1589.

APPROVAL, ABSTRACT TO PREMISES SITUATED IN FRANKLIN COUNTY, CITY OF COLUMBUS, OHIO, LOT NUMBER TWENTY-TWO, R. P. WOODRUFF'S AGRICULTURAL COLLEGE ADDITION.

COLUMBUS, OHIO, September 23, 1920.

HON. CARL E. STEEB, *Secretary, Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—You have recently submitted an abstract, last continued on September 18, 1920 by J. G. Westwater, attorney-at-law, requesting my opinion as to the status of the title to the following described premises as disclosed by said abstract:

> Situate in the county of Franklin, in the state of Ohio, and in the city of Columbus; being lot number twenty-two (22) in R. P. Woodruff's sub-division of part of lot number two hundred seventy-eight (278) of R. P. Woodruff's Agricultural College addition to said city, as said lot twenty-two (22) is numbered and delineated upon the recorded plat thereof, of record in Plat Book 3, page 421, recorder's office, Franklin county, Ohio.

After a careful examination it is my opinion that said abstract discloses a good and sufficient title to said premises to be in the name of Charles L. Cain on September 18, 1920, the date of the last continuation thereof, free from incumbrances, excepting the taxes for the year 1920 which are unpaid and a lien.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1590.

APPROVAL, FINAL RESOLUTION FOR ROAD IMPROVEMENT IN LAKE COUNTY, OHIO.

COLUMBUS, OHIO, September 25, 1920.

HON. A. R. TAYLOR, *State Highway Commissioner, Columbus, Ohio.*

1591.

BUILDING AND LOAN ASSOCIATIONS—SHOULD DECLINE TO ACCEPT MORTGAGE WHERE NO PAYMENT MADE UPON OBLIGATION SECURED FOR PERIOD OF TWENTY-ONE YEARS PRIOR TO DATE WHEN VALIDITY OF SECURITY IS TO BE CONSIDERED.

The department of Building and Loan Associations should as a general rule decline to accept as a valid and binding security a mortgage given to a building and

loan association where no payment has been made upon the obligation secured for a period of twenty-one years prior to the date when the validity of the security is to be considered.

COLUMBUS, OHIO, September 27, 1920.

HON. FRANK F. MCGUIRE, *Inspector of Building and Loan Associations, Columbus, Ohio.*

DEAR SIR:—In your recent communication to this office you say:

> "Will you kindly advise whether or not this department is justified in accepting as a valid and binding security a mortgage given to a building and loan association upon which there has been a default by the mortgagor in complying with any one or more of the terms and conditions of the mortgage contract for a period of twenty-one years or longer?
>
> We have been advised that the courts have held that, after the length of time above mentioned, such a mortgage would be of no force and effect, our attention being called to the cases of Baird vs. Ramsey (2 O. C. C. N. S. 492 and 15 O. C. D. 532) and Wilson, et al. vs. Stockwell, (78 O. S. 394.)"

You have since advised that the default which you have in mind is that of failing to make any payments on the obligation secured for a period of twenty-one years or longer prior to the time when you are to consider the validity of the security. The answer to your inquiry will therefore be confined to such a case as there might be non-compliance with other conditions of the mortgage which, if payments were kept up, would not affect its validity.

A mortgagee in Ohio has a choice of two remedies on such an instrument. He may foreclose it and sell the property in a court of equity upon default in payment or he may maintain an action in ejectment against the mortgagor, that is, take the property from him. A mortgage is in reality a deed with a defeasance clause to the effect that the mortgage shall be invalid upon the payment of the obligation secured by it. When the mortgagor defaults and the condition of the instrument is broken, the legal title, in Ohio, passes, to the mortgagee. (Bradfield vs. Hale, 67 O. S., 316). Based upon this title he may bring an action to recover the possession of the premises, but that proceeding leaves in the mortgagor the right to pay his debt and retake his property. An action in foreclosure does cut off this right and when a sale has been made in such proceeding the mortgagor has no further interest in the property. The action to foreclose is governed by the provisions of section 11221 G. C.:

> "An action upon a specialty or an agreement, contract or promise in writing shall be brought within fifteen years after the cause thereof accrued."

A mortgage is a specialty and the foreclosure thereof is barred in fifteen years.

> Kerr vs. Lydecker, 51 O. S. 240;
> Bradfield vs. Hale, 67 O. S. 316.

But if a mortgagee prefers to pursue his action in ejectment and take possession of the property, leaving in the mortgagor a right to redeem, the case is one to recover the possession of real property and under section 11219 G. C. must be

brought within twenty-one years after the cause of action accrued. The section is as follows:

> "An action to recover the title to or possession of real property, shall be brought within twenty-one years after the cause thereof accrued, but if a person entitled to bring such action, at the time the cause thereof accrues, is within the age of minority, of unsound mind or imprisoned, such person, after the expiration of twenty-one years from the time the cause of action accrues, may bring such action within ten years after such disability is removed."

The exceptions made could hardly be applicable to a building and loan company.

The question of the effect of payment upon the obligation secured upon the mortgagee's rights, has been before the courts many times. There is a great diversity of opinion on it. We are not, however, concerned with it here as our case assumes that there has been no payment made for the twenty-one years last ensuing, so that no claim could be made that the right to foreclose or eject had been revived by the payment.

Upon this reasoning and the authorities cited, you are advised that the department should not accept such mortgage as a valid and binding security. By this I do not mean to say that it is necessarily invalid. If the building and loan association had taken and retained possession of the property prior to the expiration of twenty-one years from the mortgagor's default, then the instrument would still be of force and effect and to obtain possession of his property the mortgagor would be obliged to satisfy the obligation which it secured.

Other cases might possibly arise in which the existence of peculiar circumstances might give the mortgage validity, although no payment had been made within twenty-one years, but these would be rare instances and depend upon the facts involved. But the only safe course, in my judgment, would be for your department to either consider such mortgages as of no effect or submit the particular case to this department.

You have called attention to two authorities in your communication, one of which, Wilson vs. Stockwell, 78 O. S. 394, is an unreported case. From an examination of the printed record and the arguments of counsel on both sides I could not say that the case is an authority upon any question involved here, the decision turning on the particular facts involved.

The syllabus in the case of Baird vs. Ramsey, 2 O. C. C. n. s. 492, which fairly states the law is as follows:

> "In an action to quiet title of real estate against a mortgage upon the same, given to secure a promissory note which matured more than twenty-one years before the beginning of the action, and upon which note a partial payment had been made and endorsed thereon more than sixteen years previous to the commencement of the action. Held: The plaintiff was entitled to a decree quieting his title against such mortgage."

As suggested above, it is not necessary to go as far in answering your question as the court did in deciding this case because the conclusion I have reached is based upon the hypothesis that no payments have been made within twenty-one years. In the opinion it is said:

> "We do not think the payment could in any way affect the title. It might renew the note, so that foreclosure proceedings in equity might be

prosecuted, for the period of fifteen years. On that question we express no opinion, but more than fifteen years had elapsed from the payment and the commencement of the action."

Concisely stated, the holding in this case is, that where the default occurred more than twenty-one years before the bringing of the action, a payment more than fifteen years old would not revive the instrument for any purpose. I would not say that this holding amounts to a rule of property in this state but I think your department should follow it so long as it stands unmodified if occasion requires it. But that precise question is not now before me and I have discussed this case in the main for the purpose of showing its exact application.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1592.

MUNICIPAL CORPORATIONS—BOUNDARIES FOR TAX LEVYING PURPOSES DETERMINED AS OF FIRST MONDAY OF JUNE—CHANGES OF BOUNDARIES THEREAFTER MADE BY ANNEXATION DO NOT AFFECT TAX LEVIES FOR SUCCEEDING YEAR.

The boundaries of a municipal corporation for tax levying purposes are to be determined as of the first Monday of June. Changes of boundaries thereafter made by annexation, or otherwise, do not affect the tax levies for the succeeding year.

COLUMBUS, OHIO, September 27, 1920.

HON. ISAAC C. BAKER, *Prosecuting Attorney, Hamilton, Ohio.*

DEAR SIR:—You have submitted the following question for the opinion of this department:

"The city of Hamilton on July 7, 1920, passed the final ordinance annexing certain territory to the municipality and a transcript of the proceedings was presented to the county auditor for transfer August 25.

The county auditor holds that tax lien effective the second Monday of April cannot be made to include the increased taxes and also that township officials rightfully, in budget prepared and certified in June based their figures on this property valuation remaining in the township.

I would like your opinion on the questions presented by the above facts, that is, whether or not the township or municipal levy should be made on the property annexed to the city."

This inquiry raises the general question as to what is the date as of which the boundaries of taxing districts are to be determined for tax levying purposes; putting it in another way: what is the latest date at which the boundaries of a taxing district may be changed with respect to the making of tax levies.

The suggestion involved in your statement of the auditor's position is that the lien date in April (the day preceding the second Monday of April—Section 5671 of the General Code) is the date for which we are seeking. This suggestion is not believed to be well taken. While the lien attaches on that date, yet the process of levying is not yet complete, nor even commenced. The lien is in effect an inchoate encumbrance, in that the amount of it is never determined at this time.