

"School depository banks which, at the instance of the board of education whose funds they receive on deposit, are permitted to furnish security for said funds by the hypothecation of certain securities, may not designate another bank as trustee for the holding, and disposal in case of default, of the securities so hypothecated, but must place them under the complete and exclusive control and dominion of the board of education whose deposits are to be thus secured."

The statute relating to the hypothecation of securities by a school depository bank, to secure deposits made by a board of education, reads somewhat differently than the statute relating to county depositories. A school depository bank is authorized to "deposit" certain enumerated securities whereas the statute relating to county depositories permits the commissioners to "accept" certain enumerated securities in lieu of an undertaking.

This fact does not, in my opinion, change the situation. If anything, the county depository statutes more clearly require the commissioners to exercise full, complete and exclusive control of the hypothecated securities than do the school depository statutes. I am of the opinion that when the commissioners accept securities in lieu of an undertaking as security for county deposits in a county depository bank, by authority of section 2732, General Code, these securities should pass into the complete and exclusive control of the board of commissioners.

The mere assignment of a receipt for these securities which had been deposited, with a third party, is not sufficient, although, if the deposit made with the third party, which deposit is represented by the receipt, has no conditions attached to it and no equities exist in said securities in favor of the depository bank, so that the commissioners may upon presentation of the receipt secure the actual physical custody of the securities the receipt may be accepted. In that case, however, the commissioners must forthwith, before any intervening equities may attach thereto, secure actual physical possession of the securities and provide for their safekeeping as directed by section 2735, General Code, else the deposits are not properly secured.

I am therefore of the opinion, in specific answer to your question, that the board of county commissioners which accepts securities from a depository bank as security for county deposits therein, in lieu of an undertaking therefor, by authority of section 2732, General Code, should receive said securities, by a proper legal transfer thereof, to such an extent as to have complete and exclusive control of and dominion over the same, and that the mere taking and holding of a receipt from a third party, who has custody of the securities, is not a proper compliance with the law.

Respectfully,

GILBERT BETTMAN,
Attorney General.

3281.

REALTY—MAY BE CERTIFIED AS DELINQUENT FOR UNPAID
SPECIAL ASSESSMENTS ALONE.

SYLLABUS:

Lands may be certified as delinquent under the provisions of section 5712, General Code, and for foreclosure under the provision of section 5718, General Code, for the non-payment of special assessments for such periods of time as bring the

delinquencies in the payment of such special assessments within the conditions of said respective sections of the General Code, although the general taxes on the property against which such assessments have been levied, may have been paid.

COLUMBUS, OHIO, June 2, 1931.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—This is to acknowledge receipt of your communication which reads as follows:

“A former Attorney General held at page 2380, Volume 3, of the 1917 Report, and in other subsequent opinions of other Attorneys General, it has been held that the county treasurer may receive taxes without the collection of the special assessments upon the property; and the former opinion, and the opinion of Attorney General Price to be found at page 543 of the 1922 Opinions held that land may not be certified delinquent under the provisions of sections 5712 and 5718 of the General Code for unpaid special assessments alone.

Question: Since the decision of the Supreme Court in the case of *State, ex rel. Brown, Treas. Cuyahoga Falls, Ohio, v. Cooper, Treas. Summit County, Ohio*, may lands be certified delinquent for special assessments alone?

In this connection, we may say under former opinions a large number of special assessments have remained unpaid while the general taxes have been paid. It is desired to know whether tracts of land having these unpaid special assessments may be certified delinquent under the delinquent law?”

The question presented in your communication calls for a consideration of the provisions of an act passed by the General Assembly under date of March 21, 1917, the several sections of which act as amended by the legislature from time to time are now found in the General Code as sections 5704 to 5727 inclusive.

Section 5704 provides that each county auditor shall cause a list of delinquent lands in his county to be published once a week for two consecutive weeks between the twentieth day of December and the second Thursday in February, next ensuing, such publication to be by newspaper in the manner therein provided. By said section 5704 it is further provided that there shall be attached to the list a notice that the delinquent lands will be certified to the Auditor of State as delinquent, as provided by law.

Section 5706, General Code, provides for the maximum rates to be charged by the publishers of newspapers for publishing the list of delinquent lands, as provided for in section 5704, General Code. Among other provisions in said section 5706, the following are noted:

“A greater sum than one-half of the taxes and penalties, due on any tract, lot or part of lot, shall not be allowed for advertising such tract, lot or part of lot. Such property shall not be published in a list as delinquent if the taxes, assessments, and penalty thereon have been paid before the twentieth day of December.”

By section 5708, General Code, it is provided that before advertising such list of delinquent lands and lots, the county auditor shall compare it with the duplicate in the office of the county treasurer and strike therefrom all lands or town lots

upon which the taxes, assessments and penalty of the preceding year, with the taxes and assessments of the current year, have been paid, and advertise the remainder as provided for in said act.

By section 5710, General Code, it is provided that if the county auditor, by inadvertence or mistake, omits to publish the delinquent list of the county, as required by law, he shall charge the lands and town lots with the taxes, assessments and penalty, if such taxes, assessments and penalty with which the lands and town lots therein stand charged have not been paid before the tenth day of August of the next succeeding year. This section further provides that he shall also charge them with the taxes and assessments of the current year and record, certify and publish them as a part of the delinquent list.

By section 5712, General Code, it is provided that the county treasurer or his deputy and the county auditor or his deputy, shall attend at the court house in the county on the second Tuesday in February in conformity with the notice prescribed in section 5704, General Code, and that at and after the hour of ten in the forenoon, the county auditor or his deputy shall proceed to make, in triplicate, a certificate to be known as a delinquent land tax certificate for each tract of land, city or town lot or part of lot contained in such advertisement, on which the taxes, assessments and penalty have not been paid, describing each tract of land, city or town lot the same as it is described on the tax duplicate, and the valuation thereof as shown upon said tax duplicate, and the amount of taxes, assessments and penalty thereon due and unpaid, and stating therein that the same has been certified to the Auditor of State as delinquent. By this section it is further provided that the county auditor or his deputy shall continue from day to day with the making of said certificate until one complete certificate is made for each and all of said tracts of land, city or town lots or parts of lots contained in such advertisement, and upon which said taxes and assessments have not been paid. By this section it is further provided that the original of said certificate of all the tracts of land, city or town lots or parts of lots shall be forwarded to the Auditor of State, the duplicate and triplicate copies thereof to be kept, one in the county treasurer's office and one in the county auditor's, bound in book form. The original, duplicate and triplicate of each certificate is required to be signed by the county auditor or his deputy, and countersigned by the county treasurer or his deputy. This section further provides that interest at the rate of eight per cent per annum shall be charged on the duplicate against the delinquent lands, city or town lots or parts of lots certified by the county auditor on such certificate.

Section 5713, General Code, provides in part as follows:

"The state shall have a first and best lien on the premises described in said certification, for the amount of taxes, assessments and penalty, together with interest thereon at the rate of eight per cent per annum, from the date of delinquency to the date of redemption thereof, and the additional charge of twenty-five cents for the making of said certification, and sixty cents for advertising."

This section further provides that 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 hereafter may be provided by law, for the foreclosure of mortgages on land in this state.

Relating to the foreclosure of the lien acquired by the State upon the certification of delinquent lands in the manner provided by section 5712, General Code, section 5717, General Code, provides:

"No proceeding in foreclosure, under this act, shall be instituted on delinquent lands, unless the taxes, assessments, penalties and interest have not been paid for four consecutive years."

Further touching the matter of foreclosure proceedings on delinquent lands, section 5718, General Code, provides that it shall be the duty of the county auditor to file with the Auditor of State a certificate of each delinquent tract of land, city or town lot, at the expiration of four years, upon which the taxes, assessments, penalties and interest have not been paid for four consecutive years, and that a certified copy thereof shall at the same time be delivered to the county treasurer. This section provides that it shall then be the duty of the Auditor of State to cause foreclosure proceedings to be brought in the name of the county treasurer upon each unredeemed delinquent land tax certificate, within three months from the date of the filing of such certificate with the Auditor of State, by the county auditor. By said section it is further provided that the certified copy of said delinquent land tax certificate filed with the county treasurer shall be prima facie evidence on the trial of the action, of the amount and validity of the taxes, assessments, penalties and interest appearing due and unpaid thereon.

Section 5719, General Code, provides that judgments shall be rendered for such taxes and assessments, or any part thereof, as are found due and unpaid, and for penalty, interest and costs, for the payment of which the court shall order such lands to be sold without appraisal. By this section it is further provided that from the proceeds of the sale of such premises the costs shall be first paid, next the judgment for taxes, assessments, penalties and interest, and that the balance shall be distributed according to law.

Section 5722, General Code, provides that the State, by the Attorney General, may bring an action for the foreclosure of any delinquent land upon which the taxes, assessments, penalties and interest have not been paid for a period of four years, such action to be instituted in the county in which the land therein was situated at the time of the issuance of the certificate.

Section 5723 provides that it shall be the duty of the county treasurer, upon receipt by him of all moneys due him for delinquent taxes, assessments, penalty and interest on any tract of land, city or town lot, to enter upon the tax duplicate the word "redeemed" and that thereupon it shall be the duty of the county auditor, after each settlement period, to revise the record of certified delinquent lands, city or town lots by writing the word "redeemed" on all such tracts of land, city or town lots so entered upon the treasurer's duplicate.

Section 5724, General Code, provides as follows:

"All delinquent land upon which the taxes, assessments, penalty or interest have become delinquent, may be redeemed at any time before foreclosure proceedings thereon have been instituted, by tendering to the county treasurer the amount then due and unpaid."

By section 5726, General Code, it is provided that when any tract of land, city or town lot is returned delinquent for non-payment of "taxes or assessments," and placed on the duplicate of the succeeding year, and the owner or person liable to pay taxes therefor produces the receipt of the treasurer for such taxes and assessments of the preceding year, the county auditor or treasurer shall not make the deduction from the duplicate, of such taxes, assessments, penalty and interest,

but it shall be chargeable to the treasurer as if such receipt had not been produced. By this section it is further provided that the treasurer shall receive such receipt in discharge of "the tax or assessment" for the year it is returned delinquent, with the penalty and interest, and the auditor of the county shall credit such treasurer with the amount and shall forthwith collect such taxes.

From a consideration of the statutory provisions above noted, it will be observed that assessments have been placed in the same category with general taxes in establishing the status of "delinquent lands" for the purposes of said act. This is made clear by section 2 of the act (sec. 5705 G. C.) which provides:

"Delinquent lands as defined in this act shall mean all lands upon which the taxes, assessments and penalties have not been paid for two consecutive semi-annual tax paying periods."

Shortly after the enactment and effective date of the act of March 21, 1917, above referred to and considered, the then Attorney General in an opinion directed to you, Opinions of the Attorney General, 1917, Vol. III, page 2380, held, as noted in the syllabus to said opinion, that land does not become delinquent under said act of 1917 for non-payment of assessments only, but the general taxes must be unpaid and the land returned as delinquent, as provided by law, before it can be placed upon the delinquent list; but that if land becomes delinquent, then all duplicate charges against the land in the nature of assessments, whether for past years or not, must be included in the delinquent land certificate.

In reaching his conclusion that the non-payment of assessments only would not give lands or lots the status of delinquent lands within the meaning of said act, the Attorney General said that there was not enough in the way of express provisions in the act of 1917 to enable him to hold that land can acquire the status of delinquency through non-payment of assessments alone. And notwithstanding the provisions of section 2 of said act, above quoted, he reached the conclusion before indicated with respect to the question which you have submitted for my opinion.

In the opinion above referred to the Attorney General recognized that the legislature in the enactment of said delinquent land law assumed that land could be "returned delinquent for non-payment of taxes or assessments" as expressed in section 23 of said act (sec. 5726 G. C.). The following is quoted from said opinion:

"Again, the sections quoted show that it was the supposition of the legislature in passing this act that when an assessment, as well as a tax, was not paid before the twentieth of December following the last delinquency, the assessment of the following year is immediately payable. This is true of general taxes by virtue of sections 5678 and 5679 of the General Code.

But while these assumptions are made in the statute of 1917, there is not a syllable outside of remote inferences to be drawn from section 2 which authorized the return of land as delinquent on account of non-payment of assessments; and certainly nothing which authorizes delinquent assessments to become payable prior to the time fixed in the ordinance levying them, as in the case with general taxes.

The mere fact that the legislature enacts one law upon the palpable supposition that another law with which it must articulate contains a

given provision, is not enough to read into that other law a provision which is not there."

It is obvious from the above quoted language of the former opinion of the Attorney General referred to that he arrived at the conclusion that lands could not be certified as delinquent under the provisions of said act for the non-payment of assessments alone, for the reason that aside from certain implications in said act itself, there was nothing by way of statutory provision which ascribed to lands the status of delinquency by reason of the non-payment of assessments thereon. As to this, it is to be observed that aside from the fact that many of the sections of said act with respect to the certification of delinquent lands, passed March 31, 1917, have, as sections of the General Code, been amended from time to time since the former opinion of the Attorney General above referred to. Sections 5678 and 5679, General Code, which at the time of said opinion related only to the non-payment of taxes and the consequences thereof, have been amended (113 O. L. 500). As amended these sections now read as follows:

"Sec. 5678. If one-half the taxes and assessments charged against an entry of real estate is not paid on or before the twentieth of December, in that year, or collected by distress or otherwise prior to the February settlement, a penalty of ten per cent thereon shall be added to such half of said taxes and assessments on the duplicate. If such taxes and assessments and penalty, including the remaining half thereof, are not paid on or before the twentieth of June next thereafter, or collected by distress or otherwise prior to the next August settlement, a like penalty shall be charged on the last half of such taxes and assessments. The total of such amounts shall constitute the delinquent taxes and assessments on such real estate to be collected in the manner prescribed by law."

"Sec. 5679. If the amount of delinquent taxes and assessments and penalty as provided in the next preceding section, together with one-half of the taxes and assessments charged against such real estate for the current year, is not paid on or before the twentieth day of December, of the same year, the delinquent taxes and assessments and penalty, and the whole of the taxes and assessments of the current year, shall be due, and be collected in the manner authorized by law. If the first half of the taxes and assessments charged upon any real estate is paid on or before the twentieth day of December, as provided by law, but the remaining half thereof is not paid on or before the twentieth day of June next thereafter, or collected by distress or otherwise, prior to the next August settlement, as provided by law, a like penalty shall be added to such unpaid taxes and assessments, and they shall be treated as delinquent taxes and assessments, and, with the taxes and assessments of the current year, collected as aforesaid."

Sections 5678 and 5679, General Code, prior to the amendment above noted, referred only to general taxes, and, after providing a penalty for the non-payment of such taxes in the manner and at the times therein provided for, the sections ascribed the character of delinquency to taxes on real estate and penalties thereon not so paid.

With respect to the question at hand, it will be noted that sections 5678 and 5679, as amended, place assessments in the same category with taxes with respect to the consequences of the non-payment thereof in the manner therein provided,

and that said section 5678, General Code, as amended, provides that "the total of such amounts shall constitute the delinquent taxes and assessments on such real estate to be collected in the manner prescribed by law."

I am inclined to the view that the enactment of sections 5678 and 5679, General Code, in their present form fully meet the objection noted in the former opinion of the Attorney General above discussed and that, by way of specific answer to the question presented in your communication, lands may be certified as delinquent under the provisions of section 5712, General Code, and for foreclosure under the provisions of section 5718, General Code, for the non-payment of special assessments for such periods of time as bring the delinquencies in the payment of such special assessments within the conditions of said respective sections of the General Code, although the general taxes on the property against which such assessments have been levied, may have been paid.

The conclusions above stated on the question presented in your communication have been reached by me independently of any consideration of the decision of the Supreme Court of this state in the case of *State ex rel. Brown, Treas., v. Cooper, Treas.*, 123 O. S. 23. It is quite obvious, however, that the decision of the court in this case, holding as it does, that special assessments are a species of tax and that payment of assessments are required to be made at the same time general taxes are paid, supports the conclusion reached in this opinion with respect to the question presented by you.

Respectfully,

GILBERT BETTMAN,
Attorney General.

3282.

TOWNSHIP TRUSTEES—RIGHT TO USE GAS TAX MONEY FOR COST
OF RECONSTRUCTING DRIVEWAY OF ABUTTING PROPERTY
OWNER DESTROYED BY IMPROVEMENT OF TOWNSHIP ROAD.

SYLLABUS:

When the township trustees in improving a township road destroy the approach or driveway of an abutting property owner, the gasoline tax may properly be used to cover the cost of the reconstruction of said approach or driveway.

COLUMBUS, OHIO, June 2, 1931.

HON. JOHN R. PIERCE, *Prosecuting Attorney, Celina, Ohio.*

DEAR SIR:—Your recent letter reads:

"Section 7212, General Code of Ohio, provides for the payment of damages to adjoining landowners who have approaches to roads newly constructed or in lieu of said damages said section requires that the authorities constructing said road shall reconstruct any approaches which may have been destroyed in the construction of said road.

It appears that said section was passed prior to the inauguration of the system of distributing and using gasoline tax funds by trustees in the construction of roads.

Where a township road is constructed by township trustees with