

2877

PARTY TO THE DEFENDANT IN A DELINQUENT TAX CASE —WHERE A JUDGMENT IN FAVOR OF THE COUNTY TREASURER IS MADE, IT MAY BE FOLLOWED BY EXECUTION AS PROVIDED IN SECTION 2329.01 R.C.—WHERE FUNDS ARE IN THE HANDS OF THE SHERIFF AND SUBJECT TO PREVIOUS EXECUTION, THE COUNTY TREASURER CANNOT COLLECT. SEC. 5719.08 R.C., SEC. 5719.01 R.C., SEC. 2329.02 R.C., SEC. 2329.29 R.C., SEC. 2329.10 R.C.

## SYLLABUS:

1. In an action under Section 5719.08, Revised Code, only the delinquent taxpayer need be made party defendant.

2. Where in an action under Section 5719.08, Revised Code, judgment is rendered in favor of the county treasurer prosecuting the action, such judgment may be followed by execution as provided in Section 2329.01 *et seq.*, Revised Code, subject to the specific limitations set forth in the last paragraph of said Section 5719.08, Revised Code.

3. Where funds of a judgment debtor under Section 5719.08, Revised Code, are in the hands of the sheriff, but are already subject to execution previously levied under Chapter 2329, Revised Code, the county treasurer cannot collect on his judgment from those funds.

Columbus, Ohio, March 16, 1962

Hon. George Cleveland Smythe, Prosecuting Attorney  
Delaware County, Delaware, Ohio

Dear Sir:

I have your request for my opinion, which request reads as follows:

“Where an action is brought under Section 5719.08, R.C., is it necessary that other lien claimants, including chattel mortgages, judgment creditors, State liens and Federal Tax liens, be made party defendants in order to determine priorities?”

“If not necessary in order to obtain judgment must some other type action be brought after judgment in order that proper execution and sale may be effected in which the purchaser can obtain title to the chattels sold by the Sheriff free from all liens?”

“Where funds of a judgment debtor are held by a Sheriff who also has several executions against said debtor which exceed the funds, and a personal property tax lien has also been filed against said debtor, what procedure should be followed by the County Treasurer to attempt collection from said fund of the personal property tax lien?”

Section 5719.08, Revised Code, to which you refer, reads as follows:

“When taxes, except those on real estate, stand charged against a person and are not paid within the time prescribed by law for the payment of such taxes, the county treasurer, in addition to any other remedy provided by law for the collection of taxes, shall enforce the collection thereof by a civil action in the name of the treasurer against such person for the recovery of such unpaid taxes. If the proper parties are before the court, it shall be sufficient for the treasurer to allege in his bill of particulars or petition that the taxes stand charged upon the duplicate of the county against such person, that they are due and unpaid, and that such person is indebted in the amount appearing to be due on the duplicate, and the treasurer need not set forth any further special matter relating thereto. The tax duplicate shall be prima-facie evidence on the trial of the action of the amount and validity of the taxes appearing due and unpaid thereon and of the nonpayment thereof, without setting forth in the petition any further special matter relating thereto.

“If it is found on the trial of such action that such person is indebted to the state, judgment shall be rendered in favor of the treasurer prosecuting the action, as in other cases. The judgment debtor shall not be entitled to the benefit of the laws for

stay of execution or the exemption of a homestead or other property from levy or sale on execution in the enforcement of such judgment.”

This provision of law contemplates a civil action to enforce the collection of taxes. The statute first provides that judgment may be taken in favor of the county treasurer, and then indicates that execution may be had to enforce such a judgment. There is no indication in any other part of the code that the judgment and execution provided for in this section differ in any respect from those in ordinary civil actions on a debt. As a matter of fact, the opening clause of the second paragraph of the statute indicates the action is similar to an action on a debt. Consequently, it is my view that Section 5719.08, Revised Code, provides for a personal judgment.

Section 5719.01, Revised Code, provides that a lien for delinquent personal property taxes is a lien on real property, reading in part:

“Taxes charged on any tax duplicate, except those upon real estate, shall be a lien on real property of the person charged therewith from the date of the filing of a notice of such lien as provided by law.”

I have been unable to find any provision of law which would create a lien on *personal* property of a delinquent taxpayer. Clearly, if the state has no liens on personal property, an action to marshal such liens would be a wasted action.

In answer to your first question, it is my opinion that the civil action provided for by Section 5719.08, Revised Code, is not an action to marshal liens and determine priority. That section provides for personal judgment and therefore only the delinquent taxpayer need be named as party defendant.

In answer to your second question, it is my opinion that the judgment secured under Section 5719.08, Revised Code, may be followed by execution as provided in Section 2329.01 *et seq.*, Revised Code, subject to the specific limitations set out in the last paragraph of Section 5719.08, Revised Code.

Turning to your third question, I must first repeat that a lien for delinquent personal property taxes is a lien on real property only. Any lien secured as a result of judgment under Section 5719.08, Revised Code,

if a certificate of judgment is filed pursuant to Section 2329.02, Revised Code, is also a lien on real property only.

As I noted earlier there is no general statutory lien on personal property for delinquent personal property taxes. A lien on personal property may only be acquired by execution issued upon a valid judgment. Section 2329.03, Revised Code, reads in part:

“\* \* \* Goods and chattels of a judgment debtor shall be bound from the time they are seized in execution.”

From the facts as set out in your letter, I infer that you have not issued a writ of execution on any judgment you may have obtained. I am therefore forced to conclude that no lien on personal property exists in favor of the state regardless of who holds the delinquent taxpayer's funds or personal property. The specific answer to your third question then is that there is no way to enforce the personal property tax lien against a delinquent taxpayer's funds held by the sheriff because any lien obtained, unless as a result of execution, operates as a lien with regard to the taxpayer's real property only.

Since the sheriff has custody of the funds of the delinquent taxpayer, a levy of execution on those funds can be made by merely having the sheriff endorse the writ. *Murphy v. Swadener*, 33 Ohio St., 85. I note, however, that several other executions have been issued against these same funds raising the question as to the relative priority of a writ of execution on these same funds issued on behalf of the county treasurer.

While the lien for taxes set out in Section 5719.01, Revised Code, has been held to give the state's lien for taxes priority over all other liens, *Security Trust Co. v. Root*, 72 Ohio St., 535, such priority seems to pertain only to liens on real estate created by that statute. I have found no authority which would indicate that liens achieved by levy of execution on a judgment for taxes have priority over other pending executions.

Section 2329.29, Revised Code, reads:

“If the sheriff collects any part of a judgment by virtue of an execution without the sale of real estate, he shall pay it to the judgment creditor, or his attorney, upon demand made therefor at the sheriff's office. If the execution is fully satisfied, the sheriff shall return it within three days after he collected the money thereon.”

Under the provisions of this section of the law it would seem that although no priority exists between executions, the judgment creditor who first demands the proceeds of an execution has right to the funds. However, Section 2329.10, Revised Code, reads:

“When two or more writs of execution against the same debtor are delivered to the officer to whom they are directed on the same day, no preference shall be given to either of such writs. If a sufficient sum of money is not made to satisfy all such executions, the amount made shall be distributed to the several creditors in proportion to the amounts of their respective demands. In all other cases the writ of execution first delivered to the officer shall be the first satisfied. The officer shall indorse on every writ of execution the time when he received it. This section does not affect any preferable lien which a judgment on which execution issued has on the lands of the debtor.”

This provision of the law seems to codify the maxim “first in time is first in right” so far as executions are concerned. Moreover, 22 Ohio Jurisprudence 2d, 131, Section 177, reads in part:

“Money collected by an officer on an execution and held by him in his official capacity is not, in the absence of statutory provision to the contrary, subject to another execution \* \* \*”

It would seem probable that under the facts presented by you that the sheriff is holding the delinquent taxpayer's funds under a prior writ of execution. If so, authority would indicate they are exempt from further levy. Even if such funds held by the sheriff were not collected on an execution, under the authority of Section 2329.10, Revised Code, the sheriff would be under the obligation to satisfy all writs of execution prior to the state's writ.

I am in sympathy, however, with your desire to secure for the state funds which are justly due to it. Therefore, I advise you for future reference that there are four ways of collecting personal property tax owed to the state: first, by enforcing the statutory lien against real property; second, by civil action and execution pursuant to Section 5719.08 and Section 2329.01 *et seq.*, Revised Code; third, by distress and sale pursuant to Section 323.18, Revised Code; and fourth, by rule of court and execution pursuant to Section 323.19, Revised Code. The county treasurer, pursuant to Section 323.24, Revised Code, may also attach and garnishee any debts owed to the delinquent taxpayer.

So far as your present situation is concerned, I am of the opinion and you are advised:

1. In an action under Section 5719.08, Revised Code, only the delinquent taxpayer need be made party defendant.

2. Where in an action under Section 5719.08, Revised Code, judgment is rendered in favor of the county treasurer prosecuting the action, such judgment may be followed by execution as provided in Section 2329.01 *et seq.*, Revised Code, subject to the specific limitations set forth in the last paragraph of said Section 5719.08, Revised Code.

3. Where funds of a judgment debtor under Section 5719.08, Revised Code, are in the hands of the sheriff, but are already subject to execution previously levied under Chapter 2329., Revised Code, the county treasurer cannot collect on his judgment from those funds.

Respectfully,  
MARK McELROY  
Attorney General