

1254.

LIENS—FORECLOSURE OR ENFORCEMENT OF, ON REAL PROPERTY UNDER SECTIONS 6071, ET SEQ., GENERAL CODE—COUNTY TREASURER SHOULD BE MADE PARTY DEFENDANT—DUTY OF SAID TREASURER TO FILE ANSWER, ETC.

SYLLABUS:

1. *In actions for foreclosures or the enforcement of liens or other incumbrances or charges on real property, against which, by the terms of Sections 6071, et seq., General Code, an unpaid assessment appears of record, it is necessary that the treasurer of the county in which such real property is situate be made a party defendant and properly served as provided by law. It is unnecessary that the State of Ohio or any officer or board thereof be made a party defendant.*

2. *It is the duty of such county treasurer, upon proper service of summons being made, to file an answer setting forth the facts pertaining to such assessment. The determination of the rights and interests of the several parties is then a matter for the court hearing such action to determine. It is for the court to determine the priority of liens and to order the proceeds of the sale to be paid in accordance with its findings thereon.*

COLUMBUS, OHIO, November 10, 1927.

HON. JOHN A. ELDEN, *Special Counsel, Cleveland, Ohio.*

DEAR SIR:—I am in receipt of your letter dated October 24th, which reads as follows:

“The question of the liquor liens under the Miller Act against property in process of foreclosure, has come up several times in Cuyahoga County in the last few months, and there is always some controversy among the attorneys as to just what the procedure should be.

I have insisted for their protection, as well as ours, that the State of Ohio be made defendant, and that the state be duly served by sending it through the sheriff's office and serving on the proper parties at Columbus.

I am not certain whether this should be the Tax Commission or the Treasurer of State, and I would like your advice first on that point.

Next, when the decree has been made, assuming the court finds that the mortgageholders were benefitholders, and had no knowledge of the liquor violation,—what should be our attitude about consenting to the transfer of the right of the state against property to the funds derived from the sale.

This subject has been bothering the Abstract Companies here in the city, as well as the attorneys interested in it, so if we could, we should make some ruling that will facilitate the handling of this in the future.”

The questions that you present involve a review of the several sections of the General Code relating to the Aiken Tax Law in so far as the same is supplemented by the several sections of the “Miller Act.”

The so-called “Miller Act” to which you refer was passed by the legislature on February 2, 1921, (109 O. L. 4) and appears as Sections 6212-21 to 6212-39, both inclusive, of the General Code. The sections thereof which are pertinent to your inquiry are 6212-30, 6212-31, 6212-32 and 6212-33 of the General Code.

By the terms of Section 6071, General Code :

"Upon the business of trafficking in spirituous, vinous, malt or other intoxicating liquors, *there shall be assessed yearly and paid into the county treasury*, as provided by Sections 6072, and following, of the General Code, by each person, corporation or co-partnership engaged therein the sum of one thousand dollars." (Italics the writer's.)

As provided by Section 6212-30, General Code, (Section 10 of the Miller Act) prohibition inspectors, in addition to any other duties, "shall make investigation to secure the names of all persons, firms or corporations liable to the assessment of the one thousand dollar tax, as provided in Section 6071 of the General Code" and report such names to the commissioner of prohibition who "shall determine and forthwith certify to the Auditor of State" such names "together with a description of the real estate upon which such business is carried on."

By the terms of Section 6212-31, General Code, (Section 11 of the Miller Act) :

"Thereupon, the Auditor of State shall cause all of such names to be entered upon the assessment duplicate of the proper county by the auditor thereof, together with a penalty of twenty per centum thereon, *which shall be collected in like manner as other assessments.*" (Italics the writer's.)

Section 6212-32, General Code, (Section 12 of the Miller Act), provides in part as follows :

"The Auditor of State, with the consent and approval of the Commissioner of Prohibition, may correct any errors, or remit any such assessment or increased assessment, together with the penalty thereof if it is found to have been erroneously or illegally certified. Otherwise, there shall be no rebate or refund, but the full thousand dollar tax shall be assessed and collected,
* * * "

Section 6212-33, General Code, (Section 13 of the Miller Act) so far as pertinent, provides :

"Such assessment, with any penalty thereon, shall attach and operate as a lien upon the real property on and in which such business is conducted, as of the fourth Monday of May of each year. * * * and provided further that such assessment with any penalty thereon shall not attach or operate as a lien upon the real property aforesaid, if the business taxed and for which the assessment is paid, is conducted by a person, corporation or co-partnership without the knowledge or assent of the owner of said real property, and provided, also, that, in all cases where a mortgage exists or is taken on such real property, as aforesaid, for a valuable consideration, in good faith, and without knowledge or assent on the part of the mortgagee thereunder, at the time of the execution of said mortgage that said real property had been or was being used for the illegal traffic in intoxicating liquors, the lien of such mortgage shall, to the extent of the actual principal or balance of money, including interest, secured thereby, be prior and paramount to the lien of the assessment so attaching and operating upon said property, as herein set forth. * * * "

Section 6077, General Code, provides :

"If a person, corporation or co-partnership refuses or neglects to pay the amount due under the provisions of this chapter within the time therein specified, *the county treasurer shall forthwith collect such amount * * * by distress and sale, as on execution, from any goods and chattels of such person, corporation or co-partnership.*" (Italics the writer's.)

Section 6078, General Code, authorizes the county treasurer to levy on the goods and chattels of such person, etc., "in the case of the refusal to pay such amount so due."

Section 6080, General Code, provides :

"If the county treasurer under the levy heretofore provided is unable to collect the amount due thereunder or any part thereof, the county auditor shall place the amount due and unpaid on the tax duplicate against the real estate in which such traffic is carried on, *and it shall be collected as other taxes and assessments on such premises.*" (Italics the writer's.)

As provided by Section 6085, General Code :

"The county auditor shall make and preserve duplicates of the assessments * * * showing the amount and date of each assessment, by whom to be paid and the premises whereon it is a lien. * * * By the first Monday of June of each year, he shall make out and deliver to the county treasurer a copy of such duplicate, charging him with the full amount of such assessments to be collected. * * * "

By the terms of Section 6092, General Code :

"*The county treasurer shall collect and receipt for all assessments returned to him, and, if an assessment is not paid when due, he shall forthwith proceed, as provided in this chapter, to collect it.* If he fails to satisfy such assessment from the goods and chattels therein described, he shall forthwith proceed as provided by law for the collection of unpaid taxes or assessments levied against lands, lots or parcels thereof, *to enforce the lien for such assessment with the penalty thereon.* * * * The county treasurer shall charge himself with all such assessments placed in his hands for collection, and shall account for them to the auditor, with all penalties collected thereunder. * * * " (Italics the writer's.)

Section 6093, General Code, provides :

"The revenues and fines resulting under the provisions of this subdivision of this chapter shall be distributed as follows, to-wit: in each county, three-tenths of the money paid into the county treasury on account of a business aforesaid, carried on in a city, village, hamlet or township therein, shall be passed to the credit of the general revenue fund of the state and paid into the state treasury by the county treasurer, as provided in other cases; five-tenths of the money so paid, on account of a business aforesaid, carried on in such municipal corporation or township shall be paid upon the warrant of the county auditor, into the treasury of such corporation or township, one-half to the credit of the police fund, and one-half to the credit of the general revenue fund thereof. In corporations having no police fund the entire five-tenths shall be passed to the credit of the general revenue fund thereof, and in townships having no police fund, one-half of such five-tenths shall be passed to the credit of the poor funds thereof."

Section 6094, General Code, provides what disposition should be made of the remaining two-tenths of such revenue and fines.

Section 6096, General Code, provides:

"Each county treasurer, on or before the first day of January and the first day of July of each year, shall report to the Auditor of State the amount of money paid into the treasury of the county under the provisions of this chapter; and on or before the tenth day of January and the tenth day of July of each year, by draft or otherwise as the Auditor of State may direct, he shall remit to the Treasurer of State the money due the state as shown by such statement."

You will note, as provided by Section 6071, *supra*, there shall be assessed yearly, upon the business of trafficking in intoxicating liquors, and paid into the county treasury by each person, etc., engaged therein, the sum of one thousand dollars. Section 6212-30, *supra*, imposes the duty upon prohibition inspectors to secure the names of all persons, etc., liable to the assessment provided for in Section 6071, *supra*, and report the same to the Commissioner of Prohibition who in turn certifies such names to the Auditor of State, together with a description of the real estate upon which such business is carried on. By the terms of Section 6212-31, *supra*, the Auditor of State shall cause all of such names to be entered upon the assessment duplicate of the proper county by the auditor thereof, which shall be collected in like manner as other assessments. Section 6212-33, *supra*, provides when such an assessment shall and shall not attach and operate as a lien upon the real property on and in which such business is conducted.

If a person, etc., refuses or neglects to pay such assessment *the county treasurer*, as provided by Section 6077, *supra*, "shall forthwith collect such amount" by distress and sale, as on execution, from any goods and chattels of such person, etc., and by the terms of Section 6078, *supra*, the county treasurer "shall levy on the goods and chattels of such person, etc., wherever found in such county."

If the county treasurer under such levy is unable to collect the amount due thereunder, the county auditor, as provided by Section 6080, *supra*, "shall place the amount due and unpaid on the tax duplicate against the real estate in which such traffic is carried on, and it shall be collected as other taxes and assessments on such premises."

Section 6092, *supra*, makes it the mandatory duty of the county treasurer to collect and receipt for all assessments returned to him and if an assessment is not paid when due "he shall forthwith proceed, as provided in this chapter, to collect it." If he fails to satisfy such assessment from the goods and chattels of such person, etc., he shall forthwith proceed to enforce the lien for such assessment as provided by law for the collection of unpaid taxes or assessments levied against lands. The county treasurer "shall charge himself with all such assessments placed in his hands for collection and shall account for them to the auditor." Sections 6093, et seq., General Code, provide in what manner the revenue and fines resulting under the provisions of these sections of the General Code shall be distributed.

As provided by Section 11268, General Code:

"Actions for the following causes must be brought in the county in which the subject of the action is situated. * * *

3. For the foreclosure of a mortgage or the enforcement of a lien or other incumbrance or charge on real property."

Upon examining the several sections of the General Code above quoted you will note that the duty to collect such assessments or liens is imposed upon the several

county treasurers. The county treasurer is not only a "proper" party, but a "necessary" party in this class of cases. Service of summons should be directed to and served upon such officer. It is unnecessary that the State of Ohio, or any officer or board thereof, be made a party defendant in such actions.

1. Answering your first question specifically it is my opinion that in actions for foreclosures or the enforcement of liens or other incumbrances or charges on real property, against which, by the terms of Sections 6071 et seq., General Code, an unpaid assessment appears of record, it is necessary that the treasurer of the county in which such real property is situate be made a party defendant and properly served as provided by law. It is unnecessary that the state of Ohio or any officer or board thereof be made a party defendant.

2. In answer to your second inquiry it is the duty of such county treasurer, upon proper service of summons being made, to file an answer setting forth the facts pertaining to such assessment. The determination of the rights and interests of the several parties is then a matter for the court hearing such action to determine. It is for the court to determine the priority of liens and to order the proceeds of the sale to be paid in accordance with its findings thereon.

As provided in Section 6212-33, supra, "such assessment shall not attach or operate as a lien upon the real property aforesaid, if the business taxed and for which the assessment is paid, is conducted by a person, etc., without the knowledge or assent of the owner of said real property." Obviously, if the court determines that the business taxed was conducted by a person without the knowledge or assent of the owner of said real property no lien attaches and the county treasurer would have no interest or right in the surplus, if any, of the funds derived from the sale of the property. If the court finds that the owner of said real property had knowledge or assented to the business being conducted, it is then for the court to determine what interest, if any, the county treasurer has in the premises. In other words, it is for the court to determine whether or not the lien, as set up by the answer of the county treasurer, attaches.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1255.

DISAPPROVAL, ABSTRACT OF TITLE TO LAND IN XENIA TOWNSHIP,
GREENE COUNTY, OHIO.

COLUMBUS, OHIO, November 14, 1927.

HON. CHAS. V. TRUAX, *Director of Agriculture, Columbus, Ohio.*

DEAR SIR:—You have submitted to me under date of November 4, 1927, for my opinion an abstract of title prepared and certified under date of October 19, 1927, by J. A. Finney, an abstracter, of Xenia, Ohio, together with a deed of D. E. Spahr and wife for land situate in Xenia Township, Greene County, Ohio, and more particularly described as: