

taxes, penalties, assessments then due, and interest thereon, which are a lien on the real estate sold, at the time of the sale.

2. A mortgagee who purchases real estate at a mortgage foreclosure sale, may not under the provisions of Senate Bill No. 359 of the 91st General Assembly, elect to pay one-tenth of the delinquent taxes and assessments on such real estate."

The same interpretation of Amended Senate Bill No. 3 causes no conflict with Sections 5719 and 5692, *supra*. It applies with equal force to all foreclosure actions, whether for delinquent taxes or mortgages, and regardless of whether the lands involved have been certified delinquent and entered on the foreclosure list or not.

It is therefore my opinion that Amended Senate Bill No. 3 was enacted for the purpose of encouraging the payment of delinquent taxes and assessments and its provisions are available to any of the persons named in Section 2672-1 thereof, including lienholders, at any time prior to the date such delinquent lands are sold at judicial sale. The provisions of the act are not available to the purchaser after sale. Such judicial sales include mortgage foreclosures as well as tax lien foreclosures, and it is immaterial whether or not such lands have been certified delinquent and entered upon the foreclosure list prior to the date of such sale.

Respectfully,

THOMAS J. HERBERT,
Attorney General.

1575.

TOWNSHIP TRUSTEES—NO AUTHORITY UNDER SECTION 3427-1, G. C. TO EXPEND TOWNSHIP FUNDS TO CONSTRUCT SWIMMING POOL IN PARK—OWNERSHIP AND CONTROL IN VILLAGE OF SUCH TOWNSHIP—OFFICES INCOMPATIBLE—TOWNSHIP TRUSTEE AND MEMBER, BOARD OF PARK COMMISSIONERS OF TOWNSHIP—SECTIONS 3415 ET SEQ., G. C.

SYLLABUS:

1. *Township trustees are without authority under Section 3427-1, General Code, or any other section, to expend funds of a township for the purpose of constructing a swimming pool in a park owned and under the control of a village located in such township.*

2. *The offices of township trustee and a member of the board of park commissioners of a township created under the provisions of Section 3415, et seq., of the General Code, are incompatible.*

COLUMBUS, OHIO, December 14, 1939.

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

DEAR SIRs: Receipt is acknowledged of your letter requesting the opinion of this office, which letter reads:

“May we respectfully request your opinion upon the following question:

The council of a village is contemplating the purchase and improvement of a tract of land for park purposes.

In the event of such purchase, would the trustees of the township wherein the village is located, have authority under Section 3427-1, General Code, to expend funds of the township for the purpose of constructing a swimming pool in such park?

If a park district is created under the provisions of Sections 3415 et seq., General Code, may persons holding the office of trustee of the township be appointed by the Common Pleas Court to serve as the Board of Park Commissioners of such park district?”

I. In so far as your first question is concerned, your attention is directed to Opinion No. 1556, rendered by this office to the Honorable Floyd A. Collier, Prosecuting Attorney of Wood County, under date of December 9, 1939, the syllabus of which reads as follows:

“Boards of township trustees are not authorized by law to expend public funds under their control for the purpose of constructing, maintaining and operating a swimming pool in a park located in the township, which park is not under the direct supervision of a board of park commissioners.”

In the opinion, after quoting Section 3427-1, General Code, having to do with the power and authority of township trustees with reference to township parks not under the control of park commissioners, it was said:

“As the only power extended to boards of township trustees by statute, to expend township funds for the improvement, protection and preservation of parks within the limits of their township which are not under the control of the park commissioners as provided by law is contained in the statute quoted above, and as boards of township trustees like similar statutory boards are limited as to the powers which they may exercise to those only which are granted by law, the question of whether or not they may build, maintain and operate swimming pools, with the nec-

essary accessories thereto, within such parks is one purely of statutory construction.

It will be observed that the statute, Section 3427-1, General Code, supra, does not in terms extend to township trustees the power to build, maintain and operate swimming pools. The statute in extending to the trustees power to control and improve such parks and public grounds expressly and specifically mentions a number of things which may be done such as 'to control, care for, grade and improve', 'to plant or place therein and care for trees, shrubbery and plants, and to maintain lawns', 'to construct and maintain fountains', 'to lay out, construct, reconstruct, repair and maintain * * * drive-ways and walks', 'to provide and maintain suitable and sufficient lights', 'to construct, reconstruct, repair and maintain therein all necessary sewers, drains and ditches', and in the enumeration of the several things which it authorizes the trustees to do with respect to the park the statute concludes with the clause, 'and to protect and preserve to public uses for park purposes all of said property and improvements.'

It is quite clear that it was not the intention of the legislature in the enactment of Section 3427-1, General Code, to authorize the expenditure by township trustees of township funds for any and all purposes that might be included within the concept of a public park. In other words, unlimited authority to maintain the park in all respects and to construct buildings and structures thereon for any and all purposes was not intended else it would not have been necessary to set out the things that the trustees should be authorized to do in detail as was done. If it had been intended to extend unlimited power to the township trustees to maintain the park in all respects, the legislature would no doubt have done so in appropriate language instead of detailing the several things which the trustees might do."

Since township trustees are not authorized by law to expend township funds for the purpose of constructing or maintaining and operating a swimming pool in a township park under their control, *a fortiori* such trustees may not under the law construct a swimming pool on the property and under the jurisdiction and control of another political subdivision and its officers. Your first question must accordingly be answered in the negative.

II. Your second question must likewise be answered in the negative, for the reason that the offices of township trustee and member of the board of park commissioners of the township are clearly incompatible. As stated in 32 O. Jur., 908, one "of the most important tests as to whether offices are incompatible is found in the principle that incom-

patibility is recognized * * * where a contrariety and antagonism would result in an attempt by one person to discharge the duties of both."

In 46 Corpus Juris, 941, the test of incompatibility of offices at common law is concisely set forth in the following language:

"At common law the holding of one office does not of itself disqualify the incumbent from holding another office at the same time, provided there is no inconsistency in the functions of the two offices in question, but where the functions of two offices are inconsistent, they are regarded as incompatible."

You will note that by the terms of Section 3423, General Code, the township park commissioners are authorized to levy "each year, a sufficient tax, not to exceed one mill on each dollar of valuation on all real and personal property, including property within any municipal corporation, within the limits of the township, over and above all other taxes and limitations thereon, authorized by law, unless the question of increasing such levy is submitted to and approved by a vote of the electors of such township, at a general or township election." That a township park district is a "taxing unit" was held in opinion No. 4881, Opinions Attorney General, 1933, Vol. III, page 1504.

It is unnecessary to point out that township trustees are also authorized to levy taxes. And in the preparation of annual budgets, the distribution of public moneys as between the township proper and the board of park commissioners, and in the fixing of tax levies, it is manifest that the township trustees and the board of park commissioners might be placed in the position of adversaries.

This principle was applied in opinion No. 2, Opinions Attorney General, 1927, Vol. I, page 5, in which it was held:

"The offices of township trustee and of member of the township board of education are incompatible and may not be held by the same person."

In the opinion it was said as follows:

"Generally speaking, two offices are considered incompatible, when one is subordinate or in any way a check upon the other, or when the duties of the two offices might overlap or when the proper fulfillment of the trust imposed by one office might necessarily require the holder of the office to insist on matters that would be wholly inconsistent with the full and complete performance of the duties of the other office.

You will note that in the preparation of annual budgets, the disposition of the public moneys as between the school district

and the township and the fixing of tax levies, etc., as provided by General Code Section 5649-1, et seq., the result might be that the two boards would be placed in the position of adversaries.”

The same conclusion was reached in Opinion No. 1314, Id., Vol. III, page 2375. See also Opinion No. 2306, Opinions Attorney General 1930, Vol. III, page 1718, in which it was held that the “offices of township trustee and member of the board of a general health district are incompatible”, for the same reasons.

I concur in the opinions of my predecessors above cited, and for the reasons given in such opinions, I am constrained to hold that the office of township trustee and member of the board of park commissioners are incompatible.

In view of the foregoing, and for the reasons above set forth, it is my opinion that:

1. Township trustees are without authority under Section 3427-1, General Code, or any other section, to expend funds of a township for the purpose of constructing a swimming pool in a park owned and under the control of a village located in such township.

2. The offices of township trustee and a member of the board of park commissioners of a township created under the provisions of Sections 3415, et seq., of the General Code, are incompatible.

Respectfully,

THOMAS J. HERBERT,
Attorney General.

1576.

CONTRACT—STATE WITH THE GEM CITY ELEVATOR COMPANY, EQUIPMENT AND ELEVATOR, MEDICAL COTTAGE, MASSILLON STATE HOSPITAL, MASSILLON.

COLUMBUS, OHIO, December 14, 1939.

HON. CARL G. WAHL, *Director, Department of Public Works, Columbus, Ohio.*

DEAR SIR: You have submitted for my examination and approval a contract by and between the State of Ohio, acting through you as Director of the Department of Public Works for the Department of Public Welfare, with The Gem City Elevator Company, Dayton, Ohio, for the construction and completion of Contract for Elevator for a project known as Equipment and Elevator for Medical Cottage, Massillon State Hospital, Massillon, Ohio, as set forth in Item 7, Elevator—pages 35,