

that have been submitted and, of course, before any title could be taken by the state, it would be necessary that this matter be cleared up.

It further appears that under date of October 8, 1928, J. Harvey McClure, receiver of the Indiana, Columbus and Eastern Traction Company, conveyed said premises to F. Dell Sullivan without reservation. While the deed has not been placed upon record, if no other matters of record have intervened since the date of its execution, it would appear that the said grantee now has the legal title to said premises, subject to the possibilities hereinbefore pointed out.

You have further submitted a proposed deed whereby the said F. Dell Sullivan is to quit claim his title to said premises to the State. Without discussing the legality of said instrument, it is suggested that in the event you decide to purchase said premises for highway purposes from Mr. Sullivan, it would be advisable to have him and his wife execute a regular form of easement for highway purposes or a warranty deed conveying the property to the State for highway purposes.

As hereinbefore stated in this opinion, consideration is only being given to the particular instruments submitted. As to the question of taxes that should exist against the property, there is no information at this time before me.

Respectfully,

JOHN W. BRICKER,
Attorney General.

2491.

JUDGMENT—RENDERED ON RECOGNIZANCE BOND—PROSECUTING ATTORNEY OR COUNTY COMMISSIONERS UNAUTHORIZED TO WAIVE PRIORITY OF LIEN IN FAVOR OF MORTGAGE TO HOME OWNERS' LOAN CORPORATION.

SYLLABUS:

1. *When a judgment on a recognizance bond running to the state of Ohio as obligee, has been rendered, the prosecuting attorney has no authority to waive the priority of the lien of such judgment in favor of a subsequent mortgage the proceeds of which are being used to satisfy a mortgage the lien of which is prior to the lien of the recognizance.*

2. *When a judgment on a recognizance bond running to the state of Ohio as obligee, has been rendered, the county commissioners have no authority to waive the priority of the lien of such judgment in favor of a subsequent mortgage the proceeds of which are being used to satisfy a mortgage the lien of which is prior to the lien of the recognizance.*

COLUMBUS, OHIO, April 13, 1934.

HON. FRANK T. CULLITAN, *Prosecuting Attorney, Cleveland, Ohio.*

DEAR SIR:—I am in receipt of your request for my opinion, reading as follows:

“We respectfully request your opinion concerning the legality of a waiver of priority of a judgment obtained by the State of Ohio upon a

forfeited bail bond in favor of a mortgage to the Home Owners' Loan Corporation.

At the time of the execution of the bond there was a first mortgage on the property which was pledged as security for the bond. Subsequently judgment was entered in favor of the State of Ohio by reason of the forfeiture of the bond.

The Home Owners' Loan Corporation will be in a position to make a loan to the judgment debtor if the State of Ohio by the Prosecuting Attorney of Cuyahoga County, Ohio, has authority to execute a waiver of priority of its judgment lien. The mortgage deed executed and delivered to the Home Owners' Loan Corporation would supplant the original mortgage deed, and the lien of the State of Ohio would be in the same position with reference to its priority as it was prior to the execution of the mortgage deed to the Home Owners' Loan Corporation.

The waiver and agreement further provides that no proceedings shall be commenced to enforce payment of the obligation for a period of three years from the date of the execution of the waiver.

A copy of the form of waiver used by the Home Owners' Loan Corporation is hereby enclosed."

In your request you state that you enclose a copy of the waiver used by the Home Owners' Loan Corporation but the paper attached is an "Affidavit of Designation of Homestead." Since the answer to your inquiry does not depend upon the form of the waiver, such failure to enclose is immaterial for the purposes of this opinion.

The question of law raised by your inquiry is, whether the legislature has granted authority to any officer or agency to execute a waiver of priority on the lien of a judgment or on the lien of a recognizance.

Section 13435-18, General Code, provides the procedure by which a judgment on a defaulted recognizance may be obtained and the manner of subjecting property of the sureties to the judgment so rendered. Such section reads:

"When a person under recognizance in a criminal prosecution to appear and answer, or to testify in court fails to perform the condition thereof, his default shall be recorded and such recognizance forfeited in open court; and thereupon the court shall cause the clerk to give the surety or sureties twenty days' notice, which notice shall be served upon them as in case of a summons in a civil action. If such notice cannot be served on such surety in the county where the cause is pending, service may be made by publication as in other cases under the code of civil procedure. Said notice shall require the appearance of said sureties on or before a day certain to be named, and produce the body of the defendant, or show cause why judgment shall not be entered against them for the amount of the recognizance. If good cause is not shown, the court shall then enter judgment against the sureties on said recognizance, for such sum as it may see fit, not exceeding the full amount thereof. The court may remit or reduce the whole or part of the penalty, and render judgment thereon according to the circumstances of the case and of the situation of the parties, and upon such terms and conditions as seem just and reasonable. Execution shall be awarded upon said judgment in like manner as is provided in civil actions. Upon the sale of

the property pledged for said bond, or foreclosure of the lien upon the same and the sale of said property thereunder, the lien shall be discharged and the clerk, under the instructions of the court, shall issue an order of cancellation of said lien."

Section 13435-21, General Code, prescribes the duties of the prosecuting attorney with reference to actions to subject property pledged as security for such purpose, and reads:

"The prosecuting attorney shall prosecute recognizances by him received, for the penalty thereof, unless judgment be taken thereon, as hereinbefore provided. Such actions shall be governed by the code of civil procedure so far as applicable."

In the sections of the General Code above quoted, the following powers, duties and authority on the part of the court are imposed and granted:

1. The court shall cause notice of the default of a recognizance to be issued by the clerk of courts and to be served upon the sureties either to produce the body of the defendant or to show cause why judgment should not be rendered against them for the penal sum of the recognizance on or before the date specified in such notice.

2. The court may render judgment for any amount not to exceed the penal sum of the recognizance upon hearing of, or upon default of compliance with, such order.

3. Shall award execution for the amount of such judgment as in other civil cases.

4. Upon sale of the property pledged under such recognizance to discharge the lien of the bond.

The prosecuting attorney may, by reason of the provisions of Section 13435-21, supra, prosecute a suit for the collection of the penal sum of such bond in the manner provided by statute for the conduct of a civil action.

In your inquiry you do not state whether the judgment on the recognizance in question was procured under the procedure set forth in Section 13435-18, General Code, or whether it was procured by virtue of proceedings had pursuant to the provisions of Section 13435-21, General Code. In either event, since the state of Ohio is the obligee on the bond, the action would be brought by, and the judgment obtained in favor of, the state of Ohio. See Section 13435-24, General Code; *Chandler vs. Commissioners*, 2 O. D. Rept. 112. *Gamble vs. State*, 21 O. S. 183; *Clark vs. Petty*, 29 O. S. 452.

The priority of the lien of a recognizance is fixed by the provisions of Section 13435-5, General Code, as of "the time of the filing and recording of the notice" prescribed in Section 13435-4, General Code, with the county recorder. Such section further specifies that "such lien shall not affect the validity of prior liens on said property," that is, on the property described in the affidavit or notice filed with the county recorder.

The section next following, provides for the filing and recording of the affidavit by the recorder and the canceling of the lien thereof, and provides fees for the county recorder for recording the same.

It might be urged that the county recorder had no authority to receive or record a waiver of priority of the lien of such recognizance if it were presented to him for record. Such question, however, is not now under considera-

tion and I express no opinion thereon but merely call attention to the fact that the legislature has made no provision for the recording of such waiver of priority.

The priority of such lien having been fixed by statute, who, if anyone, has the legal right to alter the priority on such lien? From the provisions of the statute, above quoted, it would appear that the legislature has delegated no such duty to the court. Section 13435-21, General Code, above quoted, prescribes the duties of the prosecuting attorney in connection with such bonds similar to that of an attorney at law to his client. There is no authority on the part of an attorney at law employed to collect a claim, to waive the lien of, or postpone the lien of his client's judgment. *Wilson vs. Jennings*, 3 O. S. 528; *Spalding vs. Allen*, 19 O. C. C. 608, nor has such lawyer the right to compromise the claim or judgment. *Boyle vs. Beatty*, 13 O. D. Rept. 1027; *Holden vs. Lippert*, 12 O. C. C. 767. I cannot construe Section 13435-21, General Code, as granting to the prosecuting attorney greater powers than are possessed by an attorney at law with reference to litigation in behalf of his client.

While the judgment in question is in the name of the state of Ohio and the recognizance runs to the state of Ohio as obligee, since the moneys realized from the judgment when paid would go into the general fund of the county, it might be considered that the obligation of the judgment was an obligation to the county. If such be correct, the question would arise as to what county officer, if any, would have the right to waive the lien of such judgment. As stated by West, J., in *Shanklin vs. Commissioners of Madison County*, 21 O. S. 525 at 583:

"It may be laid down as a general rule, that the board of county commissioners is clothed with authority to do whatever the corporate or political entity, the county, might, if capable of rational action, except in respect to matters the cognizance of which is exclusively vested in some other officer or person. * * * It is, in an enlarged sense, the representative and guardian of the county, having the management and control of its financial interests."

See also *Carder vs. Commissioners of Fayette County*, 16 O. S. 354. It would thus appear that when, as in the instant case, the legislature has not specifically granted the authority to execute the waiver to a specific county officer that the sole and exclusive power to execute such waiver in behalf of the county would be in the board of county commissioners, providing such authority exists in any county officer.

Section 2416, General Code, grants authority to the board of county commissioners to compound or release in whole or in part, claims in favor of the county. Such section reads:

"The board may compound or release, in whole or in part, a debt, judgment, fine or amercement due the county, and for the use thereof, except where it, or either of its members, is personally interested. In such case the board shall enter upon its journal a statement of the facts in the case, and the reasons for such release or composition."

There is no express authority in such section for the waiver of the priority of the lien of any judgment in favor of the county. In the first paragraph of the syllabus of *Elder vs. Smith*, 103 O. S. 369, it is held:

"A joint board of county commissioners is a mere creature of statute and has such power and jurisdiction as are expressly conferred by statute."

In the first paragraph of the syllabus of *Jones, Auditor, vs. Commissioners of Lucas County*, 57 O. S., 189, it was held:

"The board of county commissioners represents the county in respect to its financial affairs, only so far as authority is given it by statute."

See also *Peter vs. Parkinson, Treas.*, 83 O. S. 36, 49.

It would thus appear that if we are to consider the judgment on the recognizance as a claim due the county, there is at least grave doubt as to whether the board of county commissioners has the right to waive the priority of the lien of such judgment or the lien on the recognizance bond. There is further considerable question in my mind as to whether or not the obligation on such bond or the obligation of the judgment on such bond is a claim or obligation due to the county. In the case of *In re. Moore*, 14 O. C. C., 237, the court held that a fine in a criminal case was not a debt due to the county and therefore could not be compounded, compromised or released by the board of county commissioners. Since there is no express grant of legislative authority to the county commissioners to waive the priority of such lien and further since it is extremely doubtful whether such judgment is a claim in favor of the county it is my opinion that the lien of a recognizance payable to the state may not be waived by the county commissioners or any other county officials.

A further question as to whether or not such waiver would be valid, even though executed by an officer authorized to execute such waiver, is raised by reason of the statement in your inquiry that the proposed waiver provides that no proceedings could be commenced to enforce the judgment until after three years from the date thereof, and your inquiry at least intimates that the State of Ohio would receive no money or consideration for the execution of such waiver. A waiver of priority of a lien must be supported by an adequate consideration. It would therefore follow that if such waiver of priority were executed by one having the authority to execute it, such waiver would be unenforceable by reason of the fact that it was not supported by a consideration.

Were it not for the forbearance on the part of the county or state to enforce the payment of the judgment on the bond for a period of three years after the date of the execution of the waiver, it would appear that the execution of such waiver would have but little effect upon the priority of the judgment of the Home Owners' Loan Association over the lien of such judgment. It appears to be the established law in Ohio that where a mortgage is placed upon property and the proceeds thereof are used to satisfy prior encumbrance that to such extent as the proceeds are so used, the lien of such subsequent mortgage is subrogated to the lien priority rights of the liens which were paid off from the proceeds of such subsequent mortgage. This principle is reiterated in the case of *Life Insurance vs. Deitsch*, 127 O. S. 505, the first and second paragraphs of the syllabus of which read:

"1. A third person who, with his own funds, satisfies and discharges a prior first mortgage on real estate, upon the express agree-

ment with the owner of the real estate that he will be secured by a first mortgage on the real estate in question, is subrogated to all the rights of the first mortgagee in such real estate."

2. The fact that such subrogation gives the third party a preference over a prior intervening mortgagee, who had no knowledge of such agreement, in no wise affects the application of the doctrine of subrogation, when the burdens of such prior intervening mortgagee are in no wise increased. *Straman, Adm'r., vs. Rechtine et al*, 58 Ohio St., 443, 51 N. E., 44, approved and followed."

Specifically answering your inquiry it is my opinion:

1. When a judgment on a recognizance bond running to the state of Ohio as obligee, has been rendered, the prosecuting attorney has no authority to waive the priority of the lien of such judgment in favor of a subsequent mortgage the proceeds of which are being used to satisfy a mortgage the lien of which is prior to the lien of the recognizance.

2. When a judgment on a recognizance bond running to the state of Ohio as obligee, has been rendered, the county commissioners have no authority to waive the priority of the lien of such judgment in favor of a subsequent mortgage the proceeds of which are being used to satisfy a mortgage the lien of which is prior to the lien of the recognizance.

Respectfully,

JOHN W. BRICKER,

Attorney General.

2492.

BOARD OF EDUCATION—MEMBER MAY NOT LAWFULLY PURCHASE BONDS ISSUED BY SCHOOL DISTRICT.

SYLLABUS:

A member of a board of education may not lawfully purchase bonds issued by the school district either directly from the board or from a third party who has theretofore purchased the bonds.

COLUMBUS, OHIO, April 13, 1934.

HON. EMORY F. SMITH, *Prosecuting Attorney, Portsmouth, Ohio.*

DEAR SIR:—Your recent request for opinion reads as follows:

"I received an inquiry yesterday whether or not a member of a board of education could lawfully purchase bonds of such board of education directly or from a third party who had theretofore purchased the same. This question involves an interpretation of the meaning of the word 'contract' in the statutes prohibiting the members of a board of education from being financially interested, directly or indirectly, in contracts of such board of education.

I would appreciate receiving your opinion in this matter."

From the wording of your communication, I presume you have reference to section 4757, General Code, which reads as follows: