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FORECLOSURE, UNPAID SPECIAL ASSESSMENTS — SECTIONS 2667 TO 2670 G. C.—WHERE APPRAISAL REQUESTED, MUST BE MADE UNDER SECTION 11672 G. C. AND PREMISES SOLD FOR AT LEAST TWO-THIRDS OF APPRAISED VALUE.

SYLLABUS:

In the foreclosure of unpaid special assessments under authority of Sections 2667 to 2670 inclusive, General Code, if an appraisal is requested, it must be made in the manner provided by Section 11672, General Code, and the premises sold for at least two-thirds of the appraised value thereof.

Columbus, Ohio, July 5, 1940.

Hon. Thomas J. O'Connor, Prosecuting Attorney,
Toledo, Ohio.

Dear Sir:

This will acknowledge receipt of your recent request which is as follows:

"I have filed a number of suits on behalf of the County Treasurer for the collection of delinquent special assessments under the provisions of General Code Section 2667, which suits are conducted as foreclosure suits and in which only the delinquent special assessments are foreclosed, the statute making no provision for the inclusion of delinquent general taxes. When the proceeding reaches an order of sale, we have the choice of either having the property appraised, in which case the sale is made at two-thirds of the appraisal, or we may proceed to sell without appraisal, in which case the property must sell for not less than the total amount of special assessments found due with costs (G. C. Sec. 2670).

An Attorney General's opinion holds that the proceeds of the sale under Section 2667 must be applied first to the court costs, second to the delinquent specials found due and third to other taxes charged and unpaid on the tax list. Apparently there are no cases to the contrary. The result in a case where the bid price is not sufficient to pay all the specials is that the property is actually sold subject to the delinquent general taxes and all current taxes and assessments not yet past due. (1935 O. A. G. No. 4659).

Section 2670 requires the property to be appraised, if an appraisal is required, in accordance with Section 11672, which is the general section for appraisal upon levy of execution. No reference is made to 11675, which is the section providing for appraisal in cases where there is a junior mortgage or other junior lien which is being enforced subject to a prior lien, and provides that in such a case the court making the order may determine the minimum amount for which such real estate may be sold, which amount, however, shall not be less than two-thirds of the difference between the value of the real estate appraised and the amount remaining unpaid on the claims secured by the prior lien.

In the case of one property upon which we propose to foreclose the special assessments, the total taxes and special assessments now owing are way in excess of the appraised value of the property and the delinquent general taxes are equal to about 40% of the probable appraisal. If the land must be sold at two-thirds of the entire appraisal, the proceeds can pay but a small part of the delinquent special assessments and the purchaser must take the

land subject to the delinquent general tax and the total of his bid price and the delinquent general tax would therefore exceed the value of the land and there will be no bidders.

On the other hand, if the statutory rule for appraisal upon foreclosure of a junior lien can be followed, the delinquent general tax will be deducted from the gross appraised price and the sale could be made for two-thirds of the difference which would assure bidders.

The question, therefore, is: In the foreclosure of delinquent special assessments under G. C. Sec. 2667, must the land be sold for two-thirds of the total appraised price of the whole property (G. C. 11672), or can it be sold for two-thirds of the difference between unenclosed prior liens and the total appraised price under Section 11675?

We would appreciate your opinion on this point as we have several probable foreclosures where the taxes are so large that only the use of the rule of Sec. 11675 would get us a bidder."

The legislature has provided two methods of enforcing the payment of taxes and assessments by foreclosure proceedings. Under authority of Section 5713, et seq., General Code, if taxes have not been paid for three years after certification, foreclosure proceedings may be instituted by the state. Under authority of Section 2667, et seq., General Code, the county treasurer may enforce the lien of special assessments if not paid within the time prescribed by law, by a civil action in the same way mortgage liens are enforced. Upon the submission of such a proceedings to the court, provisions for the decree, appraisal and sale of the property and distribution of the proceeds are found in Section 2670, General Code, which reads as follows:

"A finding shall be entered of the amount of such assessments, or any part thereof, as are found due and unpaid, and for penalty and costs, for the payment of which the court shall order such premises to be sold without appraisal for not less than the total amount of such finding and costs, unless the county treasurer 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 finding of the amount of assessments, and the balance shall be distributed according to law. No statute of limitations shall apply to such action. When the land or lots stand charged on the tax duplicate as forfeited to the state, it shall not be necessary to make the state a party, but it shall be deemed a party through and represented by the county treasurer."

It will be noted that the above section does not provide that in the

event a sale is had after an appraisal, the taxes and assessments and the penalties, interest and charges, if any, shall be deemed satisfied, though the amount of the proceeds of the sale applicable thereto be deficient. For the purposes of this discussion, special assessments must be considered as a species of taxes. *State, ex rel. Brown, v. Cooper*, 123 O. S., 23. Generally, taxes are liens on realty removed only by payment in full. Section 5671, General Code, providing therefor, reads in part as follows:

“The lien of the state for taxes levied for all purposes, in each year, shall attach to all real property * * *, and continue until such taxes, with any penalties accruing thereon, are paid.”

Commenting on this section, Judge Washburn said in *Crafton v. Mong*, Aud., 60 O. App., 228, (affirmed in *Crafton v. Mong*, Aud., 134 O. S., 416):

“Liens for taxes to continue until paid being a legislative creation, the Legislature had authority to provide that such liens should cease in the event of a judicial sale of the real estate and attach to the proceeds of such sale, but if the Legislature intended to so provide it would be reasonable to expect the Legislature to either use language plainly indicating such intention or else amend Section 5671, General Code, which provides that a lien for taxes shall continue until paid.”

I must therefore conclude that any portion of the special assessments and taxes which remain unsatisfied following a sale and distribution made under authority of Section 2670, General Code, must remain a lien on such premises and be carried on the treasurer's general tax list and duplicate until paid.

As you have noted in your inquiry, Section 2670, *supra*, provides that in the “event the premises shall be appraised in the manner provided by section 11672 of the General Code” such premises “shall be sold for at least two-thirds of the appraised value thereof.” Section 11672, General Code, is as follows:

“When execution is levied upon lands and tenements, the officer who makes the levy shall call an inquest of three disinterested freeholders, residents of the county where the lands taken in execution are situated, and administer to them an oath impartially to appraise the property so levied upon, upon actual view. They forthwith shall return to such officer, under their hands, an estimate of the real value of the property in money.”

You ask if in lieu thereof such property might be sold under authority of Section 11675, General Code, wherein it is provided:

“No tract of land shall be sold for less than two-thirds of the value returned in the inquest; except that in all cases where a junior mortgage or other junior lien is sought to be enforced against real estate by an order, judgment or decree of court, subject to a prior lien or liens thereon, and such prior lien or liens, and the claims or obligations secured thereby, are unaffected by such order, judgment or decree, the court making such order, judgment or decree, may determine the minimum amount for which such real estate may be sold, such minimum amount, however, to be not less than two-thirds of the difference between the value of the real estate appraised as provided in section eleven thousand six hundred and seventy-two, and the amount remaining unpaid on the claims or obligations secured by such prior lien or liens.”

In Lewis' Sutherland Statutory Construction we find the following rules for the interpretation of statutes wherein a prescribed mode of procedure is outlined:

Section 492.

“Where authority is given to do a particular thing, and the mode of doing it is prescribed, it is limited to be done in that mode; all other modes are excluded. Such affirmative legislation, and any other which introduces a new rule, implies a negative. * * *.”

Section 627.

“* * * Where a statute in granting a new power prescribes how it shall be exercised, it can lawfully be exercised in no other way. Negative words in granting power or jurisdiction cannot be directory. And even affirmative words, in such a case, without any negative expressed, imply a negative. Where a statutory power or jurisdiction is granted, which otherwise does not exist, whether to a court or an officer; and in all cases where, by the exercise of such a power, one may be divested of his property, the grant is strictly construed; the mode of proceeding prescribed must be strictly pursued; the provisions regulating the procedure are mandatory as to the essence of the thing required to be done.”

If these rules be applied to Section 2670, supra, we find that when an appraisal is requested, the premises “shall be appraised in the manner provided by section 11672 of the General Code.” This must be considered as a limitation on the mode of appraisal and an exclusion of the mode authorized by Section 11675, General Code. Furthermore, Section 2670, supra,

says that in the event of an appraisal, the premises "shall be sold for at least two-thirds of the appraised value thereof." I must therefore conclude and it is my opinion that in the foreclosure of unpaid special assessments under authority of Sections 2667 to 2670 inclusive, General Code, if an appraisal is requested, it must be made in the manner provided by Section 11672, General Code, and the premises sold for at least two-thirds of the appraised value thereof.

Respectfully,

THOMAS J. HERBERT,
Attorney General.