

5000.

APPROVAL, BONDS OF LIBERTY UNION VILLAGE SCHOOL DISTRICT, FAIRFIELD COUNTY, OHIO, \$33,400.00 (UNLIMITED).

COLUMBUS, OHIO, December 14, 1935.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

5001.

APPROVAL, BONDS OF NILE TOWNSHIP RURAL SCHOOL DISTRICT, SCIOTO COUNTY, OHIO, \$11,000.00.

COLUMBUS, OHIO, December 14, 1935.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

5002.

FORECLOSURE—HOW CONSTRUCTIVE SERVICE OBTAINED WHEN STATE FORECLOSES LIEN ON DELINQUENT LAND TAX CERTIFICATE.

SYLLABUS:

Where it is necessary to make unknown heirs, executors, administrators, devisees and legatees parties defendant in a proceeding on a delinquent land tax certificate to foreclose the lien of the State, constructive service may be obtained by a single publication of notice in a newspaper printed in the county where the petition is filed, and such service is complete at the expiration of three weeks after the date of such publication, under the provisions of section 5718-3, General Code.

COLUMBUS, OHIO, December 16, 1935.

HON. HAROLD K. BOSTWICK, *Prosecuting Attorney, Chardon, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication requesting my opinion, which reads:

“Will you kindly give me your opinion on Section 5718-3, General Code, which in part reads as follows:

‘If service by publication is necessary, such publication shall be made once instead of as provided by Section 11295 of the General Code and the service shall be complete at the expiration of three weeks after the date of such publication.’

Does this apply when it is necessary to make unknown heirs, executors, administrators, devisees and legatees parties defendant, or in that event must you make publication six times, as is ordinarily required for obtaining service by publication.”

The section of the General Code, which you quote in part, was enacted in 1931 (114 O. L. 836) as part of an act relating to delinquent taxes, and provides that the prosecuting attorney shall institute proceedings on delinquent land tax certificates to foreclose the liens of the State, and, among other things, states what the necessary procedure shall be.

Without undertaking to quote the whole section, as it is believed to be unnecessary for the purposes of your question, it is to be observed that the second sentence of the section reads as follows:

“ * * * The proceedings for such foreclosure shall be instituted and prosecuted in the same manner as is now or hereafter may be provided by law for the foreclosure of mortgages on land in this state, excepting that if service by publication is necessary, such publication shall be made once instead of as provided by section 11295 of the General Code, and the service shall be complete at the expiration of three weeks after the date of such publication. * * * ”

Prior to the enactment of section 5718-3, General Code, supra, in 1931, procedure for the foreclosure of a tax lien was set forth in section 5713, General Code, (now repealed) which read so far as pertinent to the question you present:

“ * * * If the taxes have not been paid for four consecutive years, the state shall have the right to institute foreclosure proceedings thereon, *in the same manner as is now or may hereafter be provided by law, for foreclosure of mortgages on land in this state* * * *.” (Italics mine.)

In the case of *Friedlander, Treas., vs. Brown*, 29 N. P. (N. S.) 586, the facts showed that an action had been instituted by the plaintiff county treasurer for tax foreclosure on property delinquent for taxes on April 29, 1931, and service by publication was made on some defendants on June 28, 1931,

based on a defective affidavit. The plaintiff, on November 25, 1931, filed a new affidavit and service was ordered to be made on several defendants by publication. Publication was made once by the said plaintiff on the belief that section 5718-3, General Code, then effective, required but one publication. The court, however, held as disclosed by the second paragraph of the head-note:

“2. Where in one of the causes of action in such case service was commenced by publication under section 5713, General Code, requiring six advertisements, and later such service was found to be defective, subsequent service must be had under the same statute, notwithstanding the statute had been repealed in the meantime by a law requiring only one advertisement.”

The court stated at page 587:

“On June 28, 1931, service by publication based on a defective affidavit was set aside and held for naught. At this time section 5713, General Code, which required six publications of the notice *for constructive service*, was in full force and effect. On October 4, 1931, section 5718-3, General Code, repealing section 5713 went into effect. This amended section provided for one publication of the notice *for constructive service* instead of six.” (Italics mine.)

While it did not appear from the facts in the Friedlander case, whether or not all or some of the parties served by publication therein were, first, parties whose residence outside Ohio was known, or second, whose residence whether within or without Ohio could not be ascertained, yet it seems clear that the court by its above quoted language considered that the legislature had intended in passing section 5718-3, General Code, to substitute the requirement of but one publication in all instances *wherein constructive service could be and was had* for the old requirement of section 5713, General Code, namely, six publications, in all instances *wherein constructive service could be and was had*. It is thus necessary to examine the instances wherein constructive service can be had in an action of foreclosure of a mortgage.

Section 5713, General Code, had provided that the procedure for foreclosing the tax lien be the same as that provided by law for the foreclosure of mortgages.

Section 11292, General Code, in existence for years while old section 5713, General Code, was in force, and still in existence, provides in part directly underneath the heading “*Constructive Service*”, which heading was inserted by the legislature in 1910, when the present Ohio General Code, was adopted:

“Service may be made by publication in any of the following cases:

* * *

* * *

3. In an action to foreclose a mortgage or to enforce a lien or other incumbrance or charge on real property, *when the defendant is not a resident of this state or his place of residence can not be ascertained;*

* * *

* * *”

In the case of *Morton vs. Davezac, et al.*, 20 App. 427, it was recognized that section 11292, General Code, permitted service by publication on necessary *unknown* parties defendant of all kinds in a case involving foreclosure of a tax lien, if an affidavit were properly filed in accordance with the language of sections 11292 and 11293, General Code, stating that their (the defendants’) places of residence cannot be ascertained.

Under section 11295, General Code, it was provided at the time that section 5713, General Code, was in effect, and is now provided that the publication (under section 11292, General Code) “must be made for six consecutive weeks”, and the following section 11296, General Code, provided and now provides that the publication shall be complete at the date of the last publication. Section 11298, General Code, provided, and now provides as follows:

“When an heir or a devisee of a deceased person is a necessary party, and it appears by affidavit that his name and residence are unknown to the plaintiff, proceedings against him may be had without naming him; and the court, or a judge thereof, shall make an order respecting the publication of notice, but the order shall require not less than six weeks’ publication.”

It will be noted that section 11295, General Code, requires that constructive service shall be made by publication for six consecutive weeks. Section 11298, General Code, in *pari materia* with sections 11292, et seq., also provides that the order of the court respecting the publication of notice when the heir or devisee of a deceased person is *unknown* “shall require not less than six weeks’ publication.”

Your question probably arises because of the fact that the legislature in enacting section 5718-3, General Code, did not add such words as “and 11298” in stating that “if service by publication is necessary, such publication shall be made once instead of as provided by section 11295.”

While the specific insertion of 11298 in section 5718-3 would have made the intention of the legislature clearer that the notice of publication in instances where the parties defendant were unknown as well as known should

be published once only, yet it would seem clear from the language of the Friedlander case that such specific insertion was not essential to establish the intent of the General Assembly.

Under section 5713, General Code, as it has been pointed out, service by construction notice was complete on the date of the sixth publication, that is, the 35th day after the date of the first publication. See *Core vs. Oil and Oil Land Co.*, 40 O. S. 636. Under section 5718-3, General Code, service by constructive notice would appear to be complete on the expiration of the 21st day after the one and only publication. Obviously, the intention of the legislature was to disturb the former set-up only in so far as the shortening of the time necessary for complete service by constructive notice, and the reduction in the costs of foreclosure through limiting the advertisement to a minimum. From examination of the law prior to the enactment of section 5718-3, General Code, with the language of the Friedlander case in mind, it would appear to be clear that the legislature did not intend by section 5718-3, General Code, to make any distinction in the requirement for length of advertisement between known and unknown necessary parties defendant, in so far as service of summons by constructive notice is concerned.

I am therefore of the opinion, in specific answer to your question, that where it is necessary to make unknown heirs, executors, administrators, devisees and legatees parties defendant in a proceeding on a delinquent land tax certificate to foreclose the lien of the State, publication is required but one time, under the provisions of section 5718-3, General Code.

Respectfully,

JOHN W. BRICKER,

Attorney General.

5003.

BOARD OF EDUCATION — MAY COMPEL STUDENTS TO
SALUTE FLAG AND TAKE OATH OF ALLEGIANCE IF
PROPER RULE HAS BEEN ADOPTED BY IT.

SYLLABUS:

1. *In the absence of any statute on the subject, a rule of a board of education in this state requiring pupils in the public schools under its jurisdiction to salute the American Flag and pledge allegiance thereto, and otherwise participate in patriotic exercises conducted in the school, is not subversive of the "liberty" protected by the "due process" clause nor the "privileges and immunities" clause nor the "equal protection" clause of the 14th Amendment to the Federal Constitution, nor does it constitute an invasion of one's rights*