

Borrow Pits survey; thence southwesterly 440 feet to a point that is 50 feet northwesterly from station 69+00.5 feet; thence southwesterly by a 38° curve to the right 200 feet to a point 50 feet northerly from station 71+33.5; thence southwesterly 297.7 feet to a point that is 50 feet northerly from station 74+34.3; thence southwesterly 460.6 feet to the west line of said section No. 23; thence south 50° 20' west 59 feet to the place of beginning, containing 2¼ acres of land, more or less.

Upon examination of the abstract of title submitted, I find some defects of record in the early history of the title of the west half of section 23, township 17, range 18, which includes the particular tract of land here under investigation. However, on account of the great length of time which has elapsed since said defects appeared in the record of the title, I do not now deem the same to be of substantial importance.

I am, therefore, of the opinion that said Orie T. England has a good, merchantable, fee simple title to the above described tract of land, free and clear of all encumbrances except the undetermined taxes for the year 1930, the first installment of which is due and payable in December, 1930.

Upon examination of the warranty deed tendered by said Orie T. England, who is an unmarried person, I find that the same has been properly executed and acknowledged by him, and that as to form said deed is sufficient to convey the above described property to the State of Ohio by fee simple title, free and clear of all encumbrances whatsoever.

Upon examination of encumbrance estimate No. 1121, I find that the same has been properly executed and approved, and that there is a sufficient amount in the proper appropriation account to pay the purchase price of the above described property, which purchase price is the sum of \$400.00. It likewise appears, by a copy of a certificate of the board of control that the money necessary to pay the purchase price of this property has been released by said board.

I am herewith returning with my approval said abstract of title, warranty deed, encumbrance estimate No. 1121 and controlling board certificate.

Respectfully,

GILBERT BETTMAN,
Attorney General.

2100.

WATER RENT—ON PROPERTY SOLD TO SATISFY MORTGAGE—RIGHTS OF MUNICIPALITY DISCUSSED.

SYLLABUS:

1. *A lien for water rent arising after the recording of a bona fide mortgage may not take precedence over said mortgage upon distribution of the proceeds from a sale of the premises to satisfy such mortgage. However, under such circumstances, a municipality may still pursue the party contracting for said service in pursuance of the rules of the water works division.*
2. *In the event that a foreclosure proceeding is instituted and a city receives no notice of such sale, and is not a party to the suit, such lien would not be discharged and would follow the land into the hands of the purchaser.*
3. *Whether or not the owner of such land at the time when the water rents accrue may be held personally liable for the payment of such water rents is a question of fact*

depending upon the provisions of the rules and regulations adopted with reference to the sale of water.

COLUMBUS, OHIO, July 16, 1930.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Acknowledgement is made of the receipt of your communication which reads:

“The syllabus in the case of *Bucyrus vs. Sears*, decided by the Crawford County Court of Appeals on March 19, 1930, 31 O. L. R., page 510, reads:

1. A municipality has the undoubted right to prescribe the terms upon which it will furnish water to its inhabitants provided only that they are reasonable.

2. A rule making water rent a lien upon the property served is reasonable and a property owner in connecting with the city pipes assents thereto. Default of a tenant in payment is the default of the landlord.’

Question 1. In the event that the property is sold to satisfy a prior mortgage lien and the amount produced is insufficient to meet such mortgage, does a city lose the claim for water rent which is unpaid, and under the rules governing the water department is made a lien on premises supplied with water?

Question 2. In the event that a city does not receive notice of the sale of such property to satisfy a mortgage, and an insufficient sum to meet the mortgage is realized, must the city's claim for water rent be assumed by the purchaser of the property when the rules governing the water works department provide that rents are a lien upon the premises supplied with water?

Question 3. When water rents are made a lien upon premises supplied with water, may the owner of such premises, at the time the lien for water accrues, be held liable for the payment of such water rent in the event the property is sold by judicial proceedings to satisfy a mortgage?”

The case to which you refer was denied admission to the Supreme Court of Ohio recently on a motion to certify the record. Said opinion follows a number of other decisions of Ohio and conclusively establishes that a municipality may create a lien upon property for water rents. In the case you mention, the rules and regulations of the Director of Public Service substantially placed the primary obligation of the payment of such water rents upon the owner of the premises. Said rules did provide, however, that payments of such rentals could be accepted from the tenants. It is further interesting to note that the rules and regulations in that case authorized the certification of said rentals to the county auditor and required them to be placed upon the tax duplicate by him. This provision of said rules had not been complied with and it was therefore argued by the owner of the premises that an action did not lie to enforce the lien. The attorney for the city in his brief in said case pointed out the conclusion of my opinion No. 1203, rendered to your Bureau under date of November 16, 1929, in which it was held that there is no authority for the certification of delinquent water rentals to the county auditor by a city and that there was no authority for the auditor to place such certification upon the tax duplicate for collection. In any event, the Supreme Court did not admit the case and, therefore, the decision of the Court of Appeals must be regarded as the law. The opinion of said Court of Appeals is found in the issue of the Ohio Law Bulletin and Reporter under date of April 7, 1930. It is probable that the power lies with a municipality to either make the owner of the premises or the tenant, or both, liable for the water rent,

and it is possible that an examination of the provisions of the charter of a municipality would be necessary in order to determine the personal liability. It is well settled that taxes are a personal obligation of the owner of the premises at the time of the assessment and also a lien upon the premises by virtue of Section 5671 of the General Code. It has further been held that while the premises may be sold in order to satisfy the lien, the owner of the premises at the time of the assessment is personally liable to the extent that the premises are not sufficient to satisfy said taxes. It is believed that by analogy the rule with reference to the personal obligation of taxes will apply to the obligation for water rents. That is to say, when water rents under a proper rule have been made a lien upon the premises, and the premises may be sold to enforce the same, such lien does not prevent an action against the party contracting for the service in accordance with the rules adopted by the municipality.

It has frequently been decided that when property is sold to satisfy a lien for taxes, said lien will follow the proceeds of the sale as to those claims which are the subject of the action and that the premises will thereafter be free from said lien. Section 5671 provides that the taxes shall be a lien on the day preceding the second Monday in April of each year. I find nothing in the statutes which provides that a lien for water rents shall be superior to that of any other lien. It is a well known principle that liens upon real estate in Ohio depend upon statutory provisions creating the same. In the absence of a statute making one superior to the other, one may not be preferred over the other. However, it is probable that in the absence of special provisions, a lien may take priority by reason of its arising before others. By virtue of the terms of Section 8542, a mortgage takes effect from the time it is delivered to the county recorder for record. However, it has been frequently held that a tax lien is superior to that of a mortgage executed and recorded prior to the entering of the tax on the duplicate. *Brannan vs. Schartzler*, 4 Ohio App. 356.

In the case of *Donohue vs. Brotherton*, 7 O. N. P. 367, it was held that a mortgage lien is inferior to a tax lien or a lien of assessment. However, it is believed that in the case of water rents the statute has not as yet undertaken to make said lien superior to other liens and until such authority is granted said liens may not take precedence over bona fide mortgages duly recorded prior to the arising of the lien.

Based upon the foregoing, and in specific answer to your inquiry, it is my opinion:

1. A lien for water rent arising after the recording of a bona fide mortgage may not take precedence over said mortgage upon distribution of the proceeds from a sale of the premises to satisfy such mortgage. However, under such circumstances, a municipality may still pursue the party contracting for said service in pursuance of the rules of the water works division.

2. In the event that a foreclosure proceeding is instituted and a city receives no notice of such sale, and is not a party to the suit, such lien would not be discharged and would follow the land into the hands of the purchaser.

3. Whether or not the owner of such land at the time when the water rents accrue may be held personally liable for the payment of such water rents is a question of fact depending upon the provisions of the rules and regulations adopted with reference to the sale of water.

Respectfully,

GILBERT BETTMAN,

Attorney General.