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FORECLOSURE—DELINQUENT TAX—COST OF SEARCH OF TITLE UPON COURT ORDER NOT LIEN ON REAL ESTATE WHEN—PAYMENT OF TAXES AND ASSESSMENTS BETWEEN SUIT AND CONFIRMATION PERMISSIBLE.

SYLLABUS:

1. *After a delinquent tax foreclosure suit is instituted and all the defendants have been served, anyone of the defendants may avail himself of the provisions of Amended Senate Bill No. 42 of the 90th General Assembly, 115 O. L. Page 161, and Amended Senate Bill No. 105, second special session of the 90th General Assembly, 115 O. L. Pt. 2, page 332.*

2. *Costs which may have accrued by reason of a court order authorizing search of title, after a delinquent land tax foreclosure suit is instituted, are not a lien on the real estate, and the defendants or anyone of them may take advantage of the provisions of Amended Senate Bill No. 42 of the 90th General Assembly, 115 O. L. page 161, and Amended Senate Bill No. 105, second special session of the 90th General Assembly, 115 O. L. Pt. 2, page 332, without paying such costs, providing the same is done before confirmation of the sale.*

3. *After a delinquent tax foreclosure suit is instituted and before confirmation of the sale, the county treasurer is compelled to accept at any time prior to September 1, 1935, from anyone of the defendants of such suit, the payment of the principal sum of delinquent taxes and assessments which have become delinquent at or prior to the August settlement in the year 1934, if such payment is made in accordance with the provisions of Amended Senate Bill No. 42 of the 90th General Assembly, 115 O. L. page 161, and Amended Senate Bill No. 105, second special session of the 90th General Assembly, 115 O. L. Pt. 2, page 332.*

4. *The acceptance of such payment by the county treasurer, or the entering into an undertaking in the manner prescribed by Amended Senate Bill No. 42, supra, need not be approved by the prosecuting attorney.*

COLUMBUS, OHIO, August 24, 1935.

HON. SAM L. SUMMERS, *Prosecuting Attorney, Ravenna, Ohio.*

DEAR SIR:—I am in receipt of your communication as follows:

“Under Section 5718-3 of the General Code it becomes the duty of the Prosecuting Attorney to institute proceedings in the name of the County Treasurer to foreclose the lien of the state in any court of competent jurisdiction, within nine months after delivery of delin-

quent land tax certificates for the collection of taxes, assessments, penalties and interest and charges, unless the same are paid.

Under the recent Whittemore Bill and its amendments, any person, firm or corporation charged with or legally authorized or required by law or decree of court to pay real property taxes and assessments which have become delinquent at or prior to the August settlement in the year 1935, or any person, firm or corporation holding a lien upon such real property may at any time prior to the first day of September in the year 1935 elect to pay the principal sum of such delinquent taxes and assessments as provided in this act; *anything in the permanent statutes of this state relating to the payment of real property taxes, assessments, penalties, and interest thereon to the contrary notwithstanding.* Also under Section 3 of the Whittemore Act as amended, persons owing taxes are permitted to and do undertake to pay taxes over a six year period.

I am therefore desirous of your opinion on the following state facts:

1. After delinquent land tax foreclosure suit is started and all of the defendants have been served, can anyone of the defendants then take advantage of any of the clauses of the Whittemore Bill?

2. After a delinquent land tax foreclosure suit is started and all parties served according to law, and a search of title is made under a court order authorizing such search and a fee set by the court and taxed in the costs of the case; are such costs then a first lien on the property?

3. If such costs are a first lien on the property, is it necessary that the costs be paid before the defendants may take advantage of the Whittemore Law?

4. If, in your opinion, the defendants in such cases may take advantage of the Whittemore law after the suit is already started and all defendants served; does the County Treasurer have the right and authority to enter into such an undertaking, that is start anyone of the defendants on payments under the Whittemore Bill, without first obtaining the approval of the Prosecuting Attorney?"

Section 5718-3, General Code, to which you refer in your communication, reads in part as follows:

"It shall be the duty of the prosecuting attorney of the county, upon the delivery to him by the county auditor of a delinquent land tax certificate, to institute a proceeding thereon in the name of the county treasurer to foreclose the lien of the state, in any court of competent jurisdiction within nine months thereafter unless the tax-

es, assessments, penalty, interest and charges are sooner paid, and to prosecute the same to final judgment and satisfaction."

The Whittemore Bill to which you refer (Amended Senate Bill No. 42 of the 90th General Assembly, 115 O. L. page 161, and Amended Senate Bill No. 105, second special session of the 90th General Assembly, 115 O. L. Pt. 2, page 332), reads in part as follows:

Amended Senate Bill No. 105.

Sec. 1. "Any person, firm or corporation charged with or legally authorized or required by law or decree of court to pay real property taxes and assessments which have become delinquent at or prior to the August settlement in the year \* \* \* 1934, or any person, firm or corporation holding a lien upon such real property may at any time prior to the first day of September in the year \* \* \* 1935 elect to pay the principal sum of such delinquent taxes and assessments as provided in this act, *anything in the permanent statutes of this state relating to the payment of real property taxes, assessments, penalties and interest thereon to the contrary notwithstanding.* Provided, however, that no such person shall be entitled to make such election unless all taxes, assessments and penalties for the year \* \* \* 1934 then due and payable have been paid. Provided that in case a penalty and interest has been paid on account of delinquent taxes and/or assessments, for the first or second half of the years 1932 and/or 1933, such penalty shall be refunded on order of the county auditor directed to the county treasurer provided the principal sum of such taxes and assessments is paid prior to the first day of September, 1935." (Italics the writer's.)

Amended Senate Bill No. 42.

Sec. 3. "Any such person being the owner of such real property 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, in six 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 such undertaking. The first five said annual installments shall be for ten per centum each of the full original principal amount plus interest as hereinbefore prescribed and the next annual payment shall be for the balance of said principal amount plus interest as hereinbefore prescribed. Such under-

taking shall be made in duplicate; one copy shall be retained by such person and the other shall be filed with the county treasurer. 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, *anything in the permanent statutes of this state to the contrary notwithstanding.*" (Italics the writer's)

The first question contained in your inquiry is answered by my opinion No. 3959, rendered on February 23, 1935, the syllabus of which reads as follows:

"When proceedings in foreclosure are instituted on delinquent lands, a mortgagee or other lienholder may, at any time prior to September 1, 1935, under the provisions of Amended Senate Bill No. 105 of the second special session of the 90th General Assembly, redeem such lands at any time before the confirmation of the sale thereof."

It is stated therein, after pointing out the provisions of section 1 of the Act, and the purpose of its enactment as set out in section 5 thereof, that:

"While it is a general rule that statutes providing for exceptions to general laws must be strictly construed, it is likewise well settled that the letter of remedial statutes may be extended to include cases clearly within conditions they are intended to remedy. In the instant case the intent of the act is plain and should be carried into effect rather than be defeated by a most strict construction. While it may be said that the redemption of delinquent lands does not stand in direct relation to the payment of taxes, yet the connection therewith is not so remote, so as to make such a construction of the act necessary as would defeat the obvious purpose thereof."

I come now to your second question. Section 5713, General Code, reads in part as follows:

"The state shall have a first and best lien on the lands and lots

described in the delinquent land list, for the amount of taxes, assessments and penalty and accrued interest charged prior to the delivery of such list, together with interest on the principal sum of such taxes and assessments at the rate of eight per cent. per annum, from the date of the August settlement next preceding the delivery of such list to the date of redemption thereof, and the additional charge of twenty-five cents for the making of said list. If the taxes have not been paid for three consecutive years after certification, the state shall have the right to institute foreclosure proceedings thereon, in the manner provided by this chapter, and there shall be taxed by the court as costs in the foreclosure proceedings instituted on said certification, the cost of an abstract or certificate of title to the property described in said certification, if the same be required by the court, to be paid into the general fund of the county.”

It will be observed from a reading of the above section that a lien is created on real property for taxes thereon. It is likewise noted that said section provides that the cost of an abstract or certificate of title is to be taxed as costs in the foreclosure proceeding if the same is required by the court, yet there is no language contained therein which creates a lien on the property for such costs.

In an opinion rendered by me on September 6, 1933, *Opinions of the Attorney General for 1933*, page 1372, it was held, as disclosed by the syllabus:

“When unpaid costs in an action for the foreclosure of tax liens brought by the county treasurer have been taxed against the county treasurer, by reason of the fact that the premises did not sell at the sale thereunder for an amount sufficient to pay the court costs, or by reason of a dismissal of the action by the county treasurer, such costs may be paid out of the general funds of the county appropriated for such purposes by the county commissioners.”

On page 1374 it is stated:

“At common law, a recovery of costs was unknown. Each litigant paid his own costs, that is, the court costs caused by him. *Farrier vs. Cairn*, 5 O. S. 45. The legislature in Ohio has authorized the court to grant a judgment to the plaintiff or prevailing party for his costs and the method for the enforcement of such judgment. (See Sections 11614 to 11630, General Code.)

I find no statute which would relieve the county treasurer, as a litigant, from the payment of the court costs incurred by him. It

is therefore my opinion that the county is liable for the court costs incurred or caused by it in the prosecution of a foreclosure proceeding for the enforcement of a delinquent real estate tax lien."

My predecessor in office in an opinion rendered under date of February 3, 1930, *Opinions of the Attorney General for 1930*, page 204, stated:

"In this connection it is noted that by Section 5719, General Code, it is provided that the costs in the action shall be first paid out of the proceeds of the sale of the property. However, the primary obligation for the payment of expenses which may be assessed as costs in an action is upon the party incurring the same, and, in a case of this kind, if a sale of the property is not effected in such foreclosure proceeding or if the property does not sell for enough to pay the costs in the case, the county treasurer, as the party plaintiff in such action, would be liable for the expenses incurred by him in obtaining service by publication upon parties defendant in the action. In such case the court, under the provisions of Section 11628, General Code, may enter judgment in favor of the county treasurer, as plaintiff in such action, against the delinquent property owner or otherwise, as the court may adjudge to be right and equitable."

While section 5719, General Code, expressly specifies that from the proceeds of the sale, the costs shall first be paid, next, the amount found due for taxes, assessments, penalties, interest and charges, and the balance, if any, distributed according to law, yet this in nowise creates a lien upon the property. The provisions of said section, in making the costs payable first out of the proceeds realized from the sale, make such costs a charge against the fund arising from such sale and not a lien on the property. It would therefore follow that such costs not being a first lien on the property, the defendants in a tax foreclosure action are not required to pay the same before availing themselves of the provisions of Amended Senate Bill No. 42 and Amended Senate Bill No. 105, supra.

I shall now consider your last question. In regard thereto, it will be noted that Amended Senate Bill No. 105, supra, provides that any person charged with or required to pay real estate taxes *may* at any time prior to September 1, 1935 *elect to pay the principal sum* either in lump sum or installments, anything in the permanent statutes to the contrary notwithstanding. The right to avail himself of the provisions thereof is given to any such person in plain and apparent language contained therein conveying a clear and definite meaning, limited only by the provisions of the act itself. Having heretofore stated that, after a tax foreclosure suit is instituted, any person charged with or legally authorized or required by law or decree of court to

pay real property taxes or any lienholder, may at any time before confirmation of sale, as a matter of right, avail himself of the provisions of Amended Senate Bill No. 42 and Amended Senate Bill No. 105, *supra*, and it would appear that the county treasurer must accept the proper tender made, whether or not the prosecuting attorney approves of the same.

In specific answer to your inquiries, it is therefore my opinion that:

1. After a delinquent tax foreclosure suit is instituted and all the defendants have been served, anyone of the defendants may avail himself of the provisions of Amended Senate Bill No. 42 of the 90th General Assembly, 115 O. L. page 161, and Amended Senate Bill No. 105, second special session of the 90th General Assembly, 115 O. L. Pt. 2, page 332.

2. Costs which may have accrued by reason of a court order authorizing search of title, after a delinquent land tax foreclosure suit is instituted, are not a lien on the real estate, and the defendants or anyone of them may take advantage of the provisions of Amended Senate Bill No. 42 of the 90th General Assembly, 115 O. L. page 161, and Amended Senate Bill No. 105, second special session of the 90th General Assembly, 115 O. L. Pt. 2, page 332, without paying such costs, providing the same is done before confirmation of the sale.

3. After a delinquent tax foreclosure suit is instituted and before confirmation of the sale, the county treasurer is compelled to accept at any time prior to September 1, 1935, from anyone of the defendants of such suit, the payment of the principal sum of delinquent taxes and assessments which have become delinquent at or prior to the August settlement in the year 1934, if such payment is made in accordance with the provisions of Amended Senate Bill No. 42 of the 90th General Assembly, 115 O. L. page 161, and Amended Senate Bill No. 105, second special session of the 90th General Assembly, 115 O. L. Pt. 2, page 332.

4. The acceptance of such payment by the county treasurer, or the entering into an undertaking in the manner prescribed by Amended Senate Bill No. 42, *supra*, need not be approved by the prosecuting attorney.

Respectfully,

JOHN W. BRICKER,  
*Attorney General.*