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BENEFITS—LANDS SOLD IN FORECLOSURE PROCEEDINGS BEFORE EFFECTIVE DATE WHITTEMORE ACT, NOT AVAILABLE—AMENDED SENATE BILL 3, 93rd GENERAL ASSEMBLY—STATUS WHERE ENTRY CONFIRMATION FILED—SECTION 5692 G.C.—TAXES, ASSESSMENTS, PENALTIES AND INTEREST DUE TIME OF SALE—SEE OPINION 896, JULY 18, 1939.

SYLLABUS:

The benefits of Amended Senate Bill No. 3 of the 93rd General Assembly, known as the Whittemore Act, are not available when the lands were sold in a foreclosure proceedings before the effective date of the Act, even though the entry of confirmation be filed after the effective date, section 5692, General Code, requiring the payment of all taxes, assessments, penalties and interest due thereon at the time of sale.

COLUMBUS, OHIO, July 20, 1939.

HON. REX W. HANNA, *Prosecuting Attorney, Kenton, Ohio.*

DEAR SIR: This will acknowledge receipt of your request for my opinion, which reads as follows:

“In a foreclosure of mortgage proceedings, to which the county treasurer was not a party, where sale of the real estate was made to a junior lien holder on February 4, 1939, (prior to March 22, 1939, the date of the approval by the governor of Amended Senate Bill No. 3) and confirmation of sale has not yet been made, may the county treasurer legally accept a sum of money equal to the delinquent taxes and assessments less penalties, interest, and charges, for the year 1936 and prior thereto plus the taxes and assessments, penalties, interest, and charges, for the year 1937 and 1938, in full satisfaction of all taxes and assessments now a lien on the real estate:

In other words, does Amended Senate Bill No. 3 apply where sale was made prior to the effective date of the act and confirmation will be had after the enactment of such bill?

I am of the opinion that the treasurer may so accept and allow the deductions as authorized by Senate Bill No. 3. However, on principle this would seem to be in conflict with Opinion 4619, 1932 Ohio Attorney General.”

When real estate is sold in a foreclosure proceedings, taxes, assess-

ments, penalties and interest thereon are deducted from the proceeds. Section 5692, General Code, provides therefor as follows:

“When land so held by tenants in common is sold upon proceedings in partition, or taken by the election of any of the parties to such proceedings, or real estate is sold at judicial sale, or by administrators, executors, guardians, or trustees, the court shall order the taxes, penalties, assessments then due, and interest thereon, which are a lien on such land or real estate at the time of the sale, to be discharged out of the proceeds of such sale or election.”

It will be noted that the taxes, assessments, penalties and interest to be paid from the proceeds are those due at the time of the sale, no reference being made to the date the entry of confirmation is filed. This question was passed upon by the Attorney General in 1932, in Opinion 4610 (Opinions of the Attorney General, 1932, Vol. II, page 1038), the syllabus of which reads as follows:

“When the sheriff sells property as a result of a foreclosure action either of a tax lien by virtue of Sections 5713 et seq., General Code, of a special assessment lien by virtue of Section 2667, General Code, or of a mortgage or other similar lien, by reason of the provisions of Section 5692, General Code, he must pay from the proceeds of such sale any taxes standing charged on the tax list and duplicate in such county, a lien upon the property so sold at the time of the sale as distinguished from the date of confirmation of sale or delivery of the deed.”

Amended Senate Bill No. 3, passed by the 93rd General Assembly, became effective on March 22, 1939. By its terms it provides for the payment of taxes, penalties, interest and other charges for the year 1936 and prior thereto, upon compliance with the terms set forth in either section 2 or section 3 of the Act. Obviously, such payment was not authorized before the effective date of the Act. It follows, then, that since the entire amount of unpaid taxes, assessments and interest was due and payable before the effective date of Amended Senate Bill No. 3, and since section 5692, supra, requires the sheriff to deduct from the proceeds of judicial sales all taxes, assessments, penalties and interest due at the time of sale, no payment is authorized when the sale was made prior to the effective date of the Act, even though the entry of confirmation may be filed sometime after the effective date.

The same conclusion may be reached by an analysis of Amended Senate Bill No. 3 itself. Section 3 thereof reads as follows:

"Any such person being the owner of such real property or the holder of a lien thereon may at such times, in lieu of making a tender as authorized by section 2 of this act, enter into a written undertaking in such form as shall be prescribed by the bureau of inspection and supervision of public offices, to pay the full principal amount of such taxes and assessments, so delinquent, less penalties, interest and other charges for the year 1936 and prior thereto, and plus penalties, interest and other charges for the year 1937 and years subsequent thereto, in ten annual installments payable at the time prescribed by law for the payment of the second half of current real property taxes and assessments, with interest at the rate of four per centum per annum, payable annually, from the date of the written undertaking. The first installment shall be due and payable upon entering into such undertaking and shall be collected by the treasurer, who shall give a certificate therefor to the county auditor. Upon receipt of such certificate the county auditor shall note on the tax list and duplicate, and on the delinquent tax list, in such manner as the bureau may prescribe, the fact that such undertaking has been entered into; and thereafter, so long as such undertaking shall continue to be performed, the lands against which said delinquent taxes or assessments, penalties, interest and other charges are charged, *shall not be entered on the foreclosure list*, and shall not be published as provided in section 5704 of the General Code as part of the list of delinquent lands, anything in the statutes of this state to the contrary notwithstanding." (Emphasis the writer's.)

In commenting on this section, my immediate predecessor said in opinion No. 332, Opinions of the Attorney General for 1937, Volume I, page 575, at page 576:

"A landowner cannot take advantage of the Whittemore Act after foreclosure proceedings have been instituted, as the last sentence of Section 3 of the Act specifically provides that when the payment provided for in Section 1 of the Act, has been made and when the undertaking provided for in section 2 of the Act has been entered into, *such lands shall not be entered on the foreclosure list*. No provision is made for taking lands out of the list and I must conclude that if a landowner or lienholder desires to take advantage of the Whittemore Act, he must act before the lands have been entered on the foreclosure list."

Several important changes and additions were made in Amended Senate Bill No. 3, which must be considered in its interpretation. Section 15, which has been added, reads in part as follows:

“Nothing in this act shall affect the right of the prosecuting attorney to institute and complete proceedings to foreclose the lien of the state under sections 5718-3 and 5719 of the General Code of Ohio, nor the jurisdiction and power of the common pleas court under said sections of the General Code unless prior to the date of sale, the costs incurred in foreclosure proceedings shall have been paid and an undertaking shall have been entered into pursuant to this act, covering the payment of such delinquent taxes and assessments.”

The addition of this section, as I have pointed out in my opinion, No. 896, issued under date of July 18, 1939, extends the operation of the Act. If, after delinquent lands have gone on the foreclosure list and it is desired to take advantage of the provisions of the Act, in addition to the other requirements the costs incurred in the foreclosure proceedings must then be paid. But even this privilege expired unless exercised “prior to the date of sale.”

In the situation you suggest, the sale has been held and it is desired to take advantage of the Act either at or after the time of confirmation. Since there is no provision in the Act for compliance with its terms at this stage of the proceedings, it seems evident that after the date of sale the provisions of Amended Senate Bill No. 3 are no longer applicable.

It is therefore my opinion that the benefits of Amended Senate Bill No. 3 of the 93rd General Assembly, known as the Whittemore Act, are not available when the lands were sold in a foreclosure proceeding before the effective date of the Act, even though the confirmation be filed after the effective date, section 5692, General Code, requiring the payment of all taxes, assessments, penalties and interest due thereon at the time of sale.

Respectfully,

THOMAS J. HERBERT,
Attorney General.

903.

PUBLIC HIGHWAY — WHETHER “IMPROVED” OR “UNIMPROVED” — QUESTION OF FACT — DETERMINED FROM EXAMINATION FACTS AND CIRCUMSTANCES IN PARTICULAR SITUATION.

SYLLABUS:

The question as to whether a particular public highway is “improved” or “unimproved” is a question of fact that can only be determined from an examination of the facts and circumstances in the particular situation.