

Note from the Attorney General's Office:

1961 Op. Att'y Gen. No. 61-2410 was clarified by
1983 Op. Att'y Gen. No. 83-045.

2410

1) WHERE STATE ACQUIRES A PERPETUAL EASEMENT OVER LANDS ON WHICH REAL ESTATE TAXES ARE OWING, FOR PURPOSES OF A HIGHWAY, NO LIABILITY ATTACHES TO THE STATE.

2) IN A CONDEMNATION ACTION IN WHICH THE STATE SEEKS TO ACQUIRE SUCH AN EASEMENT, AND REAL ESTATE TAXES ARE OWED ON THE PROPERTY, COUNTY TREASURER MAY APPLY TO BE MADE PARTY TO PROCEEDINGS SO THAT MONEY AWARDED FOR PROPERTY MAY BE APPLIED TO ACCRUED TAXES.

3) PROCEDURE FOR ATTACHING A LIEN FOR TAXES CONSTITUTES SOLE METHOD OF COLLECTION OF DELINQUENT REAL ESTATE TAXES; AND THERE IS NO STATUTORY AUTHORITY FOR REMOVAL OF DELINQUENT TAXES FROM TAX DUPLICATE EVEN THOUGH FORECLOSURE OF THE LIEN WOULD BE OF NO AVAIL—OPINION NO. 2975, OAG 1953, PAGE 365—§§5519., 5519.01, R.C.

SYLLABUS:

1. Where the state acquires a perpetual easement over lands on which real estate taxes are owing, for the purpose of a highway, no liability attaches to the state. (Opinion No. 2975, Opinions of the Attorney General for 1953, page 365, approved and followed).

2. In a condemnation action under Chapter 5519., Revised Code, in which the state seeks to acquire such an easement, and real estate taxes are owed on the property, the county treasurer may apply to be made a party to the proceedings in order that moneys in the award for the property may be applied to the accrued taxes.

3. The procedure of Section 5719.01, Revised Code, for attaching of lien for taxes constitutes the sole method of collection of delinquent real estate taxes; and there is no statutory authority for the removal of delinquent taxes from the tax duplicate even though foreclosure of the lien would be of no avail.

Columbus, Ohio, July 29, 1961

Hon. Everett Burton, Prosecuting Attorney
Scioto County, Portsmouth, Ohio

Dear Sir :

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

“This office is in receipt of a request from the Auditor of Scioto County, Ohio, concerning the following problem :

“The State of Ohio Highway Department has secured perpetual easements over certain lands in this County, the fee to which has remained in the name of the original owner. In many of these instances, neither the Treasurer nor Auditor was joined as a party to the suit, nor was any consideration given to the taxes then owing on the premises, on the distribution of the monies. The Code seems to provide no remedy for the County Auditor concerning the collection of these taxes from the original owners, since there are no provisions for securing personal judgments for delinquent real estate taxes. Certainly, to foreclose on these properties would be of no avail.

“Since this matter, undoubtedly, is one of common concern to other Counties, we would appreciate an opinion from your office concerning how the Auditor can proceed to collect these taxes. If it appears that there is no practical solution to this problem, we are wondering if it is possible that the Attorneys for the State Highway Department could be instructed that, before any distributions are made, the matter of taxes be cleared.”

I have also received in response to my inquiry concerning this problem a letter from you wherein you state :

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“There may be no practical solution to this problem, and if that is true, and if the Auditor has no way to collect these taxes, we would appreciate an Opinion from your office as to the method to be used by the Auditor in removing these delinquencies from the duplicate.

“Section 5719.06 of the Ohio Revised Code provides a method for the Auditor to have delinquent personal property taxes removed from the duplicate, but we have been unable to determine the method to be used when the taxes are upon real estate.

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As to attachment of lien for taxes, Section 5719.01, Revised Code, reads :

“The lien of the state for taxes levied for all purposes on the real and public utility tax list and duplicate for the year 1954 and each year thereafter shall attach to all real property subject to such taxes on the first day of January, annually, and continue until such taxes and any penalties, interest, or other charges accruing thereon are paid, but taxes, assessments, penalties, interest, or other charges may be apportioned in case of transfer of a part of any tract or lot of real estate, in which case the lien of such taxes, special assessments, penalties, interest, or other charges shall extend to the transferred part and the remaining part only to the extent of the amounts allocated to such respective parts. All personal property subject to taxation shall be liable to be seized and sold for taxes. The personal property of a deceased person in the hands of an executor or administrator shall be liable for any tax due on it from the decedent.

“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.”

There seems to be little doubt that the taxes which were due upon property over which the State of Ohio acquired perpetual easements for highway purposes cannot be collected from the state. In the fourth paragraph of the syllabus of Opinion No. 2975, Opinions of the Attorney General for 1953, page 366, it is stated :

“Where the state of Ohio has acquired a perpetual easement for highway purposes over lands lying within the limits of a municipality, there is no authority under the provisions of Section 5671, General Code, for the apportionment of taxes thereafter levied against such land nor for the apportionment of a lien for accrued taxes thereon; and no liability with respect to accrued taxes attaches to the state in such case.”

The ruling of my predecessor is firmly based upon the nature of the interest acquired by the state and the rule of law that general statutes, such as Section 5723.12, Revised Code, dealing with the granting of a deed upon sale of land for delinquent taxes, do not apply to the state unless the statute so provides.

Thus, we come to the question of what action the county treasurer may take to collect the delinquent taxes which remain a lien upon the property when the state has acquired a perpetual easement over the property.

The law seems to be well established that the only remedy available to collect taxes on real property is by foreclosure of the lien provided by statute. The first and second headnotes of *Newman v. Newman Manufacturing Co.*, 31 N. P. (N.S.) 273, read :

“1. Since 1931, there has been no personal liability in Ohio on the part of the owner to pay taxes levied against his real estate, and there is no language in the statutes providing for the collection of the tax through a medium of a personal judgment against him.

“2. By authorizing the levying of taxes upon real estate and expressly providing for their enforcement by foreclosure of the lien imposed, no such authority was delegated as the right to enforce the taxes by imposing a personal obligation to be satisfied out of other property of the owner ; hence, such taxes do not constitute a prior claim against the personal property of the owner.”

Also see *In Re Estate of Frank Kastelic*, 3 O.O 164, and *In Re Estate of Minnie H. Haughton*, 21 O.O 360.

Although it appears that the treasurer may not collect the delinquent taxes from the State of Ohio nor obtain a personal judgment against the holder of the fee, there is some indication that at the time the state acquires the easement he may take action to have taxes paid from the fund created by the acquirement of the easement.

In the case of *Boyle v. The Middleburgh Realty Co.*, 75 Ohio App., 368, 31 O.O 130, Court of Appeals of Cuyahoga County, it is stated at page 131 :

“In *In re Houghton and Olmstead Avenues*, 266 N.Y., 26, 193 N.E., 539, the Court of Appeals of New York held :

“ ‘The lien of a mortgage or of a tax is upon the entire property. When a portion of it is taken in condemnation proceedings and an award made the lien attaches to the award and the lienor is entitled to satisfy the entire amount of his lien therefrom.’ ”

The Court of Appeals of Hamilton County in *Hopkins v. Jones*, 24 C. C. (N.S.) 379, in discussing this problem stated :

“As to the point that the county treasurer was not made a party to the proceedings until after the money was paid over, we are of the opinion that it was not necessary that the county treasurer should have been made a party at any stage of the proceedings. He was simply the ministerial agent of the state

to receive the taxes, and it was the duty of the court to see that the state taxes were paid out of the proceeds on distribution, and the lien for taxes is not divested by condemnation proceedings. *Lewis on Eminent Domain*, 3d Ed., Section 524; *State v. No. Pac Ry. Co.*, 75 Neb., 4; *State, ex rel Trust Co., v. Godfrey, Aud.*, 20 C.C., 649.

In *The Cullen & Vaughn Co. v. The Bender Co.*, 122 Ohio St., 82, the fourth paragraph of the syllabus reads:

“Compensation paid for the land taken by the exercise of the power of eminent domain in equity represents the land and is subject to all the rights of persons who had rights in the land.”

Thus it would appear that the treasurer, although not a party to the eminent domain proceeding might, upon discovery of such action, make application to be made a party. Certainly under the ruling in the *Hopkins* case, *supra*, he would be entitled to be made a party. There are no Ohio cases which indicate whether the treasurer could trace funds once paid to the property owner and it would seem doubtful, short of statutory authority, that such action would be successful.

Therefore, it appears that the treasurer should intervene when he learns of such actions; and if the state has already paid for the easement, he must rely upon foreclosure, when all of the property is not purchased or condemned. Also, the *Hopkins* case, *supra*, points out that the lien continues, and thus, if the state should abandon the highway, the treasurer might again resort to a foreclosure.

I have been unable to find any statutory provisions which would allow the auditor to remove the delinquent real estate taxes from the duplicate and the ruling of the Supreme Court of Ohio in *Monroe v. Doe*, 7 Ohio, 262, at page 2651 seems to conclusively prohibit such action, it being stated at page 265:

“* * * True, the land taxed is not forfeited to the state until it has been offered for sale. But still, the state has a lien upon all land not exempt from taxation, which is calculated to be perpetual, and which can not be affected by any sale or transfer. 29 Ohio Stat. 278. Neither will any length of possession affect this lien. It can be removed in no other way than by the payment of all taxes, penalties, and interest due upon the land. * * *”

In conclusion, therefore, it is my opinion and you are advised:

1. Where the state acquires a perpetual easement over lands on which real estate taxes are owing, for the purpose of a highway, no

liability attaches to the state. (Opinion No. 2975, Opinions of the Attorney General for 1953, page 365, approved and followed.)

2. In a condemnation action under Chapter 5519., Revised Code, in which the state seeks to acquire such an easement, and real estate taxes are owed on the property, the county treasurer may apply to be made a party to the proceedings in order that moneys in the award for the property may be applied to the accrued taxes.

3. The procedure of Section 5719.01, Revised Code, for attaching of lien for taxes constitutes the sole method of collection of delinquent real estate taxes; and there is no statutory authority for the removal of delinquent taxes from the tax duplicate even though foreclosure of the lien would be of no avail.

Respectfully,

MARK McELROY

Attorney General