

1727.

TAXES—FORECLOSING OF LIENS FOR NON-PAYMENT OF DELINQUENTS—INTEREST OF OTHER PERSONS.

SYLLABUS:

In suits to foreclose liens for non-payment of delinquent taxes, all persons having or claiming an interest in the land should be made parties to said suit and should set up said claim or interest so that the court may determine according to law, their respective rights and interests; and whether said land shall be sold free or subject to said rights and interests.

COLUMBUS, OHIO, February 17, 1928.

HON. HENRY W. HARTER, JR., *Prosecuting Attorney, Canton, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication which reads:

“Here in Stark County we have a number of parcels of ground which are about ten feet wide and sixty feet to one hundred feet long which have become delinquent for non-payment of taxes, and we are ready to go forward and sell them according to law, but nearly all of these strips are drive-ways, the fee simple title is in one man and there are always two or more other parties who have a right of way over these strips of ground. The question that is troubling me is can we cut off the interest of the parties who have rights of way over these strips by making them parties to the suit or not, and give a clear title to the purchaser at the sheriff's sale?”

Any opinion you may give me on this subject will be greatly appreciated.”

In regard to the sale of land for the non-payment of delinquent taxes, Section 5713, General Code, reads as follows:

“The state shall have a first and best lien on the premises described in said certification, for the amount of taxes, assessments and penalty, together with interest thereon at the rate of eight per cent, per annum, from the date of delinquency to the date of redemption thereof, and the additional charge of twenty-five cents for the making of said certification, and sixty cents for advertising. If the taxes have not been paid for four consecutive years, the state shall have the right to institute foreclosure proceedings thereon, in the same manner as is now or hereafter may be provided by law, for foreclosure of mortgages on land in this state, 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 treasurer.”

Under the provisions of this section the state has the right to institute foreclosure proceedings thereon in the same manner as is provided by law for foreclosure of mortgages on land. The cost of an abstract or certificate of title to the property described in said certification may be taxed as the court costs, if the same be required by the common pleas court.

There is a limitation as to the time when said foreclosure may be instituted, in Section 5717, General Code, which reads as follows:

“No proceedings in foreclosure, under this act, shall be instituted on delinquent lands, unless the taxes, assessments, penalties and interest have not been paid for four consecutive years.”

Section 5718, General Code, provides in part that:

“It shall be the duty of the auditor of state to cause foreclosure proceedings to be brought in the name of the county treasurer, upon each unredeemed delinquent land tax certificate, within three months from the date of filing of such certificate with the auditor of state, by the county auditor; it shall be sufficient, having made proper parties to the suit, for the treasurer to allege in his petition that the certificate has been duly filed by the county auditor; that the amount of money appearing to be due and unpaid, thereby is due and unpaid and a lien against the property therein described, and the prayer of the petition shall be, that the court make an order that said property be sold by the sheriff of the county in the manner provided by law for the sale of real estate on execution. And the treasurer need not set forth any other or further special matter relating thereto. The certified copy of said delinquent land tax certificate, filed with the county treasurer, as hereinbefore provided, shall be prima facie evidence on the trial of the action, of the amount and validity of the taxes, assessments, penalties and interest appearing due and unpaid thereon, plus the amount of eighty-five cents due from the defendants for the delinquency of each year, for advertising and issuance of certificates, and of the non-payment thereof, without setting forth in his petition any other or further special matter relating thereto.”

This section provides for the making of proper parties to the suit and states the allegations necessary in the petition of the county treasurer. It also provides what shall be prima facie evidence on the trial of the action, of the amount and validity of the taxes, assessments, penalties and interest appearing due and unpaid thereon.

Section 5719, General Code, provides for the rendering of judgment in such cases and for the distribution of the proceeds of the sale. The balance of the proceeds after the payment of the costs and the judgment for taxes, assessments, penalties and interest, shall be distributed according to law.

Section 5718, General Code, provides for the making of proper parties to the suit but does not indicate who are proper parties to said action. However, Section 5713, General Code, provides that foreclosure proceedings shall be instituted in the same manner as is provided by law for foreclosure of mortgages on lands in this state. It is therefore necessary to refer to the statutory proceedings for the foreclosure of mortgages on land.

Section 11588, General Code, reads as follows:

“When a mortgage is foreclosed or a specific lien enforced, a sale of the property shall be ordered; and when the real property to be sold is in one or more tracts, the court may order the officer who makes the sale to subdivide, appraise, and sell them in parcels, or sell any one of the tracts as a whole.”

In Kinkead's Code Pleading, Vol. I, Section 570, it is stated that:

"One of the most difficult and important steps to be taken in the foreclosure of a mortgage or other lien is to see that all proper parties are brought before the court. Close examination of records is required * * * As the proceeding is an adversary one, it is essential that jurisdiction be acquired over the person and the *res*. It is settled that the only proper parties, as far as mere legal rights are concerned are the mortgagor and the mortgagee, and those who have acquired rights under them subsequent to the mortgage."

Section 571 reads:

"All persons who have claims against or are interested in the mortgage premises should be made parties to bar the liens or right of redemption. Foreclosure proceedings being adversary, it is essential that jurisdiction over both person and thing be acquired."

In the case of *Jackson vs. Smith, et al.*, 138 N. Y. S., page 654, it is stated that:

"An 'easement' is a servitude upon, and differs from an interest in, or lien upon, the land. It is not a part of, but is so much carved out of, the estate in the land and is as much a thing apart from such an estate as a parcel or the land itself conveyed from it."

Miller, J., in the court's opinion says:

"This is an action to foreclose a tax lien, * * * The appellants are owners of adjoining premises to those under foreclosure, and as such have private easements of light, air, and access over the latter, which rights were created by deed. * * * The appellants claim to be aggrieved by the provision of the judgment which adjudges that the tax lien is 'superior to and not subject to any claim, easement, charge, incumbrance, or interest of any kind, claimed, owned, or existing in favor of' them.

The appeal presents the interesting question whether easements are extinguished by a tax sale of the premises burdened by them. * * * It has been said by the Court of Appeals that:

'One who purchases land at a tax sale must take all the easements and incidents attached or pertaining to the land.'

And it has recently been decided by this court in the Fourth Department that a tax sale of land burdened by easements, lawfully acquired prior to the levying of the tax under which the sale was made, does not extinguish the easements."

In the case of *Tax Lien Company vs. Schultz*, 146 N. Y. S., page 902, in the course of the opinion the court says:

"The objection of the purchaser to the title is that the property may be subject to an easement, but so far as appears from the record every

person owning or claiming an easement in the property was a party to the action and was either served or appeared. Undoubtedly if either of these defendants had appeared in the action and claimed that the property upon which the lien existed was subject to an easement in favor of the defendant thus appearing, and the court had by judgment attempted to sell the property free and clear of those liens, that judgment would have been erroneous and would have been reversed on appeal. * * * But in this case neither of the defendants whom it is claimed now might have an easement appeared or defended the action or made any claim to any interest in the property. The judgment was entered in an action to which all these owners of these so-called easements were parties, and a conveyance by referee will convey to the purchaser all the interest of all the parties to the action whether by easement, or as owners of the fee."

It is manifest that there may be easements which under a tax sale of land burdened by said easements lawfully acquired prior to the levying of the tax under which the sale is made, are not extinguished by said sale.

It is evident that the lien for taxes is the first and best lien, and that the state has the right to institute foreclosure proceedings in the same manner as is provided by law for foreclosure of mortgages on land; provided the taxes, assessments and penalties have not been paid for four consecutive years.

All persons having or claiming an interest in the premises as a right of way or otherwise, should be made parties, and should set up their respective claims and interests. The court may then determine said respective rights and interests, and also, whether the land may be sold free of or subject to said interests.

It is therefore my opinion that in suits to foreclose liens for non-payment of delinquent taxes, all persons having or claiming an interest in the land should be made parties to said suit and should set up said claim or interest so that the court may determine according to law, their respective rights and interests; and whether said land shall be sold free or subject to said rights and interests.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1728.

COUNTY TREASURER—DEPUTY AND CLERK HIRE DISCUSSED—
APPROPRIATION OF COUNTY COMMISSIONERS.

SYLLABUS:

The amount of money that may be expended by a county treasurer for deputies, assistants or clerk hire may not in the aggregate exceed the appropriations made by the board of county commissioners for said purpose. If a board of county commissioners, in the exercise of its discretion in the matter, does not see fit to make supplemental appropriations, or if by way of receipts and balances in the general county fund there is not sufficient money to make such supplemental appropriations, a county treasurer is without authority to pay deputies, assistants or clerks an ag-