1552.

APPROVAL, NOTES OF EMPIRE VILLAGE SCHOOL DISTRICT, JEFFERSON COUNTY, OHIO—$3,848.00.

COLUMBUS, OHIO, September 13, 1933.

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

1553.

SHERIFF—LIABLE ON BOND WHERE BANK FAILS WHEREIN HE HAS DEPOSITED PROCEEDS OF SALE OF REAL ESTATE IN PARTITION CASE—EXCEPTION TO LIABILITY WHEN.

SYLLABUS:

Where the sheriff of a county deposits the proceeds of the sale of real estate in a partition case in a bank which thereafter fails, the sheriff is liable on his bond for any loss sustained by reason of such bank failure with respect to that part of such proceeds as is payable in satisfaction of taxes on the real estate so sold.

However, under the rule recognized and applied in the case of Ikirt vs. Wells, Sheriff, 13 *O. C. C. (N. S.),* 213, *affirmed by the Supreme Court without opinion,* 82 *O. S.* 401, *the sheriff in such case is not liable for any loss so sustained with respect to that part of the proceeds of such sale which is to be distributed to the parties entitled thereto as provided for in section* 12039, *General Code.*

COLUMBUS, OHIO, September 14, 1933.

HON. JOSEPH J. LABADIE, *Prosecuting Attorney, Ottawa, Ohio.*

DEAR SIR:—This is to acknowledge the receipt from you of a communication which reads as follows:

> "I would like your opinion on the following question which has arisen in my county.
>
> FIRST—A partition suit was filed by the heirs at law for partition of real-estate in this county. Under order of Court a deed was executed to one of the heirs who elected to take the premises at the appraisement thereof. The money was paid into the Sheriff's office of this county on or about November 14th, 1932, including tax payment of 1932.
>
> The Auditor of Putnam County had compiled the tax rate for the year 1933 and same had been approved by the State Department at Columbus on or before November 1st, 1932. The tax duplicate for Blanchard Township where the land was situated, had been completed before November 14th, 1932 and the tax receipts written. The sheriff tendered the tax money to the Treasurer of Putnam County for payment of these taxes, but the Treasurer refused to accept the money until his entire tax duplicate was completed and until he had opened his tax collection books for payment.

On November 27th, 1932 and before the sheriff could pay the money into the Treasury of Putnam County, the Bank of Ottawa was closed for liquidation and all of this money has been since tied up in the sheriff's account in said bank. The purchasers of this land are seeking to have the unpaid taxes remitted in the amount which they paid the sheriff inasmuch as these taxes appear at this time delinquent on the tax duplicate. Also, the sheriff was unable to distribute this money inasmuch as some of the heirs were minor children.

Please advise me whether or not the sheriff is responsible for either the partition money or the money paid in for taxes, and whether or not the taxes appearing delinquent on this land should be remitted or cancelled.

SECOND—As Prosecuting Attorney of Putnam County, Ohio, I filed a petition to sell certain real-estate in this county to recover the unpaid delinquent taxes thereon. The order of sale was issued and the sheriff sold the property and the money was paid in to him including court costs and taxes. This was some time in November, 1932.

The sheriff tendered and offered the delinquent tax money to the Treasurer of Putnam County, Ohio, but for the same reason above stated, the Treasurer refused to accept this money.

From the tax duplicate it appears that there are still delinquent unpaid taxes against the property which was sold by me. Will you please advise what procedure should be used in this matter; whether the delinquent unpaid taxes for which the land was sold should be cancelled of record and whether or not the sheriff should be personally liable for the money which he received on the sale and which the Treasurer refused to accept.

I wish further to state that the proceeds of the sale of this property were deposited in the Bank of Ottawa Company which was closed on November 27th, 1932 and which funds are still tied up."

Although you do not so state, I assume that the judicial sale of the real property referred to in that part of your communication which relates to the first two questions therein presented, was made on or subsequent to October 1, 1932, and that by reason of this fact the taxes on this property were properly payable out of the proceeds of the sale which, as you state, were paid over to the sheriff of your county on or about November 14, 1932. *Makely* vs. *Whitmore,* 61 O. S. 587, 595; *Hoaglen* vs. *Cohan,* 30 O. S. 436. You state in your communication that after the sheriff received the proceeds of the sale of this property in the partition suit therein referred to, he tendered to the treasurer of the county the taxes for the year 1932 which were then a lien upon the property and which, as I have assumed, were payable out of the proceeds of the sale of the property then in the hands of the sheriff. In this connection, it further appears that although at the time this tender was made that part of the tax list and duplicate covering the real estate in the township in which this property was located had been completed, the tax list and duplicate of all of the real estate in the county and in the several taxing districts therein had not yet been completed and opened for the receipt of taxes; and that for this reason the treasurer refused to accept the taxes for the year 1932 tendered to him by the sheriff.

Under the provisions of section 2583, General Code, as amended in 114 O. L. 723, it was the duty of the county auditor to prepare a tax list and duplicate of the taxable real property in the county and in the several taxing districts therein

before October 1, 1932, and on said date to deliver a duplicate thereof to the county treasurer for the collection of taxes thereon. Although these provisions of section 2583, General Code, in so far as they relate to the time when the duplicate is to be delivered to the county auditor, are directory, the provisions of this section requiring the preparation of such tax list and duplicate and the delivery of the duplicate to the county treasurer for tax collection purposes, are mandatory. And aside from such authority as the county treasurer may have to receive taxes prior to the preparation of the tax list and duplicate, on a pay-in order of the county auditor under the provisions of sections 2567 and 2645, General Code, the only warrant which the county treasurer had for the receipt of real property taxes was the completed tax duplicate of the taxable real property in the county and in the several taxing districts therein, which the county auditor was required to deliver to him under the provisions of section 2583, General Code. As to this, section 2649, General Code, as amended in 114 O. L. 729, provides that the office of the county treasurer shall be kept open for the collection of real property taxes and assessments from the time of the delivery of the duplicate to the treasurer until the twenty-first day of December and from the first day of April until the twenty-first day of June. It does not appear that the taxes here in question were tendered to the county treasurer on any pay-in order made by the county auditor in the manner provided by sections 2567 and 2645, General Code, above referred to; and, in this situation, it is clear that, inasmuch as the completed real property tax duplicate of the county had not been made up and delivered to the county treasurer at the time these taxes were tendered to him by the sheriff, the county treasurer was neither authorized nor required to accept such taxes on the tender made by the sheriff. It follows on these considerations, as well as independently thereof, that there is no warrant in law for the remission of the taxes on the property referred to in your communication.

With respect to the question as to the liability of the sheriff for the payment of the money which came into his hands in his official capacity for the purpose of paying the taxes on this property, it may be observed that by reason of the provisions of section 2842, General Code, and under the bond required of him by section 2824, General Code, a sheriff of a county is liable to account for moneys received by him in his official capacity, unless he is excused from so doing by an act of God or of a public enemy. Opinions of Attorney General, 1932, Vol. I, page 530; *Seward* vs. *Surety Company,* 120 O. S. 47. Inasmuch as the moneys paid over to the sheriff for the purpose of paying the taxes on this land were moneys belonging to the public represented by the county and taxing districts therein entitled thereto, there is no escape from the conclusion that the sheriff is responsible for the moneys turned over to him for the payment of the taxes on this property.

You further inquire as to the responsibility of the sheriff with respect to that part of the proceeds of the sale of this property in the partition suit which is to be distributed by him to the parties entitled thereto under the order of the court. This question suggests a consideration of the provisions of section 12039, General Code, which are as follows:

> "The money or securities arising from a sale of, or an election to take the estate, shall be distributed and paid, by order of the court, to the parties entitled thereto, in lieu of their respective parts and proportions of the estate, according to their rights therein. All receipts of such money or securities by the sheriff are in his official capacity, and his sureties on his official bond shall be liable for any misapplication thereof."

In the case of *Ikirt,* vs. *Wells, Sheriff,* 13 O. C. C. (N. S.) 213, affirmed by the Supreme Court without opinion in *Ikirt* vs. *Wells, Sheriff,* 82 O. S. 401, it was held that a sheriff was not liable to amercement for moneys received by him under the then provisions of section 5767, Revised Statutes, now section 12039, General Code, above noted, where such moneys were deposited to the account of the sheriff in a bank which later failed. The reason given by the court for its decision in this case was that moneys received by the sheriff under the authority of section 12039, General Code, are not public moneys but are private funds belonging to the parties who own the property. In the opinion of the court in this case, it is said:

> "Of course it cannot be disputed that a public officer may not be made liable by statute or by the provisions of his bond to pay over moneys which come into his possession by virtue of his office, even though they may be lost without his fault. But it hardly seems consonant with sound principles of equity and justice to hold over a public officer a rule so strict unless the statute or the bond required it."

Inasmuch as there has been no amendment of section 12039, General Code, since the decision of the court in the Ikirt case, supra, and this decision has not been overruled or modified, it follows that unless the bond of the sheriff in this case enlarges his liability beyond that imposed by the statute, he is not liable with respect to partition moneys in his hands which may be lost by reason of the failure of the bank in which such moneys were deposited to his account as sheriff.

You further state that a part of the moneys deposited by the sheriff in the bank referred to in your communication and which stood to his credit at the time the bank closed its doors was money received by him as the proceeds of the sale of certain real property in a certain action instituted by you in your official capacity for the foreclosure of the lien of delinquent taxes on such property. It further appears that that part of the proceeds of the sale of this property which represented the delinquent taxes on the property was tendered by the sheriff to the county treasurer, and that such tender was refused by the county treasurer for the reason that the completed tax duplicate had not been turned over to him and opened for the collection of taxes. This money should have been received by the county treasurer notwithstanding the fact that the tax duplicate was not at the time in his possession and open for the collection of taxes. In other words, this money should have been paid in to the county treasurer on the draft or pay-in order of the county auditor as provided for in sections 2567 and 2645, General Code, above noted. However, it does not appear that any such pay-in order with respect to this money was applied for by the sheriff, and since in this situation the county treasurer was not authorized to receive such delinquent tax money without such order from the county auditor, the county treasurer was apparently justified in refusing the tender of this money, although not for the reasons given by him at the time. These delinquent tax moneys in the hands of the sheriff and on deposit in this bank at the time the same closed were moneys belonging to the public represented by the county and the several taxing districts therein; and for the reasons given in the discussion of your first question, it must be held that the sheriff and his bondsmen are liable for any loss of this money occasioned by the failure of the bank.

It further appears from your communication that aside from the delinquent taxes and penalties and interest thereon on which the delinquent land tax fore-

closure suit filed by you was based, there are other delinquent taxes against the property which was sold in this foreclosure action; and you inquire as to what disposition should be made of such other delinquent taxes standing against this property. Your question calls for a consideration of the provisions of sections 5718-3 and 5719, General Code, as these sections were amended by the 89th General Assembly, 114 O. L. 836. Prior to the amendment of these sections, it was held in an opinion of this office found in the Opinions of the Attorney General for the year 1930, Vol. I, page 31, that in foreclosure proceedings under the provisions of sections 5718 and 5719, General Code, only the taxes which were included in the delinquent land tax certificate were abated, and that taxes and assessments accruing subsequently to the execution and delivery of the tax title certificate upon which the foreclosure action was filed, were not abated in and by said foreclosure proceedings, but remained a lien upon the lands in the hands of the purchaser, unless such subsequently accruing taxes and assessments were paid from the proceeds of the sale of the property. Section 5718-3, General Code, which makes provision for the procedure in foreclosure actions instituted by the prosecuting attorney upon delinquent land tax certificates, provides that the delinquent land tax certificate filed by the county auditor with the prosecuting attorney, upon which such action is based, shall be prima facie evidence on the trial of such action, of the amount and validity of the taxes, assessments, penalties, interest and charges appearing due and unpaid thereon and of the non-payment thereof. Section 5719, General Code, as amended, is more particularly applicable to the question here presented. This section provides in part as follows:

> "A finding shall be entered of the amount of such taxes and assessments, or any part thereof, as are found due and unpaid, and of penalty, interest, costs and charges, for the payment of which, together with all taxes and assessments payable subsequent to certification for foreclosure, the court shall order such premises to be sold without appraisement for not less than the total amount of such finding and costs, unless the prosecuting attorney shall apply for an appraisal, in which event the premises shall be appraised in the manner provided by section 11672 of the General Code, and shall be sold for at least two-thirds of the appraised value thereof. From the proceeds of the sale the costs shall be first paid, next the amount found due for taxes, assessments, penalties, interest and charges, next the amount of any taxes and assessments accruing after the entry of the finding and before sale, all of which taxes, assessments, penalties, interest and charges shall be deemed satisfied, though the amount applicable thereto be deficient, and the balance, if any, shall be distributed according to law."

It appears from the provisions of this section above quoted that after the payment from the proceeds of the sale of the property of the costs of the case and of the amount of the taxes, assessments, penalties and interest found due on the tax title certificate upon which the foreclosure action was filed, there shall be paid from the proceeds of said sale taxes and assessments subsequently accruing on such property, and that all of such taxes, assessments, penalties and interest shall be deemed satisfied although the proceeds of the sale of such property are not sufficient in amount to satisfy all of such taxes and assessments and the penalties and interest thereon. It was the evident purpose of the legislature in the amendment of section 5719, General Code, to give the purchaser of lands sold in a delinquent land tax foreclosure case a title free and clear of all

tax and assessment liens thereon at the time of the sale of the property in said foreclosure proceedings, whether the proceeds of the sale of the property are sufficient to pay such taxes and assessment liens in full, or not. However, before such tax and assessment lien can be deemed to be satisfied, that part of the proceeds of the sale of the property available for the payment of such taxes and assessments and all penalties and interest thereon, must be paid to the county treasurer; and where the proceeds of the sale of property in such tax foreclosure action available for payment in satisfaction of the taxes and interest thereon set out in the delinquent tax certificate, and all subsequently accruing taxes and assessments, have been deposited by the sheriff to his credit in a bank, the sheriff will be liable for the loss of any of such moneys sustained by reason of the failure of such bank.

Respectfully,
JOHN W. BRICKER,
Attorney General.

1554.

APPROVAL, AGREEMENT FOR ELIMINATION OF GRADE CROSSING IN THE VILLAGE OF LEAVITTSBURG, TRUMBULL COUNTY, OHIO —ERIE RAILROAD COMPANY AND B. AND O. RAILROAD COMPANY.

COLUMBUS, OHIO, September 14, 1933.

HON. O. W. MERRELL, *Director of Highways, Columbus, Ohio.*

DEAR SIR:—You have submitted agreement by and between O. W. Merrell, Director of Highways, and Erie Railroad Company, lessee of and operating the railroad and property of the Nypano Railroad Company, and sublessee of and operating the railroad and property of the Cleveland and Mahoning Valley Railway Company, and The Baltimore and Ohio Railroad Company, which relates to the elimination of the grade crossing over the tracks of the Erie Railroad Company and the Baltimore and Ohio Railroad Company on State Highway No. 322 in the Village of Leavittsburg, Trumbull County, Ohio.

After examination, it is my opinion that said contract is in proper legal form and will constitute a binding contract when properly executed by the Director of Highways.

Respectfully,
JOHN W. BRICKER,
Attorney General.

1555.

CHECK—EFFECT OF DISHONOR THEREOF WHEN GIVEN IN PAYMENT OF REAL PROPERTY TAXES—EFFECT WHERE GRANTEE HAD NO KNOWLEDGE THAT TAXES WERE NOT PAID.

SYLLABUS:

Where a county treasurer pursuant to the authority conferred upon him by section 2744, General Code, receives checks in the collection of taxes on real prop-