

nized by the state highway commissioner. An assignment of a part of the compensation due or a part of an installment to thereafter become due, may or may not be recognized by the state highway commissioner at his option."

Several cases are cited in this opinion holding assignments of amounts due on public contracts to be valid, but it is to be observed that none of the cases seems to have passed directly upon the right of an assignee to enforce an assignment against the sovereign state. However this may be, I deem it unnecessary specifically to rule at this time upon such right of enforcement, since the only inquiry is as to your authority to recognize such assignment. The prior opinion clearly recognizes the power of the state highway commissioner (Director of Highways) to recognize such an assignment either of a portion of an amount due or all that is due. In this instance I understand that the assignment contemplates all of the amount due to the S. A. Corporation.

Based upon the conclusion in the opinion above referred to, I am clearly of the opinion that you may draw your voucher upon the Auditor of State, payable to the S. R. Company of Louisiana, Inc., for the amount originally due to the S. A. Corporation and by it duly assigned to the S. R. Company of Louisiana, Inc. That is to say, if you are of the opinion that the assignment has been properly executed (and on this point I express the view that the assignment in this instance is legal), then you may draw voucher upon the Auditor of State for such amount, payable to the assignee. It is to be observed that it is the Auditor's duty, by virtue of the provisions of Section 243 of the General Code, to examine each voucher presented to him and determine that it is a valid claim against the state and legally due. The original assignment, together with the original warrant, should accordingly accompany the voucher in order that the Auditor of State may have before him the evidence disclosing that the claim originally payable to the S. A. Corporation has been properly assigned to the payee of the voucher presented.

Specifically answering your inquiry, I am of the opinion that the Director of Highways may recognize a valid assignment of amounts due from the state upon a contract executed by him and issue a voucher upon the Auditor of State in favor of the assignee of such amount.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2857.

DELINQUENT TAXES—ACTION TO FORECLOSE LIEN MAY INCLUDE PERSONAL JUDGMENT.

SYLLABUS:

In the foreclosure of a lien for taxes by the county treasurer, a personal judgment may legally be taken against the owner of the delinquent land for such amount of taxes as accrued while he was such owner, and, in case the purchase price at the foreclosure sale is insufficient to pay the said taxes and the costs, execution upon said judgment may be levied upon the owner's other property.

COLUMBUS, CHIO, November 9, 1928.

HON. HENRY W. HARTER, JR., *Prosecuting Attorney, Canton, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication which reads:

"I would like to have your opinion on the following question, namely: in the foreclosure of a lien for taxes by the county treasurer, have we any legal right to take a personal judgment against the owner of the delinquent land and then in case the purchase price at the foreclosure sale is insufficient to pay the taxes and the costs, have a deficiency judgment against the owner upon which we might levy execution on other property he owns?"

Section 2667, General Code, which provides for action by county treasurer for unpaid taxes or assessment, reads as follows:

"When taxes or assessments, charged against lands or lots or parcels thereof upon the tax duplicate, authorized by law, or any part thereof, are not paid within the time prescribed by law, the county treasurer in addition to other remedies provided by law may, and when requested by the auditor of state, shall enforce the lien of such taxes and assessments, or either, and any penalty thereon, by civil action in his name as county treasurer, for the sale of such premises, in the court of common pleas of the county, without regard to the amount claimed, in the same way mortgage liens are enforced."

This section authorizes a civil action to enforce the lien of taxes and assessments or either and any penalty thereon, by the county treasurer for the sale of the premises, in the same way mortgage liens are enforced.

Section 2669, General Code, reads as follows:

"Having made the proper parties, it shall be sufficient for the treasurer to allege in his petition that the taxes and assessments, or either, are charged on the tax duplicate against such premises, the amount thereof, and are unpaid, and he shall not be required to set forth in the petition any other or further special matter relating thereto. On the trial a certified copy of the entry on the tax duplicate, shall be *prima facie* evidence of such allegations and of the validity of such taxes and assessments."

This section defines what shall be sufficient allegations in the petition, and that a certified copy of the entry on the tax duplicate shall be *prima facie* evidence of such allegations and of the validity of such taxes and assessments.

Section 2670, General Code, reads as follows:

"Judgment shall be rendered for such taxes and assessments, or any part thereof, as are found due and unpaid, and for penalty and costs, for the payment of which the court shall order such premises to be sold without appraisement. From the proceeds of the sale the costs shall be first paid, next the judgment for taxes and assessments, and the balance shall be distributed according to law. The owner or owners of such property shall not be entitled to any exemption against such judgment, nor shall any statute of limitations apply to such action. When the lands or lots stand charged on the tax duplicate as forfeited to the state, it shall not be necessary to make the state a party, but it shall be deemed a party through and represented by the county treasurer."

This section provides that judgments shall be rendered for such taxes and assessments as are found due and unpaid and that the court shall order the premises to be sold without appraisement; and also determines the manner of distribution of the proceeds of the sale, and it provides that the owner or owners of the property shall not be entitled to any exemption against the judgment.

The foregoing sections authorize the county treasurer to bring a civil action for the collection of taxes which are not paid within the time prescribed by law; determine the sufficiency of the petition, and what shall constitute *prima facie* evidence of the validity of such taxes; provides that judgment shall be rendered for such taxes and assessments as are found due and unpaid, and that the court shall order such premises to be sold and the proceeds thereof applied to the payment of the cost, the judgment for taxes and assessments and the distribution of the remainder according to law.

It will be noted that Section 2667, General Code, supra, provides that when the taxes charged upon the tax duplicate are not paid within the time prescribed by law, the county treasurer in addition to other remedies provided by law, may enforce the lien of such taxes and assessments by civil action in his name as county treasurer in the same way mortgage liens are enforced.

Section 11306, General Code, providing what causes of action may be joined, reads in part as follows:

"The plaintiff may unite several causes of action in the same petition, whether they are legal or equitable, or both, when they are included in any of the following classes:

* * *

8. Claims to foreclose a mortgage given to secure the payment of money or to enforce a specific lien for money, and to recover a personal judgment for the debt secured by such mortgage or lien.

* * *"

This section authorizes the recovery of a personal judgment in the same action in which it is sought to enforce a specific lien for money. It is evident under the statute that a cause of action for personal judgment may be brought; also a cause of action for the enforcement of the lien for taxes and under the provisions of Section 11306, said causes of action may be joined in the same petition.

Taxes and assessments of real estate are personal liabilities, for which an owner may be sued personally, and the act allowing the county treasurer to sue him personally for them is not retroactive in imposing any liability, but merely provides a remedy for enforcing the existing obligations. *Cummings vs. Fitch*, 1 B. 77.

In the case of *State ex rel. Gideon C. Wilson vs. John H. Gibson, County Treasurer*, 1 Nisi Prius Reports (N. S.) page 565, a case that was affirmed by the Supreme Court without report (Ohio Law Reporter, Feb. 22, 1904), it was stated by Pfleger, Judge, among other things that:

"As real estate taxes are a personal debt it is no doubt true that the treasurer might bring an action for personal judgment."

An action by a county treasurer for personal judgment for taxes may be joined in an action for the enforcement of the lien against the real estate. *Butzman vs. Whibleck*, 42 O. S. 236.

This same question was considered by me in an opinion rendered to the prosecuting attorney, Carrollton, Ohio, March 3, 1927, Opinions of the Attorney General for that year, Vol. I, at page 388, wherein the prosecuting attorney had asked concerning the legality of a personal judgment rendered in a foreclosure proceeding for delinquent taxes upon real estate. In holding that said personal judgment was legal, it was stated as follows:

"In your communication you state that the court granted a personal judgment.

Under the rules of the common law there was no personal liability for the payment of real estate taxes but this rule has been changed in Ohio by statute and taxes levied on real estate become the personal debt of the owner of the realty.

It was held in *Creps vs. Baird*, 3 Ohio St., 277, that taxes due upon lands are a personal debt of the one in whose name the lands are listed when the taxes accrue. This conclusion was based upon a construction of the statute then in force, and, while the present statute does not read precisely like the former one, yet it does, by its plain terms, make all personal property which is subject to taxation liable to be seized and sold for taxes. (1)General Code Section 5671. (1)And that section is one which fixes the lien of the state for taxes levied on real estate. The case just cited was followed and approved in *Warner, Admr., vs. York*, 16 Ohio Cir. Ct. R. (N. S.), 369, 31 O. C. D., 543, and the court in this latter case held that taxes upon real estate, accruing after death of the owner, are a personal debt of the heirs. The judgment of the Circuit Court was affirmed, without written opinion, in *York vs. Warner, Admr.*, 75 Ohio St., 595, 80 N. E., 1135."

I am further sustained in said opinion by the holding in the case of *Brown vs. Russell et al.*, 20 Ohio App. Reports, 101, wherein the Court of Appeals of Lucas County held in the first paragraph of the headnotes as follows:

"Taxes levied on real estate become the personal debt of the owner of the realty, but each cotenant is only liable for that portion of the tax chargeable to his undivided interest."

It is also stated in the same opinion at page 104, that:

"It is insisted on behalf of the defendants that no personal liability exists for the payment of either taxes or assessments, and this contention is doubtless true under the rules of the common law. We cannot, however, assent to this view in Ohio by reason of certain statutory provisions."

In accordance with the foregoing authority and specifically answering your question, it is my opinion that in the foreclosure of a lien for taxes by the county treasurer, a personal judgment may be taken against the owner of the delinquent land for such amount of taxes as accrued while he was such owner, and, in case the purchase price at the foreclosure sale is insufficient to pay the said taxes and the costs, execution upon said judgment may be levied upon said owner's other property.

Respectfully,
EDWARD C. TURNER,
Attorney General.
