

distribution and unclaimed by such owner within sixty days from the receipt thereof shall be paid into the county treasury and shall be charged to the county treasurer by the county auditor separately in each case in the name of the supposed owner. The treasurer shall retain such excess in the treasury for the proper owner of such lands upon which the foreclosure was had, and upon demand by such owner from the date of *receipts* shall pay such excess to him."

I am of the opinion that the word "receipts" is a typographical error in that the plural is used instead of the singular and such use injures the sense of the section. The county treasurer in addition to being made the custodian or trustee of such fund is the party plaintiff to the suit to foreclose the tax lien. See Section 5718-3, General Code. The treasurer is responsible for the distribution of the excess proceeds of sale, but he is under no statutory duty to make the distribution forthwith upon sale, unless he wants to assume the risk of so doing. It is not always an easy matter to determine just who are and who are not the proper distributees immediately upon sale. The General Assembly sensed this difficulty and enacted Section 5719-1, General Code, to take care of the situation, and the only safe course is for the treasurer to follow this section.

The treasurer has a perfect right to require distributees to establish their claim before making payment and this he can do by following Section 5719-1, General Code.

Respectfully,

HERBERT S. DUFFY,  
*Attorney General.*

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#### TAX FORECLOSURE—ALIAS ORDER OF SALE.

##### SYLLABUS:

*When land has been offered for sale in foreclosure proceedings under virtue of Sections 5718-3, et seq., General Code, and is not sold for want of bidders, it does not so instanti pass to the State as forfeited land, but it may be again offered for sale upon an alias order of sale, if there is reasonable ground for believing that upon reoffer such land will sell for enough to satisfy the lien of the State thereon for unpaid taxes. First*

*branch of syllabus of the opinion of The Attorney General No. 209, 1933, Vol. I, page 302, overruled.*

COLUMBUS, OHIO, April 16, 1937.

HON. D. HARLAND JACKMAN, *Prosecuting Attorney, London, Ohio.*

DEAR SIR: I am in receipt of your communication of recent date in which you request the opinion of this office upon the following statement of fact:

"I am calling your particular attention to Attorney General's Opinion Number 209 rendered in 1933 which is annotated after General Code Section 5744 in Chapter 15 applicable to forfeited lands.

In this opinion it is generally held that when land has been offered for sale in foreclosure proceedings under General Code 5718-3, et seq. and remains unsold for lack of bidders that it cannot then be offered for sale under an alias order.

We have in our county a proceeding pending which originally involved three tracts of land; under the provisions of 5719, they were first appraised and offered for sale and one tract of land sold and the other two tracts remained unsold for lack of bidders; thereafter an alias order of sale was issued and also an order of court dispensing with appraisement and the property was again offered for sale when there were possibly thirty interested persons present and considerable competitive bidding. The property was struck off to prospective purchasers and in checking the title it was discovered that the advertisement was defective by reason of an incorrect description as to the proper street location of the property which voided the sale.

There are still plenty of interested buyers for this property and we are wondering why this provision found in 5718-3: 'The proceedings for such foreclosures 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, should not modify this former opinion.'

Section 5718-3, General Code, became effective October 14, 1931, and was considered by the Attorney General in Opinion No. 209, appearing in the Opinions of the Attorney General for 1933, Vol. I, page 302. I quote from this opinion:

"\* \* \* Section 5718-3, provides that 'the prayer of the

petition shall be that the court make an order that said property be sold by the sheriff of the county \* \* \* in the manner provided by law for the sale of real estate on execution *excepting as hereinafter otherwise provided.*"

I am frank to say that I do not quite agree with this paraphrase. Section 5718-3, General Code, does provide in effect that proceedings for the foreclosure of a tax lien shall be 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. Said section further provides that the prayer of the petition in such case shall be that the court make an order that said property be sold by the sheriff of the county, or if the action be brought in the Municipal Court, by the bailiff in the manner provided by law for the sale of real estate on execution excepting as herein otherwise provided.

Section 11306, General Code, provides amongst other things that in a suit to foreclose a mortgage the claimant may join an action for personal judgment for the amount of the debt secured by the mortgage.

It is only when a personal judgment is sought that an execution in anywise becomes an incident to foreclosure. When foreclosure alone is sought, the chancellor merely orders the lands sold for the satisfaction of the lien. From all that I know, a personal judgment is never asked in a suit to foreclose a tax lien. Consequently, an execution has no place in the picture. The res in such case is the land and is the subject matter of the jurisdiction. The Court is a Court of Equity in which the judge is chancellor, invested with a broad discretion in all matters that will conduce to make the land satisfy the lien in the instant case, the State's lien for unpaid taxes.

If the land is offered once and is not sold for want of bidders, does Section 5744, General Code, divest the chancellor of jurisdiction to make an order that it be again offered for sale when he has every assurance that upon such re-offer the land will sell for enough to satisfy the lien of the State?

Section 5744, General Code, does not declare that if it is once offered for sale and not sold for want of bidders that it shall forthwith be forfeited to the State. It is for the benefit of the landowner that the land be sold for the greatest possible amount that can be obtained for it.

True, tax laws are construed strictly, but this strictness of construction is for the benefit of the landowner, lien-holders and purchasers at tax sales. Such laws are not construed strictly in favor of the State but they are construed strictly in favor of all persons interested in the land.

I will admit that if you apply to Section 5744, General Code, a strict construction in favor of the State, when the land is once offered

for sale upon foreclosure and is not sold for want of bidders, it eo instanti passes to the State as forfeited land, but I do not believe that was the legislative intent when the statute was enacted. Had it been the purpose of the General Assembly to pass the land to the State as forfeited land when once offered and not sold for want of bidders, it could have said so by merely adding the insignificant adverb "once."

I am forced to this conclusion from the fact that in no other form or class of judicial sale, is the Court confined to one offering.

Another reason: The words "in the manner provided by law for the sale of real estate on execution" applies to actions brought in the Municipal Court only. There was a reason for such provision. A Municipal Court has no general equity jurisdiction and it was a matter of "safety-first" to provide for the sale as upon execution.

And that is not all. Forfeiture under the statute merely vests the title to the lands in the State for the purpose of securing to it the unpaid taxes charged against such lands.

*Thevenin vs. Slocum*, 16 Ohio, page 519;

*Woodward vs. Sloan*, 27 Ohio State, page 592.

The State wants money, it does not want land and the General Assembly knows this probably better than any other branch of government; hence, it is almost inconceivable that it would enact a law that would force the State to take the land, so long as a reasonable opportunity was afforded for it to get its money.

I am of the opinion that you can again offer this land for sale upon an alias order.

Respectfully,

HERBERT S. DUFFY,

*Attorney General.*

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APPROVAL—TWO GRANTS OF EASEMENT EXECUTED TO THE STATE OF OHIO BY PROPERTY OWNERS IN PRAIRIE AND TRURO TOWNSHIPS, FRANKLIN COUNTY, OHIO.

COLUMBUS, OHIO, April 16, 1937.

HON. L. WOODDELL, *Conservation Commissioner, Columbus, Ohio.*

DEAR SIR: You have submitted for my examination and approval two certain grants of easement executed to the State of Ohio by prop-