

413.

DELINQUENT LAND LIST—TAX—MANDATORY, COUNTY AUDITOR ANNUALLY PUBLISH—SECTION 5704 G. C.—PUBLICATION—ALL DELINQUENT LANDS, LANDS NOT REDEEMED, ETC.—SUBSEQUENT PUBLICATION—ONLY LANDS DELINQUENT SINCE PUBLICATION OF PRECEDING LIST.

SYLLABUS:

1. *It is mandatory that county auditors annually publish the list of lands on the delinquent land list certified by them after each August settlement as provided in section 5704, General Code. The first list so published after the effective date of this act should have included all delinquent lands and all lands theretofore certified as delinquent to the Auditor of State and not redeemed, or with respect to which an action to foreclose the tax lien thereon had not been filed. Such lists published in subsequent years should contain only such lands as have become delinquent since the publication of the preceding list.*

COLUMBUS, OHIO, April 12, 1939.

HON. FRANK A. ROBERTS, *Prosecuting Attorney, Batavia, Ohio.*

DEAR SIR: This will acknowledge receipt of your recent communication, which reads as follows:

“The Auditor of Clermont County under threat of an action in mandamus, has requested this office for an opinion construing section 5704 of the General Code of Ohio, his questions being as follows:

(1) What tracts of land are to be included in the ‘List of the lands of such delinquent land list and duplicate’, required to be published twice under the second paragraph of the above section?

(2) Does the provision in the first paragraph of said section that the first of such delinquent land lists to be made by the County Auditor shall also contain all lands theretofore certified as delinquent to the Auditor of State and not redeemed or with respect to which an action to foreclose the tax lien thereon has not been filed' mean that thereafter, to-wit: On lists made subsequent to the 'first' list, such lands formerly certified or against which an action to foreclose had not been filed may be eliminated?

In this County we have many tracts of land which have been delinquent for many years and certified as delinquent to the Auditor of State and against which an action to foreclose such tax lien has not been filed for legal or practical reasons. The Auditor of this County does not desire unless compelled, to include these lands in each annual publication. All of such lands were included in the list published after the August 1937 settlement, and he is of the opinion, that the 1938 list need not include such previously advertised lands."

Section 5704, General Code, to which you refer has been developed by a series of amendments from R. S. 2864 and was formerly a part of the old tax sale law. Prior to 1917, sections 5704, 5705 and 5711, General Code, provided for the publication of the list of delinquent lands and was the only notice to the owner that his lands were about to be sold to pay delinquent taxes. The term "taxes" as used in this opinion and wherever appropriate, includes also assessments, penalties and interest.

In 1917 provision was made by the Legislature for the filing of foreclosure proceedings in order to sell lands to pay delinquent taxes. In the same act (H. B. 184, 107 O. L. 735), section 5704 was amended to read as follows:

"Each county auditor shall cause a list of delinquent lands in his county to be published once a week for two consecutive weeks, between the twentieth day of December and the second Tuesday in February, next ensuing, in one newspaper in the English language, printed and of the German language, if there be such newspaper printed, published and of general circulation therein. There shall be attached to the list a notice that the delinquent lands will be certified to the auditor of state, as delinquent, as provided by law."

This section was again amended in 1919 and 1920 (108 O. L. Pt. 1, 50; 108 O. L. Pt. 2, 1243). I am not quoting these amendments for they have no direct bearing on the questions you have presented.

The next amendment was made in 1931 (114 O. L. 831), the section thereafter reading in part as follows:

“Immediately after each August settlement, the county auditor shall make and certify a list and duplicate thereof of all the delinquent lands in his county. The first of such delinquent land lists so to be made by the county auditor shall also contain all lands theretofore certified as delinquent to the auditor of state and not redeemed, or with respect to which an action to foreclose the tax lien thereon has not been filed. Such delinquent land list and duplicate shall contain the description of the property as it appears on the tax list, the name of the person in whose name it is listed and the amount of taxes, assessments and penalty thereon due and unpaid, together with the amount of interest, if any, accrued thereon to the date of such August settlement. The original land list shall be kept in the office of the county auditor and the duplicate shall be delivered to the county treasurer. Interest at the rate of eight per centum per annum on the total amount of taxes and assessments due and unpaid with respect to each tract or lot, or part of lot entered upon such delinquent tax list and duplicate shall be charged thereon from the date of such settlement. Within thirty days after delivery of the duplicate the county auditor shall cause a list of the lands on such delinquent list and duplicate to be published once a week for two consecutive weeks in two newspapers of opposite politics in the English language published in the county and of general circulation therein.

There shall be attached to the list a notice that the delinquent lands will be entered upon the foreclosure list, as provided by law, unless the taxes, assessments, penalties and interest are paid. Such publication shall be considered to be for the information of the public, and the omission of such publication shall not in any respect affect the validity of the delinquent land list and duplicate, nor of any charge then or thereafter made thereon, nor any foreclosure proceedings or other remedies provided in this or the succeeding chapter for the collection of taxes, assessments, penalties and interest shown thereon together with costs and other charges, nor the enforcement of the state's lien therefor.”

Section 5704, General Code, in its present form was enacted in 1936 (116 O. L. Pt. 2, page 261), and now reads as follows:

“Immediately after each August settlement, the county auditor shall make and certify a list and duplicate thereof of all the delinquent lands in his county. The first of such delinquent land lists so to be made by the county auditor shall also contain all lands theretofore certified as delinquent to the auditor of state and not redeemed, or with respect to which an action to foreclose

the tax lien thereon has not been filed. Such delinquent land list and duplicate shall contain the description of the property as it appears on the tax list, the name of the person in whose name it is listed and the amount of taxes, assessments, and penalty thereon due and unpaid, together with the amount of interest, if any, accrued thereon to the date of such August settlement. The original land list shall be kept in the office of the county auditor and the duplicate shall be delivered to the county treasurer. Interest at the rate of eight per cent per annum on the total amount of taxes and assessments due and unpaid with respect to each tract or lot, or part of lot entered upon such delinquent tax list and duplicate, shall be charged thereon from the date of such settlement.

It shall be mandatory upon the county auditor to cause a list of the lands on such delinquent land list and duplicate to be published twice, within sixty days after the delivery of the duplicate to the county treasurer, in two newspapers of opposite politics in the English language published in the county and of general circulation therein; * * *.

There shall be attached to the list a notice that the delinquent lands will be entered upon the foreclosure list, as provided by law, unless the taxes, assessments, penalties and interest are paid."

Delinquent lands are defined in section 5705, General Code, as follows:

"Delinquent lands as defined in this chapter shall mean all lands upon which the taxes, assessments and penalties, or either remain unpaid at two consecutive semi-annual tax settlements."

As I have heretofore mentioned, until the commencement of tax foreclosures, section 5704, General Code, afforded the taxpayer the only means of notice that his lands were about to be sold to pay taxes. Tax foreclosure actions, however, required notice similar to other civil actions and the publication thereafter required by section 5704, General Code (107 O. L. 735, supra), was simply notice that the lands were delinquent and would be so certified to the Auditor of State. The 1931 provision (114 O. L. 831, supra) changed the procedure. Thereafter the auditor was required to make and certify duplicate lists of delinquent lands and retain the original and deliver the duplicate to the county treasurer. New provisions were also made for publication, all as noted in the section which I have quoted above. This procedure being considerably different from the former methods, it was apparently deemed advisable to start with a publication of the complete list of delinquent lands, thus assuring notice to all owners thereof. To accomplish this, the Legislature adopted

the wording, "The first of such delinquent land lists so to be made by the County Auditor shall also contain all lands theretofore certified as delinquent to the Auditor of State and not redeemed, or with respect to which an action to foreclose the tax lien thereon has not been filed." But the provisions for publication contained in this section were directory only. This was the holding of the Supreme Court in the case of Miller, et al., v. The Lakewood Housing Co., et al., 125 O. S. 152, the third branch of the syllabus reading:

"Under the foreclosure proceedings on delinquent lands prescribed by the present Code, the publication by a county auditor of the list of delinquent lands in his county, in accordance with the provisions of section 5704, is not mandatory."

This decision was affirmed and followed in the case of State, ex rel. Belt, v. Mason, 127 O. S. 574.

Primarily, because of adverse economic conditions, county auditors generally have been reluctant to force sales of lands to satisfy delinquent taxes. Knowing that the provisions of the former section 5704 have been held to be directory only as to publication, they frequently omitted the publication of such lists. To remedy this situation and encourage the payment of taxes, the Legislature amended section 5704 to read in its present form as shown above. Apparently realizing that many of the county auditors had not been following the steps outlined in the former section, the Legislature chose to retain the wording of the first paragraph thereof and thus assure the publication of all lands theretofore certified as delinquent which were not redeemed nor involved in pending tax foreclosures. Any question as to the necessity of publication was removed in the first sentence of the second paragraph wherein it is provided "It shall be *mandatory* upon the county auditor to cause a list of the lands on such delinquent land list and duplicate to be published twice", as therein specified.

Section 5704 in its present form provides for some of the several methodical steps for the enforcing of the collection of taxes. As noted in section 5705, *supra*, lands are classified as delinquent upon which taxes remain unpaid at two consecutive semi-annual tax settlement periods. To further perfect the state's tax lien, the county auditor is required to list and certify all such delinquent lands and publish such lists as set forth in section 5704, *supra*. This publication gives notice to the taxpayer of the condition of the taxes upon his lands. It informs him that he must either pay his taxes or his "delinquent lands *will* be entered upon the foreclosure list." Section 5711, General Code, requires the auditor to mail a sworn copy of the list to the Auditor of State, which is the final step in perfecting the state's first lien as provided in section 5712, General

Code, after which such delinquent lands are on the foreclosure list. The auditor then follows the procedure outlined in sections 5714 and 5715, General Code, entering the word "delinquent" on his tax list and on the treasurer's duplicate. It will thus be seen that the publication required by section 5704, *supra*, is one of several necessary steps required in the tax collection procedure for lands which have been allowed to become delinquent to be entered upon the foreclosure list. Once entered on the foreclosure list they remain there until the taxes have been paid or until the lands are forfeited to the state or certified to the prosecuting attorney for foreclosure. No further steps are required of the state during this interim. The transfer from the delinquent land list to the foreclosure list is to be completed after the publication required in section 5704, *supra*. Once on the foreclosure list, such lands need not be included in the lists published in succeeding years by virtue of the provisions of section 5704. Only one notice is required to authorize the transfer from the delinquent land list to the foreclosure list. To include lands from the foreclosure list in subsequent delinquent land lists published by virtue of section 5704 would only serve to mislead and confuse the taxpayer for the notice *must* state that the published list *will* be entered upon the foreclosure list. This could not be true in the case of entries previously made. If the foreclosure list were included, the taxpayer would thus be led to believe that three years more *must* elapse before foreclosure, as provided in sections 5717 and 5718, General Code.

This conclusion receives further support from the wording of the questioned portion of the section itself:

"The *first* of such delinquent land lists so to be made by the county auditor *shall also contain the lands theretofore certified as delinquent* to the Auditor of State and not redeemed, or with respect to which an action to foreclose the tax lien thereon has not been filed." (Italics the writer's.)

This language implies that *subsequent* lists need *not* be complete lists of all delinquent lands upon which foreclosure proceedings have not yet been filed. This follows the well-established rule of statutory construction which, as applicable to our situation, was clearly expressed in an opinion by Wanamaker, J., in *Weirick v. Lumber Co.*, 96 O. S. 386, 397, wherein it was said:

"It is an old rule of construction that where a statute specifically and expressly mentions certain things, other things, belonging to the same class, or occurring at the same time, are excluded. In short, when a statute makes certain definite things mandatory, the presumption is that the other things associated therewith are not mandatory.

The old Latin maxim *expressio unius est exclusio alterius* has become a primary and well-settled rule of statutory construction."

In other words, since the "first of such delinquent land lists" is specifically and definitely required to include all delinquent lands, it may be assumed that subsequent lists need include only delinquent lands not previously certified and published.

In conclusion and answering your questions specifically, it is my opinion that it is mandatory upon the county auditors to annually publish the list of delinquent lands as provided in section 5704, General Code, and that the first list so published after the effective date of the present act, must contain all delinquent lands and all lands theretofore certified as delinquent, to the Auditor of State and not redeemed, or with respect to which an action to foreclose the tax lien thereon has not been filed. Such lists published in subsequent years should contain only such lands as have become delinquent since the publication of the preceding list.

Respectfully,

THOMAS J. HERBERT,
Attorney General.