

377⁸

FORECLOSURE SALE, TAX—EASEMENT OVER PARCEL OF LAND GRANTED—PARCEL SUBSEQUENTLY BECAME DELINQUENT—BUYER PURCHASES PARCEL SUBJECT TO EASEMENT.

SYLLABUS:

When an easement over a parcel of land is granted and the parcel subsequently becomes delinquent, a purchaser of the parcel at a tax foreclosure sale purchases it subject to said easement.

Columbus, Ohio, September 17, 1948

Hon. Marvin A. Kelly, Prosecuting Attorney
Scioto County, Portsmouth, Ohio

Dear Sir:

I have before me your request for my opinion, which request is as follows:

“We are having a great many tax foreclosure suits and as time goes on we are confronted with questions to which the law does not provide the answer, in so far as we are able to find. We will sincerely appreciate your opinion on the question following:

“QUESTION

In a regular tax foreclosure proceedings, all persons who appear to have any interest in the action or in the premises or liens thereon having been made parties and duly served as provided by law, are these sales to be made subject to any claims of right by way of easement or otherwise, or should the premises be sold divested of all liability to those persons?

“There appears to be no question as to the law pertaining to mortgages, leases and such instruments, but there is a question as to easements especially those ordinarily held by telephone, telegraph, electric companies and such.”

In considering a question of delinquent lands which are subject to easements, a good starting place is the case of *Ross v. Franko*, 139 O. S. 395. In that case, the Supreme Court of Ohio considered the following facts:

The owner of a parcel of land granted an easement of a seven-foot driveway over the land to the owner of an adjacent parcel. Subsequently, the owner of the servient estate thus burdened failed to pay the taxes assessed against the land. The land became delinquent, was forfeited to the state, and was eventually sold at forfeited land sale. The purchaser at the forfeited land sale attempted to block the driveway, and an action was begun by the owner of the dominant estate to enjoin this interference with his right of way. The Supreme Court held that the injunction should be granted for the reason that the forfeiture and sale of the servient estate had had no effect upon the easement.

Although the *Ross* case was concerned with forfeited land, the question of what estate became delinquent and thus subject to the power of the state to foreclose or forfeit is exactly the same as that presented by your request.

The basis of the court's opinion was that at the time the easement was created the value of the dominant estate was increased and the value of the servient estate was correspondingly diminished, and that the two parcels were then subject to taxation accordingly. So the thing which became delinquent and subject to foreclosure was the servient estate assessed at its decreased valuation. The value of the easement attached to the dominant estate and presumably was taxed in connection with it. Since the easement was no longer a part of the burdened land, it could not be affected by a tax foreclosure action against that land.

It is my opinion that the reasoning and the holding of the *Ross* case govern the question set out in your request. There is involved a parcel of land, subject to an easement of right-of-way. It has long been held in Ohio that although the right-of-way of a railway, telephone or telegraph company is not appurtenant to any particular parcel of land, it is in a sense appurtenant to the entire system, and that the system occupies the position of a dominant estate. (See *Junction Railroad Co. v. Ruggles*, 7 O. S. 1, approved in *Hatch v. Railroad Co.*, 18 O. S. 92, *Platt v. Pennsylvania Co.*, 43 O. S. 228, and *Garlick v. Railway Co.*, 67 O. S. 223.) The dominant estate, in this case the telephone or telegraph system, with the value of the easement included, is subject to property taxation. Since the easement is no longer a part of the servient estate for taxation purposes, it follows that it is not affected by the tax foreclosure proceedings against that estate.

The fact that the owner of the easement was made a party to the tax foreclosure proceedings against the burdened land in the case set out in your request, while he was not made a party in the *Ross* case, does not alter my conclusion. The reasoning of the Supreme Court was that the easement attached to the dominant estate and was taxable with it as "real property." The lien of the state against such real property can be foreclosed only by an action brought against it, and naming its owner in an action brought against some other piece of real property will not affect a foreclosure.

It is probably not necessary to point out that this opinion, like the *Ross* case, is based on a situation in which an easement was granted before the taxes on the servient estate became delinquent.

In view of the above and in answer to your question it is therefore my opinion that when an easement over a parcel of land is granted and the parcel subsequently becomes delinquent, a purchaser of the parcel at a tax foreclosure sale purchases it subject to said easement.

Respectfully,

HUGH S. JENKINS,
Attorney General.