

Such advertisement so published or posted shall specify generally the property to be sold and the date, place and terms of sale.
* *”

Statutory provisions relating to the sale of real property by executors or administrators are contained in Sections 10510-37 and 10510-38, General Code. In so far as pertinent, Section 10510-37, General Code, reads:

“The real estate * * * shall be sold either in whole or in parcels at public auction at the door of the Courthouse in the county in which the order of sale was granted * * * and such order shall fix the place, day and hour of sale. * * *.”

And Section 10510-38, General Code, reads:

“If the sale is to be public, the executor, administrator or guardian must give notice of the time and place of such sale by advertisement, at least four weeks successively in some newspaper printed in the county where the lands are situated.”

Inasmuch as the Old Age Pension Law is silent as to the manner in which the public sale is to be conducted, it is apparent that all those elements generally constituting a “public sale” must be present. The statutes quoted supra, although not directly applicable to the Old Age Pension Law, do provide a guide as to procedure which, if followed, would meet the legal requirements of a “public sale” as contemplated in the Old Age Pension Law. It is believed that a more specific answer to your question may not be given.

Respectfully,

JOHN W. BRICKER,
Attorney General.

4659.

FORECLOSURE — SPECIAL ASSESSMENTS RECEIVE SAME PRIORITY AS TAXES IN DISTRIBUTION — MUNICIPAL LIEN ON REAL PROPERTY FOR TAXES.

SYLLABUS:

1. *In foreclosure proceedings, to enforce the lien for taxes, brought under the provisions of Section 5713, et seq., of the General Code, all special assessments are of the same priority as taxes, in the distribution of the proceeds of the sale of the property.*

2. *In the distribution of the proceeds arising from the sale of real estate sold under the provisions of Section 2667, et seq., of the General Code, after the costs and the amount of assessments found due are paid therefrom, the taxes standing charged and unpaid on the tax list that have accrued, shall next be paid.*

3. *If such proceeds are insufficient to pay all the taxes which have accrued, together with penalties and interest, the unsatisfied portion thereof shall remain a lien upon the property.*

4. *By virtue of section 2655, General Code, county treasurers are not permitted to receive payments of general taxes without at the same time receiving payment of installments of special assessments for public improvements certified to the county treasurer for collection.*

5. *Foreclosure proceedings to enforce the lien of special assessments of a municipality which have been certified to the county auditor as provided for in Section 3892, General Code, must be brought under Section 2667 of the General Code, et seq.*

COLUMBUS, OHIO, September 17, 1935.

HON. RICHARD W. HORTON, *Prosecuting Attorney, Caldwell, Ohio.*

DEAR SIR:—I am in receipt of your request for my opinion, which reads as follows:

“In Re Sec. 2655, G. C. requiring the Treasurer of a county to receive only the full amount of taxes charged for all purposes except what is legally enjoined and In Re of Sec. 5718-5718-1-2-3 relating to the manner of the collection of taxes, assessments, etc.

“In my view if the words ‘assessments’, ‘penalties’, and ‘interest’ used in the statute refer only to assessments, penalties and interest of the county or state then the interpretation becomes clear and the Treasurer has a right to invoke the authority of Sec. 5718-3 to collect the same. But if those words include village assessments for street and other improvements then we have the Treasurer, when he brings action to collect delinquent taxes and county and state assessments, including in his action claims of a village which is really inferior to and adverse to the rights of the county and state. It can readily be seen that if the property sold does not bring enough to satisfy all the claims it is adverse to the interests of the county and state. It is an additional evidence that the Legislature did not intend to include village assessments when it passed an Enabling Act Sec. 2667 to permit Treasurers, when the county interests are secure, to assist the village in collecting its assessments.

"Please give me your opinion on these sections of the Gen. Code and oblige."

Subsequent thereto I received the following communication:

"Is an assessment by a village for street improvements, certified to County Auditor under Section 3892 G. C., such an assessment as requires the County Treasurer, under section 2655, to refuse to receive all State and County taxes and assessments until such village assessment is also paid? Opinion of Attorney, 1928, O. A. G. No. 2833 holds they are not. Opinion of Attorney General 1932, O. A. G. No. 4152 seems to hold otherwise.

"In collection of delinquent taxes and State and County assessments, under section 2667 to 2670, it looks to me that to include a village improvement assessment in the same action there would be a conflict of interests that would prevent the County Treasurer from bringing such action until all the County and State taxes and assessments are paid.

"I would like your opinion on this.

* * *

"P. S. There are many instances where the property would not sell for the State and County taxes and assessments."

The Statutes of Ohio provide for two types of foreclosure proceedings to enforce the lien of the State for delinquent taxes and assessments. The one is an action instituted in the name of the county treasurer for the collection of taxes, assessments, penalties and interest which have not been paid for three consecutive years after the lands have been certified delinquent and may be brought by virtue of Sections 5713 et seq. of the General Code.

The other, brought under the provisions of Section 2667, General Code, is one instituted in the name of the county treasurer for the collection of special assessments or any part thereof, which have not been paid within the time prescribed by law.

Section 5713 of the General Code, in so far as is pertinent to your inquiry, reads as follows:

"The state shall have a first and best lien on the lands and lots described in the delinquent land list, for the amount of taxes, assessments and penalty and accrued interest charged prior to the delivery of such list, together with interest on the principal sum of such taxes and assessments at the rate of eight per cent. per annum, from the date of the August settlement next preceding the delivery of such

list to the date of redemption thereof, and the additional charge of twenty-five cents for the making of said list. If the taxes have not been paid for three consecutive years after certification, the state shall have the right to institute foreclosure proceedings thereon, in the manner provided by this chapter, * * *

It will be observed that while this section gives the State a lien for taxes and assessments, yet proceedings instituted thereunder may only be commenced if the taxes have not been paid for three consecutive years after certification.

To determine if any priorities exist between taxes and assessments, we must look to the manner in which distribution is made of the proceeds of a sale under such proceedings. Section 5719 of the General Code, which deals with the distribution of the proceeds of such sale, reads in part as follows:

“A finding shall be entered of the amount of such taxes and assessments, or any part thereof, as are found due and unpaid, and of penalty, interest, costs and charges, for the payment of which, together with all taxes and assessments payable subsequent to certification for foreclosure, the court shall order such premises to be sold without appraisal for not less than the total amount of such finding and costs, unless the prosecuting attorney shall apply for an appraisal, in which event the premises shall be appraised in the manner provided by section 11672 of the General Code, and shall be sold for at least two-thirds of the appraised value thereof. From the proceeds of the sale the costs shall be first paid, next the amount found due for taxes, assessments, penalties, interest and charges, next the amount of any taxes and assessments accruing after the entry of the finding and before sale, all of which taxes, assessments, penalties, interest and charges shall be deemed satisfied, though the amount applicable thereto be deficient, and the balance, if any, shall be distributed according to law. * * *

It will be noted, under the provisions of the above section, that from the proceeds of the sale, after the payment of costs, the amount found due for taxes, assessments, penalties, interest and charges shall then be paid. Assessments stand on the same footing as taxes and the lien for taxes is not regarded as superior to the lien for assessments. In the case of *Ward vs. The Home Savings and Loan Company*, 28 Nisi Prius (NS) page 95, it was held that:

“Special assessments are of the same priority as general taxes and when due and payable at the time of a judicial sale, such special assessments must be paid from the proceeds.”

Thus, it seems manifest that when foreclosure proceedings to enforce the lien for taxes are brought under the provisions of Section 5713 of the General Code supra, in the distribution of the proceeds of the sale, all special assessments are of the same priority as taxes.

I come now to the proceedings instituted under Section 2667 General Code supra. Said section which deals with foreclosure proceedings to enforce the lien of special assessments, reads as follows:

“When special 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 enforce the lien of such assessments, and any penalty 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.”

Section 2670 of the General Code, which provides for the distribution of the proceeds from such sale, reads in part as follows:

“ * * * From the proceeds of the sale the costs shall be first paid, next the finding of the amount of assessments, and the balance shall be distributed according to law. * * *”

Said sections, in their present form, became effective October 14, 1931 (114 Ohio Laws 825). Prior thereto, they read as follows:

“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 penalty 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.”

Section 2670:

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

In view of the fact that the Legislature, in amending Section 2670 omitted the word "taxes", and in view of the language of said section as it now reads, it seems apparent that if the property sells for a sufficient amount, the assessments due are paid in full. Therefore, it would appear that in so far as proceedings had under the provisions of said sections, the lien of special assessments has priority over that of taxes.

Section 2670, *supra*, provides that after the payment of the finding of the amount of assessments, the balance shall be distributed according to law.

Section 5692 of the General Code, in so far as material, reads as follows:

" * * * When real estate is sold at judicial sale, * * * the court shall order the taxes and penalties and interest thereon against such lands, to be discharged out of the proceeds of such sale. * * *"

It therefore appears that in making distribution according to law, taxes against the property should next be paid. This brings us to the question as to when taxes become a lien and whether or not all taxes which are a lien on real estate may be paid out of the proceeds of a sale. Taxes become a lien on the date preceding the second Monday in April of each year. However, in the case of *Hoglen vs. Cohan*, 30 O. S. 436, it was held that general taxes remain a lien on real estate after the date preceding the second Monday in April of each year, yet when sold at judicial sale before the first day of October of such year, the taxes for that year, although a valid lien, cannot be paid out of the proceeds of the sale, but must be paid by the purchaser. See also *Ketcham vs. Fitch*, 13 O. S. 201, and *Makley vs. Whitmore, et al.*, 61 O. S. 587. In other words, taxes must have accrued before they are payable from the proceeds of the judicial sale.

It would therefore appear, and I am of the opinion, that after the amount of the assessment found due is paid therefrom, the taxes standing charged and unpaid on the tax list that have accrued, must be paid from the proceeds arising from the sale of property sold under the provisions of Section 2667 General Code *supra*.

If, however, such sale is insufficient to pay all such taxes, together with penalties and interest, such taxes shall not be deemed satisfied, as is provided for in sales made pursuant to Section 5713 General Code *supra*. In such event the unsatisfied taxes shall remain a lien upon the property.

You also inquire as to whether or not the provisions of Section 2655 of the General Code are applicable to village assessments. Said section reads in part as follows:

"No person shall be permitted to pay less than the full amount of taxes charged and payable for all purposes on real estate, except only when the collection of a particular tax is legally enjoined.
* * *"

In the case of *State ex rel. Brown vs. Cooper*, 123 O. S. 23, it was held as disclosed by the syllabus, as follows:

“3. By virtue of Section 2655, General Code, county treasurers are not permitted to receive payments of general taxes without at the same time receiving payment of installments of special assessments for public improvements certified to the county treasurer for collection.”

In the opinion rendered by my predecessor, to which you refer in your communication, (1932 O. A. G. 4152), it was held that:

“The County Treasurer has no authority to receive payment of general taxes without, at the same time, receiving payment of installments of special assessments as are due, unless the payment of said assessments has been legally enjoined.”

Your question as to whether village improvement assessments may be the subject matter of a proceeding under Section 2667, General Code *supra*, is answered by the provisions of Section 3892, General Code, which deals with the matter of certification of special assessments made by municipalities, to the county auditor, wherein it is stated, with reference to such assessments, that:

“ * * * 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.”

It therefore seems manifest that foreclosure proceedings to enforce the lien of special assessments of a municipality which have been certified to the county auditor as provided for in Section 3892, General Code, must be brought under Section 2667 of the General Code, *supra*.

Respectfully,

JOHN W. BRICKER,
Attorney General.