

1828.

FORECLOSURE — DELINQUENT TAX LIEN—WHERE PREMISES NOT SOLD PURSUANT TO FIRST ORDER OF SALE—ALIAS ORDER ISSUED — SHERIFF — PROSECUTING ATTORNEY—SECTION 5719 G. C.—SALE MUST BE ADVERTISED FIVE CONSECUTIVE WEEKS—SECTIONS 11681, 11682 G. C.

SYLLABUS:

When in an action to foreclose a delinquent tax lien the premises are not sold pursuant to the first order of sale and thereafter, under authority of Section 5719, General Code, an alias order of sale is issued, the sale to be held thereunder must be advertised for five consecutive weeks in the manner provided in Sections 11681 and 11682, General Code.

Columbus, Ohio, February 8, 1940.

Hon. Glenn R. Immel, Prosecuting Attorney,
Urbana, Ohio.

Dear Sir:

This will acknowledge receipt of your request for my opinion, which reads as follows:

"G. C. 5719 provides that if premises being foreclosed for taxes are not sold for costs, taxes and other charges, that they may be sold according to the following paragraph:

'Said premises, if not sold pursuant to the first order of sale may again and successively and notwithstanding the provisions of section 5744 of the General Code, be appraised, advertised, and offered for sale by the sheriff, except, however, that the court may waive reappraisal of such premises and order the same to be sold to the highest bidder or may fix a minimum price for which said premises may be sold.'

If the court orders the premises sold to the highest bidder in accordance with this section, will it be necessary to advertise the sale to the highest bidder five more times as was done when offered for sale for the taxes and costs? In other words, must the procedure for advertising as required in foreclosure suits be followed again?"

The judicial sale of property in actions brought for the foreclosure of the equity of redemption of mortgages on real property is governed by the provisions for sale on execution. Section 11681, General Code, requires publication of notice of the time and place of the sale of lands and tenements taken on execution to be made in a newspaper at least thirty days prior to the day of sale.

The authority for bringing action to foreclose the lien of delinquent taxes and the procedure to be followed are found in Sections 5718-3 and 5719, General Code. These sections, in so far as they relate to your inquiry, read as follows:

"Sec. 5718-3. It shall be the duty of the prosecuting attorney of the county, except as hereinafter provided, upon the delivery to him by the county auditor of a delinquent land tax certificate, to institute a proceeding thereon in the name of the county treasurer to foreclose the lien of the state, in any court of competent jurisdiction within nine months thereafter unless the taxes, assessments, penalty, interest and charges are sooner paid, and to prosecute the same to final judgment and satisfaction. * * * *
The proceedings for such foreclosure shall be instituted and prosecuted in the same manner as is now or hereafter may be provided by law for the foreclosure of mortgages on land in this state, excepting that if service by publication is necessary, such publication shall be made once instead of as provided by section 11295 of the General Code, and the service shall be complete at the expiration of three weeks after the date of such publication. It shall be sufficient, having made proper parties to the suit, for the treasurer to allege in his petition that the certificate has been duly filed

by the county auditor; that the amount of money appearing to be due and unpaid thereby is due and unpaid and a lien against the property therein described, without setting forth in his petition any other or further special matter relating thereto, and the prayer of the petition shall be, that the court make an order that said property be sold by the sheriff of the county, or if the action be in the municipal court, by the bailiff, *in the manner provided by law for the sale of real estate on execution* excepting as hereinafter otherwise provided. * * * " (Emphasis mine.)

It appears to have been the intention of the legislature, generally, to follow the foreclosure procedure provided by law for the foreclosure of real estate mortgages. Exceptions, such as the method of obtaining service by publication, are expressly noted. The provision in Section 5718-3, supra, for the contents of the prayer of the petition is of particular significance. There would be no consistency in requiring the prayer of the petition to be for the sale of the property "in the manner provided by law for the sale of real estate on execution" unless the legislature intended such procedure to be followed.

Section 5719, General Code, deals with the method of selling the property to satisfy the delinquent taxes and assessments after hearing has been had and the court's finding entered. Here again, it seems obvious that the legislature intended that sales be conducted in the manner provided by law for the sale of real estate on execution with such variations only as are set forth in the section. From your inquiry it appears that you are interested in the procedure to be followed when a property has been offered for sale but not sold pursuant to the first order of sale and therefore ordered "sold to the highest bidder." An alias order of sale is now specifically authorized by Section 5719, supra. The outlined procedure requires the premises to be again "appraised, advertised and offered for sale." The only variations or exceptions provided refer to the appraisal. A reappraisal may be waived by the court, and the premises either sold to the highest bidder or a minimum sale price may be fixed by the court. There being no qualification or special definitions of the word "advertised" as used in connection with alias orders of sale, the procedure provided for sales of real estate on execution must be used.

When an order of sale has been issued for the sale of lands and tenements, and a return made showing the property unsold, Section 11697,

General Code, provides that "other executions may be issued to sell them." The notice of sale of lands and tenements upon execution must be made as provided in Sections 11681 and 11682, General Code, that is, for five consecutive weeks before the day of sale. No distinction has been made between executions and alias executions.

In specific answer to your inquiry I am of the opinion that when in an action to foreclose a delinquent tax lien the premises are not sold pursuant to the first order of sale and thereafter under authority of Section 5719, supra, an alias order of sale is issued, the sale to be held thereunder must be advertised for five consecutive weeks in the manner provided in Sections 11681 and 11682, General Code.

Respectfully,

THOMAS J. HERBERT,
Attorney General.