

Therefore, I am of the opinion that, under the facts disclosed by you, the owner of the cigarette vending machine should take out the cigarette license.

Respectfully,  
GILBERT BETTMAN,  
*Attorney General.*

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3494.

APPROVAL, BONDS OF VILLAGE OF NEW CONCORD, MUSKINGUM COUNTY, OHIO—\$5,275.00.

COLUMBUS, OHIO, August 8, 1931.

*Retirement Board, State Teachers Retirement System, Columbus, Ohio.*

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3495.

LEGAL ADVERTISEMENT—NOTICE OF SALE OF REALTY FOR DELINQUENT TAXES—EXPENSES PAYABLE, AS COSTS IN CASE, FROM PROCEEDS OF SALE.

**SYLLABUS:**

*The expenses of publishing the notice of the sale of real property in proceedings for the foreclosure of delinquent land tax certificates on said property under the provisions of Section 5718, General Code, are to be paid as costs in the case out of the proceeds of the sale of said property.*

COLUMBUS, OHIO, August 10, 1931.

HON. RAY T. MILLER, *Prosecuting Attorney, Cleveland, Ohio.*

DEAR SIR:—This is to acknowledge the receipt of a communication from your office over the signature of Mr. George S. Tenesy, Assistant Prosecuting Attorney, which communication reads as follows:

“Some time during the early part of 1930 I wrote your office for an opinion regarding the payment of legal advertising in foreclosure actions under General Code Section 5718 (sale of real estate for delinquent taxes), to which I received a reply, being your opinion No. 1483.

I neglected, however, in my first question to include the question as to how, by whom and from what fund the advertising which the sheriff must insert in the legal news for the sale of this property is paid.

Thanking you in advance for giving us your opinion on this point, I beg to remain”

The former opinion of this office, referred to in your communication, was addressed to the question as to how and in what manner expenses incurred in securing service by publication on parties defendant in actions to foreclose delinquent tax certificates under the provisions of section 5718, General Code, should be paid. In said opinion, after reference was made therein to the provisions of sections 5713, 5718, 5719 and of other sections of the General Code relating to the question there presented, the conclusion was reached that the expenses in-

curred in securing service by publication in a case of this kind are to be considered as costs in the case and are to be paid out of the fund from the sale of the property as provided for by section 5719, General Code.

The question presented in your recent communication, and as stated therein, is "as to how, by whom and from what fund the advertising which the sheriff must insert in the legal news for the sale of this property is paid."

By reference to section 5718, General Code, providing for foreclosure proceedings upon delinquent land tax certificates, it is noted that it is therein provided 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 in the manner provided, by law for the sale of real estate on execution."

By section 11653, General Code, an execution is defined as a process of the court issued by the clerk and directed to the sheriff of the county; and by section 11654, General Code, executions include orders of sale. Section 11681, General Code, provides as follows:

"Lands and tenements taken in execution shall not be sold until the officer causes public notice to be given of the time and place of sale, for at least thirty days before the day of sale, by advertisement in a newspaper printed and of general circulation in the county. The court ordering sale may, in the order of sale, designate the newspaper in which such notice shall be published."

Section 11682 is likewise pertinent to the consideration of the question here presented. This section reads as follows:

"When such advertisement is made in a newspaper published weekly, it shall be sufficient to insert it in five consecutive numbers. If there is both a daily and weekly edition of the paper selected, and the circulation of the daily in the county exceeds that of the weekly, or if the lands and tenements taken in execution are situated in a city, and there is published both a daily and weekly edition of the paper selected, and the circulation of the daily in such city exceeds that of the weekly, it will be sufficient to publish the advertisement in the daily once a week for five consecutive weeks before the day of sale, each insertion to be on the same day of the week. The expense of such publication in a daily shall not exceed the cost of publishing it in a weekly. All sales made without such advertisement shall be set aside, on motion, by the court to which the execution is returnable."

The provisions of section 6256 are more immediately applicable in the consideration of the question presented in your communication. This section reads:

"The publication of an advertisement, notice or proclamation, required by law to be published in a newspaper by a trustee, assignee, executor, administrator, receiver or other officer of the court or a party in a case or proceeding, shall be approved by the court or clerk thereof and allowed as a part of the costs in the case or proceeding therein."

Inasmuch as under the provisions of section 6256, General Code, above quoted, the expense of the publication of the notice of the sale of property sold by the sheriff on order of the court in a case of this kind is required to be allowed as a part of the costs in such case, it follows that such expense is to be paid as costs from the proceeds of the sale of the property. This follows from the provisions of

section 5719, General Code, which, so far as pertinent to the question here presented, provides as follows:

“Judgment shall be rendered for such taxes and assessments, or any part thereof, as are found due and unpaid, and for penalty, interest and costs, for the payment of which, the courts shall order such premises to be sold without appraisalment. From the proceeds of the sale the costs shall be first paid, next the judgment for taxes, assessments, penalties and interest and the balance shall be distributed according to law.”

By way of specific answer to the question presented in your communication, I am of the opinion therefore that the expenses incurred in advertising the sale of property sold in foreclosure proceedings under the provisions of section 5718, General Code, are to be paid out of the proceeds of the sale of such property.

In my former opinion, referred to in your communication, the observation was made that if a sale of the property is not effected in such foreclosure proceedings, or if the property does not sell for enough to pay the costs in the case, the county treasurer as the party plaintiff in such action would, in his official capacity, be liable for the expenses incurred in obtaining service by publication upon parties defendant in the action; and that in such case the court under the provisions of section 11628, General Code, may enter judgment in favor of the county treasurer, as plaintiff in such action, against the delinquent property owner as the court may adjudge to be right and equitable. In said opinion it was further held that, inasmuch as in such case the county treasurer is acting in his official capacity, such expenses incurred in obtaining service by publication on the necessary parties defendant in the action, are payable out of the general county fund provided for by section 5625-9, General Code, on an appropriation of money therefor made by the county commissioners in the manner provided by section 5625-29, General Code.

No reason is perceived why the observations made in said former opinion should not apply in like case with respect to the expenses incurred in publishing the notice of the sale of property sold by the sheriff in the proceedings under the provisions of section 5718, General Code.

Respectfully,

GILBERT BETTMAN,  
*Attorney General.*

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3496.

COUNTY BOND ISSUE—CONSIDERED IN COMPUTATION OF NET INDEBTEDNESS TO THE EXTENT ISSUED IN ANTICIPATION OF COLLECTION OF COUNTY TAXES AND NOT IN ANTICIPATION OF SPECIAL ASSESSMENTS AND TOWNSHIP TAXES.

*SYLLABUS:*

*County bonds which have been issued in anticipation of the collection of county taxes, special assessments and township taxes, should be considered in computing the net indebtedness provided in Section 2293-16, General Code, only to the extent that such bonds are issued in anticipation of the collection of county taxes.*