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FORECLOSURE SALE—SHERIFF MUST PAY TAXES THAT ARE A LIEN FROM TIME OF SALE RATHER THAN DATE OF DELIVERY OF DEED.

SYLLABUS:

When the sheriff sells property as a result of a foreclosure action either of a tax lien by virtue of Sections 5713 et seq., General Code, of a special assessment lien by virtue of Section 2667, General Code, or of a mortgage or other similar lien, by reason of the provisions of Section 5692, General Code, he must pay from the proceeds of such sale any taxes standing charged on the tax list and duplicate in such county, a lien upon the property so sold at the time of the sale as distinguished from the date of confirmation of sale or delivery of the deed.

COLUMBUS, OHIO, September 14, 1932.

HON. P. L. A. LIEGHLEY, *Prosecuting Attorney, Cleveland, Ohio.*

DEAR SIR:—I am in receipt of your recent request for opinion on the following question:

“The question is, to what date the Sheriff should collect taxes, assessments, penalties, interest, and charges in foreclosure proceedings. In other words, should the Sheriff collect taxes, assessments, penalties, interest, and charges to the time of the confirmation of the sale or until such time as a purchaser takes up a deed from the Sheriff?”

There are three types of foreclosure proceedings in Ohio in which the question of payment of taxes on the real estate affected by the proceedings arises: The first, in which the action is instituted by a lien holder who is the party plaintiff or the party instituting the action.

The second, in which the action is instituted in the name of the county treasurer for the collection of taxes which have been certified delinquent for three years or more, by virtue of Sections 5713 and 5717, General Code.

The third, in which the action is instituted in the name of the county treasurer for the collection of special assessments which have become delinquent by virtue of Section 2667, General Code.

Section 2667, General Code, provides that the proceedings for foreclosure in the third classification above, shall be conducted “in the same way mortgage liens are enforced.” I am therefore discussing the first and second classifications only, since any reasoning applicable to the first classification would be similarly applicable to the third classification.

In foreclosure proceedings under the first classification, that is, in an ordinary foreclosure proceeding, Section 11588, General Code, provides:

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

There is no mention in this section of the distribution of the proceeds or

manner of making the sale except to set forth the method of appraising and sale in separate tracts. The statutory law does, however, provide the method of conducting sales as on execution and in pursuance of these provisions the sale in foreclosure is conducted (See Section 11672, General Code.)

Section 11675, General Code, provides the manner of sale of real property in foreclosure of junior mortgage or other junior liens and the minimum amount for which such premises may be sold.

Section 11676, General Code, provides:

"If the sum bid by the purchaser for the real estate sold under the provisions relating to the enforcement of junior liens be insufficient to pay the costs and allowances as the court may have determined prior to such sale should be paid out of the proceeds thereof, pursuant to the terms of the mortgage or lien so sought to be enforced, then the purchaser in addition to the amount of his bid must pay a sum which with the amount so bid will be sufficient to pay the costs and allowances. The court may fix the amount remaining unpaid on such claims or obligations for the purpose of the sale, and to that end require the parties to the suit to furnish to it satisfactory evidence of such unpaid amount."

A "junior mortgage lien" or other "junior lien" are phrases of common meaning denoting a valid lien on the premises, which is inferior to some superior lien which has a prior right to be paid from the proceeds derived from the sale of the premises. Section 5713, General Code, provides that:

"The state shall have the 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 such list. * *"

This section makes the lien for all taxes certified delinquent a lien prior to all mortgages. Section 5671, General Code, gives the state a lien on the property for all taxes as soon as assessed, which lien attaches, as to the current year's taxes, on the day preceding the second Monday in April in each year. The Supreme Court, in the case of *The Security Trust Company vs. Root*, 72 O. S., 535, in construing this section, which was then Section 2838, Revised Statutes, held that this section gave the state a lien for current taxes prior to or paramount to all other liens on the property.

Section 5692, General Code, in so far as material to your inquiry, reads:

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

In the case of *In re. Estate of Harper*, 26 O. N. P., (N. S.) 431, the Probate Court of Tuscarawas County, in an opinion which was later affirmed by the Common Pleas Court, held, as stated in the second paragraph of the syllabus, that:

"Taxes on real estate, for the purpose of enforcing payment thereof,

become a lien on the said real estate on the day preceding the second Monday of April of each year; but taxes on real estate do not accrue until October first of each year."

Such case further holds that only the taxes that have "accrued", are payable from the proceeds of the sale. In arriving at this conclusion, the court reasons that until the duplicate was delivered to the county treasurer by the county auditor, the county treasurer had no authority to receive the taxes; they therefore had not accrued. The effect of this holding, if the law, is that when the property is sold in foreclosure prior to October first the taxes to be assessed for that current year, which are to be due and payable in the December and June following, should not be paid by the sheriff, but if the sale is after October first then the taxes for the current year, so payable, should also be deducted.

The holding of the court as to the taxes and assessments which are to be paid from the proceeds of the sale seems to be settled in Ohio. In other words, it is the settled law that from the proceeds arising from a judicial sale any taxes standing charged and unpaid on the tax list and duplicate must be paid. Such is the holding of the court in the case of *Ketcham vs. Fitch*, 13 O. S., 201; *Hoglen & Houck vs. Cohan*, 30 O. S., 436.

I am therefore of the opinion that from the proceeds of a judicial sale of real estate the sheriff should pay any taxes which stand charged on the books of the county treasurer, and if after October first of any year the taxes for that year should be paid even though by virtue of the provisions of Section 2653, General Code, the owner might have elected to pay such taxes in two installments, one in the following December and the second the following June.

Your query suggests one further question, that is, when the sale is made and confirmed prior to October first, but the sheriff does not deliver the deed and disburse the proceeds until after the date when the tax accrues, that is, October first, should he pay such tax? Permit me to again refer to the case of *In Re. Estate of Harper*, *supra*, the first paragraph of the syllabus of which reads:

"1. When real estate is sold at judicial sale, it does not become complete until the deed is executed and delivered, but when such deed is finally executed and delivered, it relates back to the day of the sale."

While this case was decided by a court of inferior jurisdiction those parts of the opinion are amply fortified by the authorities. In support of such holding contained in syllabus No. 1, the court cites the cases of *Boyd vs. Longworth*, 11 Oh., 235; *Oviatt vs. Brown*, 14 Oh., 285.

It is as well supported by reason and equity. In a judicial sale proceedings the rights of the lien claimants have been fixed by the court. In an ordinary sale of real property the delivery of the deed and payment of the purchase price are concurrent acts, unless other agreements have been entered into by the parties. In auction sales the sale takes place when the b'd is accepted, the purchase price immediately becomes due and payable, unless the sale is on terms other than cash. Similar rules prevail in judicial sales, except to the extent modified by statute and decree of the court. (*Camden vs. Mayhew*, 129 U. S. 73). The statute provides for a confirmation of the sale by the court (Section 11688, General Code). It is always presumed in the absence of order of the court that in a judicial sale the terms of sale are "cash" or that the purchase is payable at the time of the acceptance of the b'd, subject to the confirmation of the court. It is further held that a deed to the purchaser as a result of a judicial sale, although not delivered

until after confirmation relates back to the date of sale. *Boyd's Lessee vs. Longworth*, 11 Oh., 235; *Jashenosky, vs. Volrath*, 59 O. S., 540; *Estate of Harper*, 26 O. N. P., (N. S.), 431.

I am therefore of the opinion that in a foreclosure sale arising out of an action for the foreclosure of a lien other than as a result of Sections 5713 et seq. General Code, Section 5692, General Code, requires that all taxes standing charged and unpaid on the tax list and duplicate at the date of sale must be paid by the sheriff from the proceeds arising from such sale.

In proceedings brought in the name of the county treasurer to foreclose a delinquent tax lien, pursuant to the requirements of Sections 5713 et seq. General Code, the language of Section 5719, General Code, is specific as to what taxes shall be paid from the proceeds of such sale and the manner and priority of payment. Such section reads:

"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. Upon confirmation of the sale a husband or wife of the party charged with the delinquent tax shall thereby be barred of the right of dower in the property sold, though such husband or wife was not a party to the action. No statute of limitations shall apply to such action. When the land or lots stand charged on the tax duplicate as certified delinquent, 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."

It is therefore my opinion that when the sheriff sells property as a result of a foreclosure action either of a tax lien by virtue of Sections 5713 et seq., General Code, of a special assessment lien by virtue of Section 2667, General Code, or of a mortgage or other similar lien, by virtue of the provisions of Section 5692, General Code, he must pay from the proceeds of such sale any taxes standing charged on the tax list and duplicate in such county, a lien upon the property so sold, at the time of the sale, as distinguished from the date of confirmation of sale or delivery of the deed.

Respectfully,
GILBERT BETTMAN,
Attorney General.