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TAX LIEN FORECLOSURE — LANDS SOLD UNDER SECTION 5719 GENERAL CODE — WHERE PROCEEDS INSUFFICIENT TO SATISFY IN FULL, COSTS, TAXES, ASSESSMENTS, PENALTIES, INTEREST AND CHARGES, LANDS CHARGED WITH TAXES AND ASSESSMENTS FOR CURRENT YEAR — OPERATIVE WHERE SALE PRIOR TO OCTOBER 1 — WHERE SALE ON OR AFTER OCTOBER 1 TAXES AND ASSESSMENTS DEEMED SATISFIED.

SYLLABUS:

When lands are sold pursuant to a tax lien foreclosure sale under authority of Section 5719, General Code, and the proceeds of such sale are insufficient to satisfy in full the costs and all taxes, assessments, penalties, interest and charges, if such sale occurs prior to October 1st, the lands thus sold will be charged with taxes and assessments for the current year. If the sale occurs on or after October 1st, the taxes and assessments for that year are to be deemed satisfied.

Columbus, Ohio, December 4, 1941.

Hon. Ross Michener, Prosecuting Attorney,
St. Clairsville, Ohio.

Dear Sir:

I am in receipt of your request for my opinion which is as follows:

"We have brought numerous foreclosure actions in our common pleas court upon delinquent land tax certificates and the question arises as to the application of the proceeds of the sale toward the payment of taxes where there is not sufficient money to pay all delinquent and current taxes, etc.

Section 5719 of the General Code of Ohio, effective August 16, 1939, provides in part in the fourth paragraph as follows:

'From the proceeds of the sale the cost shall be first paid, next the amount found due for taxes, assessments, penalties, interest and charges, next the amount of any taxes and assessments accruing after the entry of the finding and before sale, all of which taxes, assessments, penalties, interest and charges shall be deemed satisfied, though the amount applicable thereto be deficient, and the balance, if any, shall be distributed according to law.'

In many of our sales under this law the amount realized is insufficient to pay charges set forth in this statute, and the question now arises whether the 1941 taxes which are now a lien on the real estate but not yet due and/or payable, are included in the phrase in the statute as follows: 'Next, the amount of any taxes and assessments accruing after the entry of the finding and before sale,' and whether the auditor shall issue a remitter for the 1941 taxes?

In other words does the phrase 'accruing taxes' mean taxes which have become a lien, or only taxes which are now due and/or payable?"

The distribution of the proceeds of a tax lien foreclosure sale must be made in accordance with the provisions of Section 5719, General Code, the pertinent portions of which section you have correctly quoted in your inquiry. After payment of costs, the amount found due for taxes, assessments, penalties, interest and charges is to be paid. This obviously refers to the court's finding, concerning which it is said in the first paragraph of Section 5719, General Code:

"A finding shall be entered of the amount of such taxes and assessments, or any part thereof, as are found due and unpaid, and of penalty, interest, costs and charges, for the payment of which, together with all taxes and assessments payable subsequent to certification for foreclosure, the court shall order such premises to be sold without appraisal for not less than the total amount of such finding and costs, unless the prosecuting attorney shall apply for an appraisal, in which event the premises shall be appraised in the manner provided by section 11672 of the General Code, and shall be sold for at least two-thirds of the appraised value thereof."

The expression "the amount of such taxes and assessments * * *" appears to refer back to Section 5718-3, General Code, which section, among other things, furnishes authority for the prosecuting attorney to commence foreclosure proceedings upon delinquent land certificates within nine months after his receipt thereof. It is provided that the petition shall be sufficient if it allege that the certificate has been duly filed by the county auditor and that the amount of money appearing on the certificate to be due and unpaid still remains due and unpaid and a lien against the property therein described. The section also states:

"* * *The delinquent land tax certificate filed by the county auditor with the prosecuting attorney, shall be prima facie evidence on the trial of such action, of the amount and validity of the taxes, assessments, penalties, interest and charges appearing due and unpaid thereon and of the non-payment thereof."

It thus appears that the court in its decree should find that there is due the treasurer the total amount of taxes, assessments, penalties, interest and charges shown on the certificate, less any payments found to have been made thereon.

The third item to be paid from the proceeds of the sale or to be deemed satisfied if the proceeds be insufficient is the amount of taxes and assessments accruing after the entry of the finding and before sale. Two former attorneys general have held in Opinions of the Attorney General for 1928, No. 1814, Volume I, page 597, and Opinions of the Attorney General for 1930, No. 1368, Volume I, page 31, that only the taxes and assessments included in the delinquent land certificate were abated by the foreclosure proceedings and sale. But these opinions were based upon a former wording of Section 5719, General Code, and are not applicable in construing the section in its present form. Real property taxes become a lien on the day preceding the second Monday in April, annually, as provided in Section 5671, General Code, which reads in part:

"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. * * *"

While they become a lien in April, the amount cannot be determined before the following September and taxes cannot be paid until the county auditor has certified and turned over to the treasurer his duplicate as provided in Section 2583, General Code, which reads in part:

“On or before the first Monday in August annually, the county auditor shall compile and make up, in tabular form and alphabetical order, separate lists of the names of the several persons, companies, firms, partnerships, associations and corporations in whose names real property has been listed in each township, city, village, special district, or separate school district or part of either in his county, placing separately, in appropriate columns opposite each name, the description of each tract, lot or parcel of real estate, the value of each tract, lot or parcel and the value of the improvements thereon, if any, * * * Such lists shall be prepared in duplicate. On or before the first Monday of September in each year, the county auditor shall correct such lists in accordance with the additions and deductions ordered by the tax commission of Ohio, and by the county board of revision, and shall certify and on the first day of October deliver one copy thereof to the county treasurer. The copies prepared by the county auditor shall constitute the auditor’s general tax list and treasurer’s general duplicate of real and public utility property for the current year. In making up such tax lists, the county auditor may place each town lot in its numerical order, and each separate parcel of land in each township according to the numerical order of the section.”

The question of what taxes should be paid from the proceeds of a judicial sale was considered in the case of *Hoglen v. Cohan* (1876), 30 O.S., 436. The controversy arose over the construction of a portion of Section 77, now Section 5692, General Code, which section at that time provided that “when any real estate shall be sold at judicial sale, * * * the court shall order the taxes and penalties, and interest thereon against such lands, to be discharged out of the proceeds of such sale.” In the second branch of the syllabus the court held:

“For the purpose of being so discharged, the taxes charged against the land become due and payable, within the meaning of the last clause of section 77, on the 1st day of October annually, that being the date on which the duplicate of taxes is required by law to be placed in the possession of the county treasurer; and this clause of section 77 is not affected by the provisions of section 53 (S. & S. 762, 763), that ‘the lien of the state for taxes shall attach on the day preceding the second Monday of April annually.’”

In *Makley v. Whitmore*, 61 O.S., 587, it is said with reference to special assessments on page 595:

“The lien of such installments still remains upon the real estate just as the lien for general taxes remains on real estate after the day preceding the second Monday in April of each year, and yet when sold at judicial sale before the first day of October of such year, the taxes for that year, although a valid

lien, cannot be paid out of the proceeds of the sale, but must be paid by the purchaser.”

See also *Magnolia Building and Investment Company v. Sulzman*, 57 O. App., 431.

Section 5692, General Code, was amended in 1935 and now provides that there shall be paid from the proceeds of judicial sales all taxes, penalties, “assessments then due” and interest “which are a lien on such land or real estate at the time of the sale.” Whether this amendment has changed the rule stated in *Hoglen v. Cohan*, *supra*, and the subsequent decisions, it is unnecessary to determine at this time. It is apparent from those decisions that the tax lien from the day preceding the second Monday in April until the first day of October is inchoate. The lien for payment is secured, but the taxes are not yet imposed. They do not accrue, in words of Section 5719, General Code, until October 1st, when they become due and payable. That October 1st should be regarded as the accrual date is definitely indicated in the opinion of one of my predecessors, found in *Opinions of the Attorney General for 1935*, No. 4659, Volume II, page 1208, wherein it is said:

“This brings us to the question as to when taxes become a lien and whether or not all taxes which are a lien on real estate may be paid out of the proceeds of a sale. Taxes become a lien on the date preceding the second Monday in April of each year. However, in the case of *Hoglen vs. Cohan*, 30 O.S. 436, it was held that general taxes remain a lien on real estate after the date preceding the second Monday in April of each year, yet when sold at judicial sale before the first day of October of such year, the taxes for that year, although a valid lien, cannot be paid out of the proceeds of the sale, but must be paid by the purchaser. See also *Ketcham vs. Fitch*, 13 O.S. 201, and *Makley vs. Whitmore, et al.*, 61 O.S. 587. In other words, taxes must have accrued before they are payable from the proceeds of the judicial sale.”

The same conclusion appears to have been reached by Judge Lamneck in the case of *In re Estate of Anna E. Harper*, 26 O.N.P.(N.S.), 431, wherein the second branch of the syllabus reads:

“Taxes on real estate, for the purpose of enforcing payment thereof, become a lien on the said real estate on the day preceding the second Monday of April of each year; but taxes on real estate do not accrue until October 1st of each year.”

Returning to a consideration of Section 5719, General Code, we find

that "any taxes and assessments *accruing* after the entry of the finding and before sale," including penalties, interest and charges, "shall be deemed satisfied."

It therefore appears and it is my opinion that when lands are sold pursuant to a tax lien foreclosure sale under authority of Section 5719, General Code, and the proceeds of such sale are insufficient to satisfy in full the costs and all taxes, assessments, penalties, interest and charges, if such sale occurs prior to October 1st, the lands thus sold will be charged with taxes and assessments for the current year. If the sale occurs on or after October 1st, the taxes and assessments for that year are to be deemed satisfied.

Respectfully,

THOMAS J. HERBERT,
Attorney General.