

be void, however, unless a well was commenced in three months from the date of execution or the lessee to pay \$76.00 per year.

4. The 1926 taxes amounting to \$81.72 are unpaid and a lien.

5. The abstract still contains no reference to the payment of the inheritance tax in the S. B. Eyman estate.

The deeds tendered are in proper form and when delivered will transfer good title to the premises under consideration, subject to the five encumbrances above noted.

Evidence of approval of the Board of Control of the purchase of the above real estate, together with a regularly certified encumbrance estimate should accompany this abstract.

The abstract, deeds and other data submitted are herewith returned.

Respectfully,

EDWARD C. TURNER,

Attorney General.

537.

COUNTY TREASURER—ACTION BROUGHT UNDER SECTION 2667, GENERAL CODE, TO ENFORCE LIEN FOR DELINQUENT TAXES MAY BE MAINTAINED ALTHOUGH SAID TAXES HAVE NOT BEEN DELINQUENT FOR FOUR YEARS—OBJECTIONS OF PROPERTY OWNERS—COSTS OF ACTION.

SYLLABUS:

1. *An action to enforce a lien for delinquent taxes or assessments, by the county treasurer, under the provisions of Section 2667, General Code, may be maintained, although the assessments at the time of the filing of the action have not been delinquent for four years.*

2. *No property owner may object to the amount of an assessment who originally petitioned for the improvement and in said petition expressly waived the right to object to the amount of such assessment.*

3. *Any property owner who is duly notified of the proposed improvement and has further received notice by publication of the amount of the assessment in accordance with the provisions of Section 3895 of the General Code, and has not filed his objection to the amount of such assessment with the clerk of the municipality, will be deemed to have waived his right to object to the amount of such assessment, even though such amount is in excess of the statutory limitation of 33⅓% of the actual value of the lands or lots or parcels of land in question after the improvement is made.*

4. *Where in an action by the county treasurer to enforce a lien for delinquent taxes or assessments against lands or lots or parcels, as provided by Sections 2667, et seq., General Code, the proceeds of the sale are not sufficient to pay the costs of the action, the city cannot be held for any resulting deficiency.*

COLUMBUS, OHIO, May 24, 1927.

HON. HARRY B. REESE, *Prosecuting Attorney, Jackson, Ohio.*

DEAR SIR:—Acknowledgment is made of your recent communication as follows:

"I have received your letter of March 11th concerning the default in the payment of bonds of the city of Wellston, Ohio, and have taken the matter up with A. L. Jackson, the county treasurer.

The county treasurer refuses to bring action and, in spite of your letters and my advice to him, thinks that it is the duty of the city to enforce the payment of these street assessments. I believe, however, that if requested by the auditor of state to bring suit upon the same, as provided in 2667, G. C., that he would do so.

May I also ask your opinion upon this matter: Many of the lots upon which assessments for the street improvements have been made are more than thirty-three and one-third per cent of the value of the property, and, in many cases, several times the value of the same. In such cases, if the question is properly raised of course, the whole assessment cannot be recovered. In many of these cases I am also reasonably certain that at sheriff's sale under the tax foreclosure proceedings the lots will not bring sufficient to pay the costs of these cases, especially where service by publication must be made. In such cases is it incumbent upon the board of county commissioners to make up the deficit of said costs as they have done in regular tax foreclosure suits. I feel reasonably sure that if all the suits are brought nothing will be realized for the benefit of the bond holders but that either the county or the city, if the latter is responsible, will be indebted for several hundred dollars in costs. I reach this conclusion after my experience last fall in foreclosing on some eighty odd delinquent lands. The outcome of these suits was that all of the proceeds went to pay the costs and the board of county commissioners were compelled to pay a few hundred dollars to take care of the costs, which the proceeds would not pay. I can find nothing in the statutes by which we could hold the city responsible for any deficit in costs although it seems inequitable that the tax payers of the county outside the city of Wellston should be forced to pay a portion toward the collecting of the city's debts. If you know of any way in which the city could be made responsible for these costs I will appreciate your letting me know.

Another consideration that I would like to bring to your attention concerning these suits: I believe that the suit by the treasurer can only be brought for the assessment or assessments that were delinquent in 1922, or prior thereto. The assessments are payable in nine annual installments, I believe. It will be difficult to obtain buyers for lots or lands which are, at the time of the sale by the sheriff subject to three years street assessments, which are past due. Or am I wrong in this and can all of the assessments, not now delinquent four years, be sued for in the treasurer's civil action?

I am acquainted rather intimately with regular tax foreclosure proceedings and have followed the methods of Hamilton County, where the officials have given much time to the same in these proceedings, but the matter of bringing an action for assessments alone is rather new and I can find no court decisions on the same under these new foreclosure proceedings.

As soon as the county treasurer has received notice from the auditor of state to institute foreclosure proceedings, I will have the treasurer sign and verify the pleadings and file the same."

The above letter is in reply to my letter to you on March 11, 1927, concerning the default in the payment of bonds of the city of Wellston, Ohio. Previous to writing you I also wrote a letter to the city solicitor, of Wellston, Ohio, requesting information as to why that city was in default in the payment of the bonds and interest due and payable, and he replied that the assessments were duly levied against

the property liable for the assessments and also duly certified to the county auditor for collection, but that while the county treasurer collected the taxes on the land, he did not collect the assessments.

After sending you the letter to which your letter to me is a reply, I find that the present legislature amended Section 3892, General Code, relative to the collection of special assessments, adding some additional remedial provisions not contained in the old statute. The amended section reads as follows:

"When any special assessment is made, has been confirmed by council, and bonds, notes or certificates of indebtedness of the corporation are issued in anticipation of the collection thereof, the clerk of the council, on or before the second Monday in September, each year, shall certify such assessment to the county auditor, stating the amounts and the time of payment. The county auditor shall place the assessment upon the tax list in accordance therewith and the county treasurer shall collect it in the same manner and at the same time as other taxes are collected, and when collected, pay such assessment, together with interest and penalty, if any, to the treasurer of the corporation, to be by him applied to the payment of such bonds, notes or certificates of indebtedness and interest thereon, and for no other purpose. For the purpose of enforcing such collection, the county treasurer shall have the same power and authority as allowed by law for the collection of state and county taxes. Each installment of such assessments, remaining unpaid after becoming due and collectible, shall be delinquent and bear the same penalty as delinquent taxes. The city solicitor or the regular and authorized legal representative of any such municipality is hereby authorized and directed to act as attorney for the county treasurer in actions brought under authority of Section twenty-six hundred and sixty-seven of the General Code for the enforcement of the lien of such delinquent assessments."

The re-enacted statute was passed March 9, 1927, and approved by the Governor March 17, 1927, and filed in the office of the secretary of state on March 18, 1927. Not being an emergency measure, however, the above statute will not become effective until the expiration of ninety days after being filed in the office of the secretary of state and it will therefore not be in force until June 17, 1927.

As applied to your local situation, the significant changes in the amended statute from the provisions of the old statute are:

" * * * For the purpose of enforcing such collection, the county treasurer shall have the same power and authority as allowed by law for the collection of state and county taxes."

and,

" * * * The city solicitor or the regular and authorized legal representative of any such municipality is hereby authorized and directed to act as attorney for the county treasurer in actions brought under authority of Section twenty-six hundred and sixty-seven of the General Code for the enforcement of the lien of such delinquent assessments."

Since said amended section has not yet gone into effect, you should represent the county treasurer in the preparation and filing of suits until June 17, 1927, at which time the municipal attorney of Wellston should take charge of such cases.

In your letter you ask three questions, as follows:

(1) May a suit in foreclosure be lawfully maintained to collect assessments which have not been delinquent for four years?

I am of the opinion that the four year inhibition only applies where the state institutes a real estate foreclosure proceeding under Sections 5712 and 5718, General Code, inclusive. Section 5717 provides:

“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 5717, General Code, in its present form was enacted as Section 14, of an act entitled:

“An Act—to abolish the evils arising out of delinquent land sales, to repeal Sections 5704 to 5743, inclusive, of the General Code, and to give to the state a first lien on all delinquent lands.”

This act was passed March 21, 1917, (107 v. 735). The act contained twenty-four sections, which are now respectively number 5704 to 5727, inclusive, of the General Code. Section 2667, General Code, was not a part of that act and no argument is necessary to show that Section 5717 relates solely to the provisions of Sections 5704 to 5727, supra, and in no way pertains to the provisions of Section 2667, supra, and related sections. It is clear, therefore, that the four year limitation in Section 5717, supra, has no application in the instant case.

(2) You say that many of the lots assessed are for amounts that are more than $33\frac{1}{3}$ per cent of their value, and if in the foreclosure suit that question is properly raised, the whole assessment cannot be recovered, and you ask if in such cases it is incumbent upon the board of county commissioners to make up the deficit, as to court costs, if there be such.

As to the question of claiming that the assessment exceeded $33\frac{1}{3}$ per cent of the value of the land, your attention is directed to the fact that the property owners who petitioned for the improvement without doubt waived all objections which said owners might otherwise have made as to the amount of the assessment. The usual form of such petition includes a waiver of this character. Moreover, if it appears that the property owner had actual notice of the improvement and also notice by publication of the amount of the assessment, as provided in Section 3895 of the General Code, then unless he seasonably filed his objection to the amount of the assessment with the estimating board or council, any objection to the amount of the assessment is deemed to be waived. This is the express holding in the case of city of Cuyahoga Falls vs. Beck et al., 110 O. S. 82, the syllabus of which reads as follows:

“Under Section 3848, General Code, a property owner objecting to a street assessment made according to benefits by a municipality must file his objection in writing with the clerk of the municipality within two weeks after the expiration of the notice given under Section 3895, General Code. Where the property owner has received actual notice of the amount of the assessment, failure to file such written objection constitutes waiver of the right to question the assessment in a court of equity under Section 12075, General Code, and this is true even though the assessment exceeds $33\frac{1}{3}$ per cent of the actual value of the lot or parcel of land in question after the improvement is made.”

You state you feel reasonably sure that if all of the suits are brought nothing will be realized for the benefit of the bond holders and that either the county or

city will be indebted for several hundred dollars in costs, basing that conclusion on your experience in foreclosing some eighty odd delinquent pieces of land, in which the county commissioners were compelled to pay several hundred dollars to take care of the costs which the proceeds would not pay. You ask "do you know of any way in which the city could be made responsible for these costs". It being the duty under the law of the county treasurer to institute suits to recover delinquent assessments under Section 2667, General Code, I do not believe that officers should attempt to determine in advance the outcome of the suits as to whether enough money will be realized to pay the costs. However, as to whether or not the city can be held responsible for a deficiency of costs, we should keep in mind the provisions of Section 2670, General Code, wherein it is provided:

"From the proceeds of the sale the costs shall first be paid, next the judgment for taxes and assessments and the balance shall be distributed according to law. * * * *"

The provisions of Section 2667, General Code, make it the duty of the county treasurer, by civil action in the common pleas court, without regard to the amount claimed, to foreclose in the same manner that mortgage liens are enforced; which is a sale of the lands by the sheriff upon execution, as provided in Sections 11672, et seq., of the General Code. When such foreclosure suits are conducted under the provisions of Section 2667, General Code, manifestly the sheriff's duty is to pay the court costs, including the clerk's costs and the costs of publication of the sale in a newspaper, and his own costs. There is no provision of law for the city to get any part of the costs, and I find no provision of law requiring the city to pay any of the deficiency in costs, and therefore I am of the opinion that the city cannot be legally compelled to pay any costs.

(3) You also say that you think that in a suit by the treasurer, he can only ask for a judgment and foreclosure for the assessments that were delinquent in 1922, or prior thereto, and if you are right as to that, it will be difficult to obtain buyers for lots or lands which are at the time of the sale subject to three years' delinquent assessments. In answer to this question, I think that under the provisions of Section 2667, General Code, all taxes and assessments that stand charged on the tax duplicate and not paid within the time prescribed by law, should be incorporated by the county treasurer in his action for delinquent assessments. I am of the opinion that the spirit of the above statute manifestly is to recover, when suit is filed, all delinquent assessments charged against lots and lands that stand on the tax duplicate and are not paid within the time prescribed by law.

In conclusion, I deem it proper to advise you of my intention to call the attention of the auditor of state to the statement in your letter, wherein you say:

"The county treasurer refuses to bring action and, in spite of your letters and my advice to him, thinks that it is the duty of the city to enforce the payment of these street assessments. I believe, however, that if requested by the auditor of state to bring suit upon the same, as provided in 2667 G. C., that he would do so",

as well as to that part of Section 2667, which provides:

"When taxes or assessments, charged against lands or lots or parcels thereof upon the tax duplicate, authorized by law, or any part thereof, are not paid within the time prescribed by law, the county treasurer in addition to other remedies provided by law may, and when requested by the auditor of state, shall enforce the lien of such taxes and assessments, or either, and

any penalties thereon, by civil action in his name as county treasurer, for the sale of such premises, in the court of common pleas of the county, without regard to the amount claimed, in the same way mortgage liens are enforced",

so that he may take such action as he may deem proper.

Respectfully,
EDWARD C. TURNER,
Attorney General.

538.

APPROVAL, NOTE OF PIERPONT RURAL SCHOOL DISTRICT, ASHTABULA COUNTY—\$2,688.00.

COLUMBUS, OHIO, May 25, 1927.

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

539.

APPROVAL, BONDS OF AMSTERDAM SPECIAL SCHOOL DISTRICT, JEFFERSON COUNTY—\$4,500.00.

COLUMBUS, OHIO, May 25, 1927.

Industrial Commission of Ohio, Columbus, Ohio.

540.

APPROVAL, BONDS OF VILLAGE OF BAY, CUYAHOGA COUNTY—\$34,009.38.

COLUMBUS, OHIO, May 25, 1927.

Industrial Commission of Ohio, Columbus, Ohio.

541.

APPROVAL, BONDS OF VILLAGE OF BAY, CUYAHOGA COUNTY—\$6,879.28.

COLUMBUS, OHIO, May 25, 1927.

Industrial Commission of Ohio, Columbus, Ohio.