

you are authorized to grant permits in special cases where it is desired to operate a vehicle when the combined height of vehicle and load is in excess of twelve feet six inches.

Respectfully,
 JOHN G. PRICE,
Attorney-General.

3103.

TAXES AND TAXATION—DELINQUENT REAL ESTATE TAX—FORECLOSURE ACTION PROVIDED FOR IN SECTION 5718 G. C. BROUGHT BY COUNTY TREASURER—PROSECUTING ATTORNEY REPRESENTS TREASURER—ACTION PROVIDED IN SECTION 5722 G. C. SPECIAL—THE THREE MONTHS PERIOD MENTIONED IN SECTION 5718 G. C. REFERS TO TIME—AUDITOR OF STATE MUST ACT—NO LIMITATION APPLICABLE TO ACTION BY TREASURER UNDER SECTION 5718 G. C.

The foreclosure action provided for in section 5718 G. C. in case of delinquent land is to be brought by the county treasurer; and it is the duty of the prosecuting attorney to represent such treasurer in such proceedings. The provision of section 5722 of the General Code for such action in the name of the State brought by the Attorney-General is special.

The period of three months mentioned in section 5718 G. C. refers to the time within which the Auditor of State must act; whether or not it is directory, quære. There is no limitation applicable to the action brought by the treasurer under section 5718 G. C.

COLUMBUS, OHIO, May 16, 1922.

HON. C. A. MAXWELL, *Prosecuting Attorney, Zanesville, Ohio.*

DEAR SIR:—Your letter of May 9th, requests the advice of this department as follows:

“I am writing you for an opinion as to whose duty it is to bring the proceedings for foreclosure provided for under sections 5718, 5719, 5720, 5721 and 5722 of the General Code. Our county auditor on the 15th of February, 1922, certified to the State Auditor a list of some thirty-seven pieces of property that had been delinquent for four years as provided under section 5718. The State Auditor has notified our county treasurer to bring the necessary proceedings as required under said section for foreclosure of these tax liens on the said property. Recently the treasurer has requested me as prosecuting attorney to bring these proceedings. Section 5722 provides that these proceedings shall be brought by the Attorney-General. I would like to know whether the Attorney-General is expecting to take care of these proceedings or whether they are expecting me as prosecuting attorney, to take care of them. According to law the time for bringing the proceedings will expire on May 15th, leaving a very short time in which to prepare the necessary proceedings for so large a number of cases.

The great majority of the cases are tax liens on property that has since been destroyed or removed and there are perhaps very few of them in which the property concerned would anyways near pay the expenses of foreclosure.

Please let me know what I am expected to do in this matter, if anything."

Appreciating the necessity of haste, this opinion will deal very briefly with the questions thus raised.

In the opinion of this department it is the duty of the prosecuting attorney to represent the county treasurer in these cases. The action under section 5718 is to be brought "in the name of the county treasurer". The petition therein is referred to as the petition of the treasurer. Section 5719 refers to the state as represented through the treasurer. The sections governing the duties of the prosecuting attorney require him to represent county officers in all actions. The reference in section 5722 to the Attorney-General is believed to be special. That section provides as follows:

"Sec. 5722. The state, by its Attorney-General, may bring its action for foreclosure of any delinquent land upon which the taxes, assessments, penalties and interest have not been paid for a period of four years, in the county in which the land therein described was situated, at the time of the issuance of said certificate, whether the land, city or town lot at the time of the institution of foreclosure proceedings continue to be within the county or not, in like manner as though the land, city or town lot still remain within the limits thereof."

This is a strange provision, but it is clear that it applies only when the land that has become delinquent is at the expiration of the period of four years in a different county from that in which it was at the time of its delinquency. This, of course, could only come about by change of county lines. It is, however, the only case in which the Attorney-General is authorized to bring the action. In cases arising under this section the proper party plaintiff is the state. In the normal actions referred to in section 5718, the party plaintiff is the county treasurer.

Your communication also raises the question as to whether these proceedings can be brought later than three months from the date of the filing of the delinquent land tax certificate with the Auditor of State. This statement requires consideration of the following provisions:

"Sec. 5718. * * * 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; * * * "

Section 5719, referring to the same action, provides in part as follows:

"The owner or owners of such property shall not be entitled to any exemption against such judgment, nor shall any statute of limitations apply to such action."

Section 5713 G. C. also apparently applying to the same action, provides generally for the institution of foreclosure proceedings without any limitation, in the following words:

"The state shall have the right to institute foreclosure proceedings thereon, in the same manner as it now or hereafter may be provided by law, for foreclosure of mortgages on land in this state."

If read in one way, these provisions cannot be mutually reconciled. In the opinion of this department, the phrase "within three months from the date of filing such certificate with the auditor of state" does not relate to the filing of the action, for to make it so relate would be to contradict section 5719 to the effect that no statute of limitations shall apply to such action. Rather this clause in section 5718 should be construed as relating to the time within which the Auditor of State is required to act. It is his duty "to cause foreclosure proceedings to be brought in the name of the county treasurer", yet the statute shows that the Auditor of State has no control over the action itself, not being a party thereto. You state that the Auditor of State has notified the county treasurer to bring the necessary proceedings. In the opinion of this department this is all that is required of the Auditor of State, and it is this action that must be taken within three months from the time the certificate is filed with him. Stated in another way, two officers must act under section 5718. The Auditor of State must "cause foreclosure proceedings to be brought", and the treasurer must file "his petition". If the Auditor of State acts within three months it is enough, and as this action has apparently been taken within time in the case about which you inquire, the question as to the effect of the failure of the Auditor of State to act within three months need not be considered, though it is possible that the phrase might be read as directory merely.

The doctrine of the cases which requires that a strict construction be given to statutes providing for tax sales does not necessarily apply to these statutes, because the title of the owner can be divested under these sections only in a proceeding to which he is a party and in which he has an ample opportunity to set up any defense which he may have. The proceedings under the statutes formerly in force were *ex parte*, and the owner had no personal notice of the tax sale.

It is accordingly the advice of this department that the prosecuting attorney should prepare the necessary pleadings for the county treasurer, and while as a precautionary measure these proceedings might well have been instituted prior to May 15, it is the best judgment of this department that the failure of the treasurer, represented by the prosecuting attorney, to file his petition within that time would not be fatal.

Respectfully,
JOHN G. PRICE,
Attorney-General.