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DELINQUENT TAXES—PROCEEDS FROM SALES OF LAND—DISTRIBUTION BY COUNTY AUDITOR AMONG TAXING SUBDIVISIONS MUST BE ACCORDING TO STATUTE—EXCEPTIONS WHEN COURT ORDERS OTHERWISE.

*SYLLABUS:*

*A county auditor, in distributing the proceeds of tax levies, proceeds of sales of lands for delinquent taxes, or other moneys among the several taxing subdivisions entitled thereto, acts in a ministerial capacity and is bound to distribute said moneys in the manner provided by statute, regardless of the equities of the situation, unless by specific order of court distribution is to be made otherwise.*

COLUMBUS, OHIO, October 17, 1928.

HON. J. L. CLIFTON, *Director of Education, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your request for my opinion with reference to a situation which has arisen in Ottawa County. In your communication you state that:

“The Rocky Ridge Lime & Stone Company, a corporation doing business in the village of Rocky Ridge, Ottawa County, had prior to 1924, for four successive years defaulted in the payment of its taxes, on all of its properties located in that village. In August, 1924, the Common Pleas Court of Ottawa County ordered the sale of this property for taxes, ordered deeds to be given to the purchasers, and ordered the delinquent taxes for the entire four years to be distributed to the various taxing units involved (State, County, School District and Village). The County Auditor, in pursuance of this court order, disbursed the money resulting from the sale of said real estate to the several taxing units on the basis of the tax rate that prevailed for that year. The Rocky Ridge Board of Education received this money, and with it paid off a note which they owed to one of the banks in the county.

In December, 1926, The Ohio Savings Bank and Trust Company, a corporation doing business in the City of Toledo, which held a mortgage on this property, through its attorney, asked a modification of the decree under which this property was sold, and asked that where pieces of property belonging to the defunct Rocky Ridge Lime & Stone Company sold for more than taxes, that the excess be turned over to them as mortgagees. Some of these pieces of property sold for much less than taxes. The decree was modified, and the court ordered that the Treasurer of Ottawa County pay to the mortgagee the net amounts on pieces of property that sold for more than the taxes.”

You further state that the County Auditor and Treasurer having disbursed the money to the several taxing subdivisions in accordance with the first court order now seek to withhold these several amounts from the current distribution of taxes and pay them over to The Ohio Savings Bank and Trust Company. If this is done the Rocky Ridge Village School District will lose approximately thirteen hundred and no/100 dollars (\$1,300.00) from the present quota of taxes and will not have sufficient money to pay the necessary expenses of running its schools. You therefore inquire:

“Can the County Auditor and County Treasurer withhold this money from the Rocky Ridge Board of Education in the next distribution of taxes

or is this an obligation of the county to be paid from the general fund of the county, since the money was paid to the several taxing units on an erroneous order of the court?"

From information received through one of the examiners of the Bureau of Inspection and Supervision of Public Offices it appears as shown by the records of Ottawa County, that on December 9, 1922, the County Treasurer of Ottawa County instituted a number of suits in the Common Pleas Court of said county against the Rocky Ridge Lime and Stone Company, et al., for the collection of delinquent taxes on a number of parcels of land owned by the said Rocky Ridge Lime and Stone Company.

The Ohio Savings Bank and Trust Company of Toledo, Ohio, to which a deed of trust had been made by the Rocky Ridge Lime and Stone Company, conveying these several parcels of land to the bank as security for an issue of bonds of the Rocky Ridge Lime and Stone Company, which the bank had underwritten, was made a party defendant and answered, setting up its claim. The petition in the several suits asked for foreclosure, sale of the lots, marshaling of liens and distribution of the proceeds of the sale to the lien holders in accordance with their priorities. There were thirteen of these suits, numbered 7386 to 7397, inclusive. These suits were later consolidated, hearing had thereon and sale of the lots ordered to satisfy the liens. On August 29, 1924, the following order of the court was approved and spread upon the Journal.

"Nos. 7386b to 7397, both inclusive.

This cause coming on further to be heard upon the pleadings herein and upon motion duly made to distribute the proceeds of the sale herein, amounting to the sum of \$5,123.00; it is ordered that the sheriff, out of said proceeds in his hands, pay:

First, To the Clerk of the Court the costs of this action, amounting to \$177.85.

Second, To the Treasurer of Ottawa County, Ohio, the taxes, assessments, penalty and interest thereon, against said premises, to-wit: the sum of \$3,402.69, together with interest thereon from May 1, 1923, at the rate of six per centum per annum; and, also, all of the accrued taxes and assessments on said lands to date, together with all penalties and legal interest thereon.

Third, To distribute the balance according to law."

The sheriff made distribution in accordance with the foregoing order of the Court, paying to the County Treasurer the sum of \_\_\_\_\_ dollars, being the amount of taxes found to be due and unpaid by judgment of the court under date of May 1, 1923, on the several parcels of land involved in the said suits, together with interest and further accrued taxes, assessments, penalties and interest from May 1, 1923, to date of distribution. This money was duly certified by the County Treasurer with other collections of taxes and was distributed to the various taxing subdivisions entitled thereto, including the Rocky Ridge Village School District, in the August 1924 settlement.

It appears that the lands involved in eight of these suits sold for less than the taxes found to be due thereon. The lands involved in five of the suits, numbers 7389, 7390, 7391, 7393 and 7397 sold for more than the taxes. In two of the suits, numbers 7389 and 7390, the difference was only thirty-nine and 28/100 dollars (\$39.28). In three of the suits, however, numbers 7391, 7393 and 7397, the lands sold for three

thousand four hundred sixty-six and 26/100 dollars (\$3,466.26) more than the taxes found to be due thereon on May 1, 1923.

On October 4, 1924, the Ohio Savings Bank and Trust Company filed its motion for rehearing and for modification of the court's former order of distribution. Upon hearing in November, 1926, the motion was sustained in part and under date of December 29, 1926, the following order was spread upon the Journal:

"This day this cause came on for hearing upon the motion of The Ohio Savings Bank and Trust Company to modify the decree of the Court heretofore entered herein, ordering the distribution of the fund arising from the sale of the several properties in the causes heretofore consolidated herewith, and the same was duly submitted to the Court.

On consideration of said motion, it is ordered that Charles Rauch be substituted as a party plaintiff herein for said A. G. Winmi, said Charles Rauch being successor in office of the said A. G. Winmi.

And the Court further finds that the order of the Court herein heretofore entered should be, and the same is hereby, modified as to such distribution.

And the Court finds that the premises described in Cause No. 7391 sold for more than sufficient to pay the taxes due upon said property and that of the money so received there should be paid to said The Ohio Savings Bank and Trust Company upon its mortgage, the sum of two thousand five hundred thirteen and sixty hundredths (\$2,513.60) dollars and that the premises described in Cause No. 7393 sold for more than sufficient to pay the taxes due upon said property and that of the money so received there should be paid to said The Ohio Savings Bank and Trust Company upon its mortgage, the sum of three hundred sixty-six and twenty-eight hundredths (\$366.28) dollars.

And that the premises described in Cause No. 7397 sold for more than sufficient to pay the taxes upon said property and that of the money so received there should be paid to said The Ohio Savings Bank and Trust Company upon its mortgage, the sum of three hundred eighty seven and twenty-six hundredths (\$387.26) dollars.

And the Court finds that the amount of costs chargeable to said three causes is the sum of forty-four and forty-six hundredths (\$44.46) dollars and that out of the funds so received from the sale of said properties there should be paid to The Ohio Savings Bank and Trust Company the total sum of three thousand, two hundred sixty-four and fourteen-hundredths (\$3,264.14) dollars, less said sum of forty-four and forty-six hundredths (\$44.46) dollars, to-wit: three thousand, two hundred, nineteen and sixty-eight hundredths (\$3,219.68) dollars.

And it being made to appear to the Court that said moneys have heretofore in accordance with an erroneous order of said Court been paid into the treasury of Ottawa County, Ohio, it is ordered that said treasurer pay to The Ohio Savings Bank and Trust Company out of any funds in the treasury of said county, the said sum of three thousand, two hundred, nineteen and sixty-eight hundredths (\$3,219.68) dollars and that said The Ohio Savings Bank and Trust Company recover from said Ottawa County the said sum of three thousand, two hundred, nineteen and sixty-eight hundredths (\$3,219.68) dollars for which execution is awarded."

Pursuant to the foregoing order of the Court the County Auditor of Ottawa County issued his warrant for three thousand two hundred nineteen and 68/100 dollars (\$3,219.68) upon the county treasurer on April 20, 1927, payable to The Ohio Savings

Bank and Trust Company, out of the undivided general tax funds and now seeks to treat this payment as a refund and withhold this amount from the several taxing subdivisions in the next distribution of taxes.

By the terms of Section 5719, General Code, relating to the sale of lands for taxes, it is provided:

“ \* \* \* From the proceeds of the sale the costs shall be first paid, next the judgment for taxes, assessments, penalties and interest and the balance shall be distributed according to law. \* \* \* ”

The Court in making its first order in 1924 apparently intended to follow the statute but failed to take into consideration that the lands had been carried on the tax duplicate in parcels and were sold in that way and that some of the parcels sold for much more than the taxes charged against them, whereas others sold for less, but treated the entire property as one parcel.

Inasmuch as this order was not stayed by the filing of a motion for rehearing or otherwise, the sheriff, after the sale, could do nothing else but act in accordance with the order of the court and pay from the proceeds of the sale to the treasurer the sum of \$3,402.69, together with interest thereon from May 1, 1923, at the rate of six per cent per annum, and also all of the accrued taxes and assessments on said lands to date, together with all penalties and legal interest thereon and distribute the balance according to law. This having been done by the sheriff in accordance with the order of the court, the treasurer was authorized to act as he did in the premises and certify these moneys with the other collections of taxes and the auditor was thereafter authorized to distribute the same according to law in the next tax settlement.

I know of no authority whereby the auditor or treasurer is authorized under circumstances of this kind to refund from future tax settlements moneys which had been distributed in accordance with an order of court when that order is later modified. A county auditor and county treasurer are mere ministerial officers and have only such powers as are granted to them by statute. They have no discretion except to collect and distribute taxes as provided by law.

The Court in this case was no doubt fully advised of the situation or could have been apprised of the same. In fact the Journal Entry of 1926 shows affirmatively that the Court was advised that these moneys had been paid into the Treasury of Ottawa County. Whether or not the Court was advised that these moneys had been distributed to the various taxing subdivisions and spent, does not appear, but it does appear that he knew that the same funds were not available for payment to The Ohio Savings Bank and Trust Company and accordingly made the order that the moneys which were found, upon rehearing, should be paid to The Ohio Savings Bank and Trust Company were to be paid “out of *any* funds in the treasury of said county.” It was no doubt within the power of the court having knowledge of the manner in which these moneys had been distributed under the previous order of the court to have provided that the distribution as made should be refunded and the entire matter readjusted so that each taxing subdivision would get only such portion of it as it was rightfully entitled to. The Court, however, did not make such an order but provided, as before stated, that The Ohio Savings Bank and Trust Company should be paid its rightful portion of the proceeds of said tax sale “out of *any* funds in the Treasury of said County.”

I am therefore of the opinion that neither the County Auditor nor the County Treasurer of Ottawa County is authorized to withhold any moneys from the Rocky Ridge Board of Education in the next or any other distribution of taxes for the pur-

