

2732.

DELINQUENT TAXES—FORECLOSURE OF STATE'S LIEN BY SINGLE ACTION—WHEN DELINQUENT ASSESSMENTS COVER ONLY ONE PART OF A TRACT OF LAND, WHOLE OF TRACT IS SUBJECT TO LIEN—CONDITIONS NOTED.

SYLLABUS:

The lien of the state for delinquent taxes and assessments, together with interest and penalties thereon, which have remained unpaid for four consecutive years, and which have been certified to the Auditor of State under the provisions of Section 5718, General Code, may be foreclosed in a single action, although the lien of the delinquent assessments so certified may cover only a part of the tract of land which is involved in said action, the whole of which tract of land is subject to the lien of the delinquent taxes, together with interest and penalties thereon so certified.

COLUMBUS, OHIO, December 29, 1930.

HON. JOHN G. WORLEY, *Prosecuting Attorney, Cadiz, Ohio.*

DEAR SIR:—This is to acknowledge the receipt of your communication, which reads as follows:

“In connection with the foreclosure of certain tax liens in this county, the following question has arisen: In cases where the whole of a tract of land is delinquent for taxes and a lesser part of the same tract is under an additional burden for pike assessment,—for example, John Smith has a farm of one hundred acres on which he failed to pay the taxes for four consecutive years and the same has been certified as delinquent, and on fifty acres of the same farm there is an additional sum due for pike assessment, only part of the farm being within the assessment district,—should the one hundred acres be for the purpose of one group of delinquent taxes considered as a separate tract and the lesser amount for the purpose of pike assessment be considered as a separate tract and two separate actions in foreclosure instituted, or should both causes of action be combined in a single petition against the common defendant.”

The question presented in your communication arises in the foreclosure of the liens of the state for delinquent taxes and assessments which have been certified to the Auditor of State under the provisions of Sections 5712, et seq., of the General Code, and which have been unpaid for four consecutive years. Under the provisions of Section 5713, General Code, the state has the first and best lien on the property and premises for the delinquent taxes and assessments so certified, together with the penalty and interest thereon. This section further provides that 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 the foreclosure of mortgages on land in this state.

Section 5718, General Code, is pertinent in the consideration of the question here presented. This section reads as follows:

“It shall be the duty of the county auditor to file with the Auditor of State, a certificate of each delinquent tract of land, city or town lot, at the expiration of four years, upon which the taxes, assessments, penalty and interest have not been paid for four consecutive years, and a certified copy thereof

shall at the same time be delivered to the county treasurer, and 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."

Section 5719, General Code, provides that judgment shall be rendered for such taxes and assessments, or any part thereof, as are found due and unpaid, and for penalty, interest and costs, for the payment of which the court shall order such premises to be sold without appraisal. This section further provides that "from the proceeds of the sale the costs shall be first paid, next the judgment for taxes, assessments, penalties and interest, and the balance shall be distributed according to law. * * * When the land or lots stand charged on the tax duplicate as certified delinquent 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."

In an opinion of this office under date of February 17, 1928, Opinions of the Attorney General for 1928, Vol. 1, page 439, it was held:

"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."

Obviously this rule applies to persons whose lien or other interest extends to only a part of the property involved in the foreclosure proceedings. *C. S. & L. Assn. vs. Kreitz*, 41 O. S. 143; *Bank of Muskingum vs. Carpenter*, Wright's Rep., 729; *Middletown Savings Bank vs. Bacharach*, 46 Conn., 513.

Applying this rule to the question presented in your communication, it follows that delinquent assessments included in the certificate upon which the foreclosure action is predicated, together with interest thereon, can be paid from the proceeds of the sale of the property described in such certificate and in the petition in the foreclosure action, although such assessments and interest thereon may have been a lien upon only a part of the lands involved in such foreclosure action. Such foreclosure proceedings is in a court of equity and the court has the power to marshal the proceeds of the sale of the property and the liens against the lands from the sale of which such proceeds arise, so as to preserve the priority of the respective liens with respect to the proceeds

of the lands or parts thereof upon which such liens were in effect, and to this end the court may segregate the proceeds of the sale of such property with respect to the several tracts thereof upon which the respective liens operated, so as to preserve the equities of each and all of said liens.

I assume that your question has reference to the sale of delinquent lands for the payment of taxes and assessments, together with penalties and interest thereon included in the certificate upon which the action in foreclosure is predicated, as provided for in Section 5718 of the General Code, above quoted. However, I apprehend that the rule just stated would likewise apply with respect to taxes and assessments accruing subsequently to the delivery of the delinquent tax and assessment certificate upon which the foreclosure action is filed, which subsequent taxes and assessments should likewise be satisfied as far as possible out of the proceeds of the sale of the property involved in such action.

In the consideration of the question here presented, it is noted that Section 11588, General Code, provides as follows:

“When a mortgage is foreclosed, or a specific lien is 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.”

Under the provisions of this section of the General Code, the court in a case such as that stated in your communication could order the separate sale of the tract of land covered by the lien of the assessments and the interest thereon, and of the remainder of the lands covered only by the lien of the delinquent taxes and the interest and penalty thereon. In such case the court would apply the proceeds of the sales of said several tracts of land to the liens upon said respective tracts, marshaling said liens so as to preserve the equities of each in the funds applicable to their payment.

However, as above noted, I do not deem it necessary for the court, in a case such as that stated in your communication, to divide the lands described in the certificate into two tracts and to order the sale of such tracts separately. The court has ample power to segregate the proceeds of the sale of the tract of land described in the certificate as a whole so as to accomplish the same result that could be accomplished by division and sale of such lands in the manner provided by Section 11588 of the General Code. In any event, I am clearly of the opinion, by way of specific answer to your question, that it is only necessary to file one action to foreclose the liens of such taxes and assessments, together with interest and penalties thereon.

Respectfully,

GILBERT BETTMAN,
Attorney General.

2733.

SCHOOL PROPERTY—BOARD OF EDUCATION HOLDS TITLE IN TRUST
FOR USE OF PUBLIC SCHOOLS OF DISTRICT—WHEN BOARD MAY
RENT OR LEASE—CONTRACT FOR OTHER USES DISCUSSED.

SYLLABUS:

1. *Boards of education are invested with the title to the property of their respective districts in trust for the use of the public schools of the district, and the appropriations of such property to any other use is unauthorized, except as definite and specific statutory authority exists therefor.*