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SALE, DELINQUENT AND FORFEITED LANDS—PURCHASER AT SALE RECEIVES, UPON RECEIPT OF AUDITOR'S DEED, A FEE SIMPLE TITLE SUBJECT TO ONE YEAR PERIOD FOR ATTACKING SALE, §5723.13 RC—ANY EXCESS FUNDS FROM SUCH SALE MUST BE RETAINED BY COUNTY TREASURER; §5723.11 RC PROVIDES FOR DETERMINATION OF RIGHTS IN SUCH EXCESS—PROPER PARTIES TO TAX FORECLOSURE PROCEEDING, ESTATE HELD BY TENANT IN TAIL; LIFE TENANT IN TAIL, HIS CHILDREN, UNBORN CHILDREN, AS PROVIDED IN §2307.131, RC.

## SYLLABUS:

1. The purchaser at a sale of forfeited lands as provided in Chapter 5723., Revised Code, receives upon receipt of the auditor's deed a fee simple absolute title to such property, subject, however, to the one year period for attacking the validity of the purchaser's title as provided in Section 5723.13, Revised Code.
2. The county treasurer is required to retain any excess funds derived from the sale of forfeited lands as provided in Chapter 5723., Revised Code, and upon demand to pay such excess to the proper owner. If the treasurer is not satisfied that a particular claimant is entitled to such excess funds, he is required to commence an action in the court of common pleas for the determination of the rights in and to such funds as provided in Section 5723.11, Revised Code; and in such an action the court is authorized to determine the rights to such excess funds as provided in Sections 5303.21, *et seq.*, Revised Code, giving recognition to the rights of any persons yet unborn as provided in Section 2307.131, Revised Code.
3. In a tax foreclosure proceeding, as provided in Chapter 5723., Revised Code, for the sale of an estate held by a tenant in tail, the life tenant in tail, his children, and unborn children, as provided in Section 2307.131, Revised Code, are proper parties to the action.

Columbus, Ohio, November 29, 1957

Hon. Wilford R. Miller, Prosecuting Attorney  
Tuscarawas County, New Philadelphia, Ohio

Dear Sir:

I have your request for my opinion reading in part as follows:

"I am in the process of foreclosing on certain properties located here in New Philadelphia, pursuant to Ohio Revised Code Section 5721.18 *et seq.*

"A listed owner of one of the parcels involved has an *estate in fee tail*, the property having been granted to him and the heirs of his body. The value of the property is worth considerably more than the taxes due thereon and therefore there will be a fund left over to deposit with the County Treasurer according to the Code.

"My problem is three-fold:

"1. Will the deed which the purchaser receives as a result of the tax sale convey to him a fee simple title which is not subject to attack after one year from date of recording same deed?

"2. Shall the County Treasurer deliver over the excess funds to the present owner in full or place them in trust for the possible heirs of said owner according to the tenor of the disentailment statutes?

"3. Should the minor children and unborn children of said owner be made parties to the foreclosure suit even though they have only an expectancy in the property until they actually become heirs?"

In answer to your first query I invite your attention initially to Section 5723.12, Revised Code, reading as follows:

"The county auditor, on making a sale of a tract of land to any person under sections 5723.01 to 5723.19, inclusive, of the Revised Code, shall give such a purchaser a certificate of sale. On producing or returning to the auditor the certificate of sale, the auditor, on payment to him by the purchaser, his heirs, or assigns, of the sum of one dollar and twenty-five cents, shall execute and deliver to such purchaser, his heirs, or assigns, a deed, which deed shall be prima-facie evidence of title in the purchaser, his heirs, or assigns. When a tract of land has been duly forfeited to the state and sold under such sections, the conveyance of such real estate by the auditor shall *extinguish all previous title and invest the purchaser with a new and perfect*

*title*, free from all liens and encumbrances, except taxes and installments of special assessments and reassessments not due at the time of such sale, and except such easement and covenant running with the land as were created prior to the time the taxes or assessments, for the nonpayment of which the land was forfeited, became due and payable.” (Emphasis added)

It is to be noted that the proceedings for sale of forfeited lands is in character an action *in rem*. See *Jones v. Devore*, 8 Ohio St., 430, *Clark v. Lindsey*, 47 Ohio St., 437, *Security Trust v. Root*, 72 Ohio St., 535. The auditor's deed conveys a “new and perfect title”, thereby starting a new chain of title. Section 5723.13, Revised Code, limits the period for attacking the validity of the purchaser's title to one year from the date of filing the auditor's deed for record. Section 5723.16, Revised Code, provides for the purchaser's security in the event he is ousted from the property as a result of a suit under Section 5723.13, *supra*. See also *Kahle v. Nisley*, 74 Ohio St., 328, *Slaughter v. Fitzgerald*, 66 App. 53, Opinion No. 4653, Opinions of the Attorney General for 1954, page 677.

The purchaser at a sale of forfeited lands as provided in Chapter 5723., Revised Code, receives upon receipt of the auditor's deed a fee simple absolute title to such property, subject, however, to the one year period for attacking the validity of the purchaser's title as provided in Section 5723.13, Revised Code.

In answer to your second question I invite your attention to Section 5723.11, Revised Code:

“If any forfeited lands are sold for a greater sum than the amount of the tax, assessment, interest, penalty, and costs of sale, the county auditor shall charge the county treasurer separately in each case, in the name of the supposed owner, with the excess above such amount. The treasurer shall retain such excess in the treasury for the proper owner of the forfeited lands, and upon demand by such owner, within six years from the day of sale, shall pay the excess to him.

“If the treasurer, upon demand, is not fully satisfied as to the right of the person demanding to receive such excess sum or if there are several different claimants, he shall commence a civil action by filing a petition of interpleader in the court of common pleas of the county where the land was sold, wherein he shall make the person claiming the excess, and the state, defendants, and the action shall proceed as other civil actions. The costs of the proceedings shall be paid by the person claiming the excess, as the court orders. The prosecuting attorney shall prosecute the action, in behalf of the treasurer.”

From this language it would seem to be apparent that the county treasurer shall retain the excess funds in the county treasury until such time as the proper parties have established their rights to such funds. The above statute amply supplies a means for an action to properly determine the rights of the claimants. In such an action the court of common pleas may determine these rights under the relevant disentailment and/or partition statutes. See Sections 5303.21, 5303.211 and 2307.131, Revised Code. See also Opinion No. 473, Opinions of the Attorney General for 1937, page 754.

Therefore, it appears to be clearly provided that the county treasurer shall retain any excess funds derived from the sale of forfeited lands as provided in Chapter 5723., Revised Code, and upon demand shall pay such excess to the proper owner and if the treasurer is not satisfied that the claimant is entitled to such excess funds, he shall commence an action in the court of common pleas for the determination of the rights in and to such funds as provided in Section 5723.11, Revised Code; in such an action the court is authorized to determine the rights to such excess funds as provided in Sections 5303.21, *et seq.*, Revised Code, giving recognition to the rights of any persons yet unborn as provided in Section 2307.131, Revised Code.

You ask me, in effect, to determine the rights of all possible claimants as a substitute for such judicial action, and this without having before me all the facts and circumstances which may be brought before the court in appropriate proceedings. As an abstract proposition I may say that I incline to the view that the *corpus* of the excess funds thus coming into the custody of the treasurer should, in the ordinary situation, be treated in the same way as are funds derived from the sale of lands in a disentailment action under Section 5303.21, Revised Code, *i.e.*, as provided in Section 5303.27, Revised Code, effective September 9, 1957.

In this situation, and in the absence of any Ohio decisions in a situation of this kind, I must decline to invade the judicial function described in Section 5723.11, Revised Code.

In answer to your third query, I invite your attention to the case of *Slaughter, Treasurer, v. Fitzgerald, et al., supra*, the second paragraph of the syllabus reading as follows:

“In a tax foreclosure proceeding by the state of an estate held by a life tenant with remainder to the heirs of his body, it is suffi-

cient if the life tenant in tail and his children are joined as parties defendant, and the grandchildren of the life tenant in tail are not necessary parties.”

This appears to be the latest judicial pronouncement upon the requirement of proper parties defendant in a tax foreclosure action where the land to be sold is subject to an estate in fee tail.

This authority should be considered in the light of the subsequent enactment of Section 2307.131, Revised Code, which provides in pertinent part:

*“If in any action it shall appear that any persons not yet born are or may become entitled to, or may upon coming into being claim to be entitled to, any future interest, legal or equitable, whether arising by way of remainder, reversion, possibility of reverter, executory devise, upon the happening of a condition subsequent, or otherwise, in any property, real or personal, involved in such suit, the court may, and upon the application of any party to the action shall, appoint some competent and disinterested person as trustee of the interest of such persons not yet born, to appear for and represent in such cause such future interest and to defend the suit for and on behalf of such persons not yet born; and any judgment or decree rendered in such suit shall be as binding and effectual for all purposes as though such persons were born and were parties to such suit. Such persons not yet born need not be served by publication.”*

(Emphasis added.)

This statutory provision for protecting the interests of unborn persons applies to “any action” and would appear to include the foreclosure action.

We may next note that Section 5303.22, Revised Code, provides:

*“The petition for a sale of an estate described in Section 5303.21 of the Revised Code shall contain a description of such estate, a clear statement of the interest of the plaintiff therein, and a copy of the will, deed, or other instrument of writing by which the estate is created. All persons who are interested in the estate, or who may, by the terms of the will, deed, other instrument creating the entailment or other estate, thereafter become interested therein as heir, reversioner, or otherwise, shall be made parties to the action. If the names or residence of persons who should be made parties are unknown to the plaintiff, that fact shall be verified by affidavit of the plaintiff, whereupon the sale may be ordered.”*

(Emphasis added.)

This section relates to an action to disentail the land rather than the foreclosure action. However, since the Court of Appeals of Madison

County in the Slaughter case, *supra*, has seen fit to include persons having "mere expectancies" in the property as being necessary parties to the action, I am impelled to conclude that the provisions of Section 2307.131, *supra*, should be invoked in such a foreclosure suit instituted as provided in Chapter 5723., Revised Code.

Therefore, in specific answer to your enumerated questions, it is my opinion and you are accordingly advised that :

1. The purchaser at a sale of forfeited lands as provided in Chapter 5723., Revised Code, receives upon receipt of the auditor's deed a fee simple absolute title to such property, subject, however, to the one year period for attacking the validity of the purchaser's title as provided in Section 5723.13, Revised Code.

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3. In a tax foreclosure proceeding, as provided in Chapter 5723., Revised Code, for the sale of an estate held by a tenant in tail, the life tenant in tail, his children, and unborn children, as provided in Section 2307.131, Revised Code, are proper parties to the action.

Respectfully,

WILLIAM SAXBE

Attorney General