

2112.

WATER—FURNISHED BY CITY TO TENANTS—RENT NOT A PREFERRED LIEN ON REAL ESTATE OF OWNER.

SYLLABUS:

Where a municipality either by charter provision, ordinance, or rules properly adopted for the management of its waterworks, provides that water rentals are a lien on the real estate to which water is supplied, a claim for water rent is not a preferred claim in the event the owner of the property becomes bankrupt, or when the property is in the hands of a receiver, except in the sense that if the real estate is sold, the claim for water rent should be paid from the proceeds of said sale, in preference to subsequent lien holders and general creditors.

COLUMBUS, OHIO, May 17, 1928.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—This will acknowledge receipt of your communication as follows:

“Section 3958, General Code, authorizes the Director of Public Service to assess and collect a water rent from all tenements and premises supplied with water.

In Opinion No. 357, to be found at page 243 of the Opinions of the Attorney General for 1912, the Bureau was advised that the rules of the water department could provide that water rents are a lien upon the premises supplied therewith.

Question 1: When the rules of a water department provide that property is liable for water rents, is such claim a preferred one in the event that the owner of the property becomes bankrupt and his affairs are liquidated?

Question 2: When the rules governing a waterworks department provide that the property is liable for water rents, is such rent a preferred claim when the property is in the hands of a receiver?

The case of *The City of Cincinnati vs. Schultz*, 97 O. S. 317, may be pertinent.”

Sections 3956, 3957 and 3958, General Code, read in part as follows:

Sec. 3956. “The Director of Public Service shall manage, conduct and control the waterworks, furnish supplies of water, collect water rents, and appoint necessary officers and agents.”

Sec. 3957. “Such director may make such by-laws and regulations as he deems necessary for the safe, economical and efficient management and protection of the waterworks. Such by-laws and regulations shall have the same validity as ordinances when not repugnant thereto or to the constitution or laws of the state.”

Sec. 3958. “For the purpose of paying the expenses of conducting and managing the waterworks, such director may assess and collect from time to time a water rent of sufficient amount in such manner as he deems most equitable upon all tenements and premises supplied with water. * * *”

The opinion of the Attorney General to which you refer is found in the Annual Report of the Attorney General for 1912 at page 243, and holds:

"The Director of Public Service is authorized, by Sections 3956, 3957, (and) 3958, General Code, to adopt such rules and regulations as to security for water rent as he sees fit so long as they do not conflict with statutes, and these powers extend to making the premises a lien for water rents, or to making the landlord responsible for rentals due from a tenant.

When, however, neither such rules and regulations, nor the statutes provide for the same, water rentals due from a tenant are not collectible against the landlord personally nor are they chargeable against the real estate."

Some years before the above referred to opinion of the Attorney General was rendered, the Common Pleas Court of Gallia County in its decision of the case of *City of Gallipolis vs. The Trustees of Waterworks*, 2 N. P. 161, said :

"The assessment of water rents provided for in 2411 Revised Statutes (now 3958, G. C.) is made a charge upon the tenements and premises supplied with water and is to be collected in the same manner as other city taxes, which means that if they are not paid when due the premises may be sold to pay them."

The opinion of the Attorney General of 1912 is based on the right of the Director of Public Service to make rules and regulations under authority of Section 3957, supra. It is clear that the Director is authorized by Section 3958, supra, to assess water rents on the tenements and premises supplied with water, thus clearly authorizing the making of these assessments a lien upon the property.

By the terms of Section 4 of Article XVIII of the Constitution of Ohio adopted in 1912, municipalities are granted the right to acquire, construct, own, lease and operate within or without their corporate limits any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants, and the Supreme Court of Ohio in the recent case of *Board of Education of the City School District of Columbus, Ohio, vs. The City of Columbus, Ohio*, 118 O. S. 295 held :

"Municipalities derive the right to acquire, construct, own, lease and operate utilities the product of which is to be supplied to the municipality or its inhabitants from Section 4, Article XVIII of the Constitution and the Legislature is without power to impose restrictions or limitations upon that right."

Whether municipalities now derive their right to control their waterworks and provide for making water rents a lien on the premises which are supplied with water from said waterworks from the statutes above referred to, or the authority granted to them by virtue of Section 4 of Article XVIII of the Constitution of Ohio, it is clear that they now have the right to provide by charter provision, ordinance or rules and regulations of the department having in charge the operation of the waterworks that water rentals are a lien on the real estate which is supplied with water.

This does not mean, however, that such rentals are preferred claims against a receiver or a trustee in bankruptcy, but simply that they are a lien on the real estate, and take priority of other subsequent liens in the distribution of the proceeds of the sale of such real estate.

It often happens that receivers are appointed for corporations and partnerships not for the purpose of bringing the property of the corporation or partnership to sale, and paying its debts, but to put its property temporarily beyond the reach of its creditors on execution, and enable it to tide over temporary financial embarrassment. In such cases, claims for water rents could not be said to be preferred claims, but are

general claims against the receiver, on a parity with the claims of other creditors. The security of the lien of course remains intact, and if the real estate is sold, either through the receiver by order of court or foreclosure proceedings, the claim for water rent then takes its proper place as a lien and is preferred to subsequent lien holders on the same property. If, however, the real estate does not sell for a sufficient amount to pay all the prior liens, and the lien for water rent, the claim for water rent remains as a mere general claim against the estate in the hands of the receiver and cannot be said to possess any priority over the claims of other general creditors merely by reason of the fact that it had been a lien on the real estate included within the estate in charge of the receiver. The same is true when the property of a bankrupt is administered by a trustee in bankruptcy.

The case of *City of Cincinnati vs. Schultz*, 97 O. S. 317 does not in any way limit or abridge the right of municipalities to acquire liens on real estate for water rents. This case merely holds that in the particular case under consideration no statute or rule of the water department of the city of Cincinnati provided that water rents were a lien on the personal property of persons or corporations which had been supplied with water.

I am therefore of the opinion, in specific answer to your questions, that where a municipality either by charter provision, ordinance or rules properly adopted for the management of its waterworks, provides that water rentals are a lien on the real estate to which water is supplied, such claim is not a preferred claim in the event the owner of the property becomes bankrupt or when the property is in the hands of a receiver, except in the sense that if the real estate is sold, the claim for water rent should be paid from the proceeds of said sale in preference to subsequent lien holders and general creditors.

Respectfully,

EDWARD C. TURNER,
Attorney General.

2113.

APPROVAL, BONDS OF THE VILLAGE OF NORTH COLLEGE HILL,
HAMILTON COUNTY—\$30,354.48.

COLUMBUS, OHIO, May 17, 1928.

Industrial Commission of Ohio, Columbus, Ohio.

2114.

APPROVAL, ARTICLES OF INCORPORATION OF THE AMERICAN
BROTHERHOOD OF COACH-OPERATORS.

COLUMBUS, OHIO, May 17, 1928.

HON. CLARENCE J. BROWN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your letter of the 16th instant inclosing the articles of incorporation of the American Brotherhood of Coach-Operators for my approval.

I am returning the same with my approval endorsed thereon.

Respectfully,

EDWARD C. TURNER,
Attorney General.