with the requirements of the statutes with reference to execution. See also *Anonymous*, 1 Ohio, 235; *Higgins vs. West*, 5 Ohio 554.

Considerable difficulty arose from the earlier decisions of the court in their attempt to follow this rule, especially since the statute required the land to be appraised at its value and sold for not less than two-thirds of the appraised value. This difficulty arose particularly when a junior mortgagee sought to foreclose his mortgage and there was, and is, no statute requiring the foreclosure of the prior mortgage in such action. The earlier decisions held that even though such mortgagee was foreclosing subject to a prior lien the premises must be appraised at their total value and the sale be for not less than two-thirds of that value even though such sale was subject to the prior lien. *Baird vs. Kirtland*, 8 Ohio 21; *Seymour vs. King*, 11 Ohio, 444; *Canby vs. Porter*, 12 Ohio, 79.

There was at that time no statute specifically requiring mortgage foreclosure sales to be conducted in the same manner as execution sales nor does such statute exist at the present time. No mention of "orders of sale" was made in the execution statutes prior to the year 1879. In 1879, the words "order of sale" first appeared in what is now Section 11867, General Code. In 1880, the words "orders of sale" were inserted in the sections which are now Sections 11654, 11695, 11696 and 11697, General Code.

The effect of such addition of language is to lend additional evidence that the legislative intent was to adopt the judicial interpretation placed upon such statutes as controlling judicial sales and to correct the defect hereinbefore pointed out with reference to the foreclosure of a junior lien subject to a prior mortgage lien. It therefore appears that sales in foreclosure of a mortgage are conducted pursuant to the execution statutes of Ohio and in the same manner as an ordinary execution sale of real property except to such extent as those statutes permit a departure therefrom. (For a more detailed discussion of the reasons underlying the foregoing conclusion, see 30 O. L. R. 3.)

The sections of the General Code with reference to sales as on execution are contained in Chapter 1, Division V of Part Third thereof. Section 11714, General Code, referred to in your inquiry, is contained in such chapter. Such section reads:

"Each appraiser of real estate under the provisions of *this chapter* shall be paid fifty cents per day for his services, to be collected on the execution by virtue of which the property appraised was levied on." (Italics the writer's.)

It is self-evident that the language of this chapter refers to such Chapter 1, and is applicable to all sales of real estate on execution, unless otherwise provided by statute. By reason of the established practice of conducting the sale in a fore-

closure action in a similar manner such Section 11714, General Code, would be equally applicable.

In Section 3006, General Code, also referred to in your inquiry, the following language is contained:

“Except when otherwise provided, each person called by an officer to appraise real or personal property on execution, replevin or attachment, or to fix the value of exempt property shall receive one dollar each day.”

This section is contained in Chapter 2 of Division III, Title X of Part First of the General Code, which chapter purports to lay down the fees of various officials which may be taxed as part of the costs. The sentence quoted above was, before the adoption of the General Code, contained in Section 1300, Revised Statutes and read:

\* \* “and persons called by an officer to appraise real or personal property on execution, replevin or attachment, or to fix the value of exempted property, shall receive one dollar per day, *except as otherwise specially provided.*” (Italics, the writer’s.)

The procedure on execution requires the sheriff to have the property levied upon and appraised by three disinterested freeholders. Section 11672, General Code. All of the provisions of statute with reference to the appraisal of property on execution are contained in the chapter of which Section 11714, General Code, is a part. The provisions of Section 3006, General Code, must therefore refer to the appraisal of real property seized upon execution issued by virtue of the provisions of that same chapter. If so, there is such conflict between the language of Sections 3006 and 11714, General Code, as would render meaningless that part of Section 3006 quoted above since the provisions of Section 11714, General Code, can not apply to all sales on execution and provide a fee of fifty cents per day for each appraiser and Section 3006, General Code, provide a fee of one dollar per day for the same appraisals. As is stated by the Court of Appeals for Hamilton County in the case of *Harig vs. McCutcheon*, 23 O. App. 500, Syllabus 3:

“Court, in construing a statute, cannot read any provision into or out of a statute.”

See also *Froelich vs. Cleveland*, 99 O. S. 376. An examination of the time of enactment of Sections 3006 and 11714, General Code, discloses that Section 11714, General Code, was enacted in the year 1853 (51 O. L. 57) while Section 3006, General Code, was enacted in the year 1908 (99 O. L. 26). Such section is therefore the later expression of the legislative will. Section 11714, General Code, is a portion of an act having for its purpose the establishment of a method of levying executions on real property, while the act of which Section 3006, General Code, is a part, has for its apparent purpose the establishment of a system of fees which may be taxed as a part of the costs in any action in the Court of Common Pleas.

The act of which Section 3006, General Code, is a part is therefore a special provision and the provision contained in the act of which Section 11714, General Code, is a part, is a general provision.

While there is in the law a strong presumption against the repeal of a statute by implication, there is also in the law a definite rule that:

"An act of the legislature that fails to repeal in terms an existing statute on the same subject matter must be held to repeal the former statute by implication if the latter act is in direct conflict with the former, or if the subsequent act revises the whole subject matter of the former act and is evidently intended as a substitute for it."

*Goff vs. Gats*, 87 O. S. 142, Syllabus 1. See also *Cleveland vs. Purcell*, 31 O. App. 495.

The act in 73 O. L. 127, of which Section 3006, General Code, is a part, has for its purpose the revision or re-establishment of a complete schedule of fees and costs in all Common Pleas Court proceedings. It purports to revise the whole subject matter with reference to such items. The provisions of Section 3006, General Code, are in direct conflict with the provisions of Section 11714, General Code, and I am therefore of the opinion that Section 3006, General Code, supersedes the provisions of Section 11714, General Code, in so far as such section purports to establish the rate of compensation for appraisals arising out of sales as on execution in the Courts of Common Pleas.

Your inquiry further suggests that the provisions of Section 3006-1, General Code, might authorize the court to fix a fee to be paid to appraisers in sales as on execution by means of an entry in his journal or otherwise. Such section reads:

"That in any cause, matter or proceeding arising in any court of record in this state where appraisers, commissioners or arbitrators *are appointed by such court* to make or procure to be made an appraisal or valuation of any property, real or personal, such appraisers, commissioners or arbitrators shall receive on application to such court, such compensation as the court may deem reasonable and proper in addition to the amount specified by law and such compensation shall be taxed in the costs of such cause, matter or proceeding in the same manner as other costs are now taxed." (Italics, the writer's.)

Section 11672, General Code, provides the method for the selection of appraisers in a sale as on execution. Its language is:

"\* \* *the officer who makes the levy shall call an inquest of three disinterested freeholders*, residents of the county where the lands taken in execution are situated, and administer to them on oath impartially to appraise the property so levied upon, upon actual view. They forthwith shall return to such officer, \* \* an estimate of the real value of the property in money." (Italics, the writer's.)

Since Section 3006-1, General Code, specifically limits the additional fees to appraisers to those appointed by the court, and further, since there is no provision of law for the appointment of appraisers in a foreclosure action or execution sale by the court, it is my opinion that Section 3006-1, General Code, contains no authority for the payment of the additional compensation therein provided to appraisers in a foreclosure sale.

Specifically answering your inquiry it is my opinion that:

1. Section 3006, General Code, by reason of the irreconcilable inconsistency of its provisions with those contained in Section 11714, General Code, supersedes the provisions of such latter section, in so far as it purports to fix the compensa-

tion for appraisers of real estate sold as on execution.

2. By virtue of the provisions of Section 3006, General Code, appraisers of real estate in a judicial sale as on execution are entitled as compensation for their services to the sum of one dollar per day.

3. Since appraisers of land in foreclosure sales are required to be appointed by the officer making the sale, Section 3006-1, General Code, grants no authority to a Court of Common Pleas to fix a higher rate of compensation therefor.

Respectfully,

JOHN W. BRICKER,  
*Attorney General.*

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APPROVAL, BONDS OF CITY OF BEDFORD, CUYAHOGA COUNTY,  
OHIO—\$10,500.00.

COLUMBUS, OHIO, March 3, 1933.

*Retirement Board, State Teachers Retirement System, Columbus, Ohio.*

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TAX AND TAXATION—WHERE TAX COMMISSION MAKES PER-  
CENTAGE REDUCTION OF REAL ESTATE TAXES IN A COUNTY—  
HOW SUCH AFFECTS REAL ESTATE OWNED BY PUBLIC UTILI-  
TIES.

**SYLLABUS:**

*When the Tax Commission, acting under authority of Section 5613, General Code, makes an order reducing by percentage rate the assessed valuation of real property generally in a county and the taxing districts therein, such action, without further order of the Tax Commission, is effective as to such real property of a public utility, located in such county and taxing districts, as is assessed for taxation by the county auditor under the authority conferred upon him by Sections 5548 and 5548-1, General Code.*

*As to real property of a public utility, other than such real property of the utility as is assessed for taxation by the county auditor under Section 5548 or 5548-1, General Code, the Tax Commission is not authorized to make any order reducing by percentage rates the previously assessed valuation of this kind of property of public utilities generally in any tax district or districts; but in each case and as to each public utility it is the duty of the Tax Commission to assess this property of the public utility so that, as compared with the valuation of other real property in the taxing district or districts where the real property of the*