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LIEN OF STATE FOR TAX LEVY AGAINST REAL PROPERTY
— LIEN UPON REALTY—IF ANY PORTION OF SUCH
PROPERTY SEVERED PRIOR TO ENFORCEMENT OF TAX
LIEN IT BECOMES PERSONALTY — NO PROVISION FOR
CONTINUANCE OF SUCH LIEN ON PERSONALTY THUS
CREATED.

SYLLABUS:

The lien of the state for taxes levied against real property is a lien only

upon the realty. If any portion of such property, such as a building, is severed therefrom prior to the enforcement of the tax lien, it becomes personalty and no provision is made for the continuance of the lien on the personalty thus created.

Columbus, Ohio, September 10, 1940.

Hon. Norton C. Rosentreter, Prosecuting Attorney,
Port Clinton, Ohio.

Dear Sir:

Your recent request for my opinion reads as follows:

“This office would appreciate your formal opinion on the question whether or not the lien of the State for real estate taxes, having once attached to a building which is so affixed to the real estate as to become a legal part thereof, follows the building in the event the owner thereof sells the building but not the land and the purchaser moves the building from the premises.

In the situation which we have at hand A owned real estate upon which buildings were situated and upon which the State had a lien for delinquent taxes. A sold a building which was situated thereon on a foundation and the purchaser moved the building from the foundation and off of the premises. The purchaser now claims that the building has become personal property and that, having been removed from A's real estate, the building is no longer subject to the lien for A's taxes.

We find in 38 Ohio Jurisprudence on page 790 that the owner of property may change its form to avoid taxation, yet the Ohio General Code, section 5671 provides that the lien of the State for taxes, upon attaching to real estate, continues until such taxes, with any penalties, are paid, and in the instant case the lien of the State had attached before the sale was made by A.”

It is one of the rights of the legislature to enact measures for the levying of taxes and the classification of subjects of taxation. This right includes the power to define what types of property shall be included in the various taxes which it levies. Thus, the kinds of property included in taxes levied against real property is defined in Section 5322, General Code, wherein it is provided:

“The terms ‘real property’ and ‘land’ as so used, include not only land itself, whether laid out in town lots or otherwise, and all growing crops, including deciduous and evergreen trees, plants and shrubs, with all things contained therein but also, unless otherwise

specified, all buildings, structures, improvements, and fixtures of whatever kind thereon, and all rights and privileges belonging or appertaining thereto."

I assume therefore that the buildings mentioned in your inquiry, at least so long as they remained on their original foundations, were included as part of the realty and were subject to the same lien for taxes as the ground itself. Section 5671, General Code, makes the taxes levied on real property a continuing lien thereon until paid, the provisions therefor being as follows:

"The lien of the state for taxes levied for all purposes, in each year, shall attach to all real property subject to such taxes on the day preceding the second Monday of April, annually, and continue until such taxes with any penalties accruing thereon, are paid. * * * "

Similar provisions are also contained in Section 5713, General Code, wherein it is provided that:

"The state shall have a first and best lien on the lands and lots described in the delinquent land list, for the amount of taxes, assessments and penalty and accrued interest charged prior to the delivery of such list, together with interest on the principal sum of such taxes and assessments at the rate of eight per cent. per annum, from the date of the August settlement next preceding the delivery of such list to the date of redemption thereof, and the additional charge of twenty-five cents for the making of said list. * * * "

In discussing the questions you have presented, it must constantly be borne in mind that taxes are not debts of the taxpayer. They are imposts, the positive acts of government, authorized by the Constitution, created by the Legislature and enforceable only in the manner provided by statute. See *Voekel vs. Cincinnati*, 112 O. S., 374. In 61 C. J., 1011, Section 1290, it is said:

"Taxes are collectible in, and only in, the manner provided by statute, the matter being wholly statutory."

The rule in Ohio is in accord with the foregoing as shown in the first branch of the syllabus in the case of *Straub vs. Hilker*, 24 O. App., 90, which reads:

"1. All taxes are statutory, and method of collection and enforcement, being part of statute, must be followed."

In *Cooley on Taxation*, Vol. 3, page 2620, Section 1326, the extent of the

available remedies of the taxing authorities is summed up in the following language:

“A sovereignty will provide such methods for the collection of its revenue as are suitable to the various taxes laid, and its discretion is only limited by constitutional principles. The legislature has power to choose its own method of collection, where no constitutional provision is violated, and in fact the method for recovering delinquent taxes generally is wholly statutory. The method prescribed by statute is in general exclusive, and, unless a contrary intent can be gathered from the statute, it must be followed strictly; for the power which seeks to collect a tax must show clear authority to do so. * * * ”

Essentially, in Ohio the methods provided for the collection of real estate taxes commence with the provisions for voluntary payments to the county treasurer as provided in Section 2649, General Code, which reads:

“The office of the county treasurer shall be kept open for the collection of real property taxes and assessments and public utility property taxes from the time of delivery of the duplicate to the treasurer until the eleventh day of September, excepting during such time for which it may be necessary to close such office for the purpose of the February settlement of such taxes.”

If taxes are not paid when due, provisions are made for the addition of penalties and interest and measures to enforce payment are provided. In so far as this procedure applies to real estate tax collections and the subject of your inquiry, it appears that the available remedies are actions by the county treasurer under authority of Section 5703, General Code, for the appointment of receivers to collect the “rents, issues and income” from delinquent real estate and apply the same to the payment of taxes; actions to foreclose delinquent tax liens under authority of Section 5718-3, General Code, and sales of forfeited lands under authority of Sections 5752 and 5755, General Code. I am unable to find any authority for pursuing fixtures or any other items of realty that have been severed prior to the invoking of any of the remedies above noted.

When a house is removed from its foundation and the property where it stood, its severance is completed and its character is changed from realty to personalty. It remains personalty until it is again affixed to the realty. The lien for real estate taxes, as I have pointed out, is against the realty and ceases at the moment the severance is completed unless some authority can be found for its continuance. If the legislature had so chosen, it might have

enacted appropriate measures to insure the preservation of the tax lien. But under the rules I have quoted, the courts would be powerless to assist the tax collecting officials by permitting them to pursue the building after its removal and severance from the realty. Surely it would not be contended that the lien for unpaid taxes would follow a tree that was cut down and taken to the mill, nor would it follow stone that was quarried, or gravel, oil, gas and the like that was taken from the property. Yet each of these items originally was a part of the realty just as much as the building thereon. Thus it appears that while taxes may be a lien on the realty against which they are levied, the character of the realty is to a certain extent flexible. Its value may be increased by having fixtures annexed and decreased by their severance. The lien which exists solely by virtue of the statutes, exists and encumbers only such property as is designated in the statutes, that is, the realty.

In specific answer to your inquiry, it is my opinion that the lien of the state for taxes levied against real property is a lien only upon the realty. If any portion of such property, such as a building, is severed therefrom prior to the enforcement of the tax lien, it becomes personalty and no provision is made for the continuance of the lien on the personalty thus created.

Respectfully,

THOMAS J. HERBERT,
Attorney General.