

2457.

LIEN, FORECLOSURE BY STATE—TAXES DELINQUENT, ASSESSMENTS, PENALTIES AND INTEREST — PROCEEDINGS ONLY IN COURTS HAVING JURISDICTION OF MORTGAGE FORECLOSURE ACTIONS—PROBATE COURT, NO JURISDICTION, FORECLOSURE DELINQUENT TAX LIENS, SECTIONS 5718-3 AND 5719 G. C. — IF AMOUNT DEFICIENT, PAID TO COUNTY TREASURER, NO AUTHORITY FOR PROBATE COURT TO ORDER SATISFACTION OF SAID LIENS SHOULD COUNTY TREASURER FILE CROSS-PETITION IN LAND SALE PROCEEDINGS.

SYLLABUS:

1. *Actions for the foreclosure of the lien of the state for delinquent taxes, assessments, penalties and interest may be instituted and prosecuted only in courts having jurisdiction of mortgage foreclosure actions. The jurisdiction of the probate court is limited to the powers given it by the Constitution and legislative enactment, and having received no authority to hear and determine actions for the foreclosure of mortgages and marshalling of liens*

*other than in land sale proceedings, it has no jurisdiction of actions to foreclose delinquent tax liens as provided in Sections 5718-3 and 5719, General Code.*

*2. Should the county treasurer file a cross-petition in a land sale proceedings pending in the probate court, there is no authority for the court to order the satisfaction of all taxes, assessments, penalties, interest and charges, if the amount applicable thereto and paid to the county treasurer be deficient.*

Columbus, Ohio, June 25, 1940.

Hon. Paul D. Michel, Prosecuting Attorney,  
Marion, Ohio.

Dear Sir:

This will acknowledge receipt of a communication from your office, which reads as follows:

“Will you please furnish this office with your written opinion on the following:

We have an instance in this county where the administrator of a deceased person filed his petition in the Probate Court to sell real estate belonging to the deceased to pay debts of the estate, including a charge for taxes at the time the petition was filed of \$1900. The petition was filed four years ago, the land was appraised and offered for sale, but failed to sell for want of bidders. Subsequently thereto, it has been reappraised and re-offered for sale, each time at a lower figure, but in vain. The last amount at which the tract could be sold was \$3500.00. The taxes and assessments against the land in the meantime have accumulated so as to amount to the sum of \$3500.00. In other words, the land is worth less than the amount of taxes and assessments charged against the same. It will therefore be necessary for the Treasurer to file an action to foreclose these taxes. Obviously there will have to be an order of remittur of the taxes and assessments in an amount equal to the difference between the purchase price and the amount of taxes and assessments due. Now, the question comes as to whether the Treasurer must file an original action in the Common Pleas Court to foreclose the State's lien for taxes and assessments, or whether he can file his answer and cross petition in the action already instituted in the Probate Court, in which action all the parties interested in the real estate are already in that court. In other words, the question is, whether the Probate Court has the jurisdiction and authority to remit taxes and assessments under Section 5719 of the Gen-

eral Code of the State of Ohio. We have a number of like cases and therefore would appreciate your opinion on this point, so that we may be guided in our procedure on the same."

By virtue of Section 5671, General Code, tax liens may only be removed by payment in full or by some further provision of the statutes otherwise directing. Section 5671, General Code, reads in part as follows:

"The lien of the state for taxes levied for all purposes, in each year, shall attach to all real property \* \* \*, and continue until such taxes, with any penalties accruing thereon, are paid."

It is further provided in Section 5713, General Code, that when lands are placed on the delinquent list the state shall have the first and best lien thereon for the amount of taxes, assessments, penalties and interest.

The only exceptions to the rule that taxes remain a lien until paid in full, which are pertinent to the subject of your inquiry, are found in Section 5755, General Code, relative to certain sales of forfeited lands, and Section 5719, General Code, relative to the sale of delinquent lands upon foreclosure of the delinquent tax liens. Section 5719, General Code, provides for the finding in tax lien foreclosure cases and for the manner of selling the premises at judicial sale. It further provides that:

"From the proceeds of the sale the cost shall be first paid, next the amount found due for taxes, assessments, penalties, interest and charges, next the amount of any taxes and assessments accruing after the entry of the finding and before sale, *all of which taxes, assessments, penalties, interest and charges shall be deemed satisfied, though the amount applicable thereto be deficient*, and the balance, if any, shall be distributed according to law. Upon confirmation of the sale a husband or wife of the party charged with the delinquent tax shall thereby be barred of the right of dower in the property sold, though such husband or wife was not a party to such action. No statute or limitations shall apply to such action. When the land or lots stand charged on the tax duplicate as certified delinquent, 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." (Emphasis mine.)

The provision for the remission of the unpaid balance of the taxes is self executing. It does not require any action by the court. It is apparent, however, that the sale whose proceeds are deemed to satisfy the taxes, though the amount applicable thereto be deficient, is a judicial sale, the result of a tax lien foreclosure. There is no authority given the courts to make such

remissions of taxes. In *Grafton v. Mong*, Aud., 60 O. App., 226, (affirmed in *Grafton v. Mong*, Aud., 134 O. S., 416), Judge Washburn said:

“Liens for taxes to continue until paid being a legislative creation, the Legislature had authority to provide that such liens should cease in the event of a judicial sale of the real estate and attach to the proceeds of such sale, but if the Legislature intended to so provide it would be reasonable to expect the Legislature to either use language plainly indicating such intention or else amend Section 5671, General Code, which provides that a lien for taxes shall continue until paid.”

The same conclusion was reached in *Canton Bank & Trust Co v. Smith-Martindale Co.*, 62 O. App., 550, wherein the syllabus reads:

“Where realty is sold upon foreclosure the court is without authority to direct that the decree shall operate as full satisfaction of tax liens thereon where the taxes are in fact but partially paid. The unpaid balance remains a lien upon the property.”

The reasoning of the court in these cases is equally applicable to the probate courts in the absence of any statutory authority, I must conclude that no authority exists for a probate court to order the remission or abatement of any taxes or assessments and that such court is powerless to order real estate to be freed from the lien of taxes and assessments and such lien transferred to the proceeds of a judicial sale of such realty.

It next appears proper to consider the question of whether or not, in appropriate proceedings in the probate court, realty may be sold free from taxes at judicial sale if the proceeds are insufficient to satisfy the taxes.

Probate courts are established by virtue of Article IV, Section 7 of the Constitution of Ohio. Provision for their jurisdiction is made in Article IV, Section 8, which reads:

“The Probate Court shall have jurisdiction in probate and testamentary matters, the appointment of administrators and guardians, the settlement of the accounts of executors, administrators and guardians, and such jurisdiction in habeas corpus, the issuing of marriage licenses, and for the sale of land by executors, administrators and guardians, and such other jurisdiction, in any county, or counties, as may be provided by law.”

By reason of the provision that probate courts shall have such other jurisdiction as provided by law, the legislature has power to grant jurisdic-

tion to the probate courts as extensive as that which may be exercised by the common pleas courts. *Railroad v. O'Harra*, 48 O. S., 43; *Bogard v. Railway*, 64 O. S., 564. That portion of the Constitution has been held to be an enabling rather than a restrictive provision. *Pearson v. Stephens*, 13 G. C., 49, 7 O. C. D., 122; *In re Belle*, 22 N. P. (N. S.), 113. Under the constitutional provision, the probate court has been given jurisdiction of actions brought by administrators, executors and guardians for the sale of real estate necessary in the course of the administration of estates. Its general jurisdictional powers as provided by law for the sale and transfer of title to realty are found in Section 10501-53, General Code, which reads in part as follows:

“Except as hereinafter provided, the probate court shall have jurisdiction:

\* \* \*

\* \* \*

\* \* \*

8. To authorize the sale of lands or equitable estates or interests therein, on petition by executors, administrators and guardians, and the assignments of inchoate dower in such cases of sale;

9. To authorize the completion of real contracts on petition of executors and administrators; \* \* \*.”

Actions to sell real estate brought by fiduciaries are ancillary to the administration of estates. While the court exercises certain chancery powers, such as the determination of priorities of liens, yet it must be conceded that its chancery powers are limited to such powers as have been conferred by statute. It is not vested with general equity jurisdiction. 11 O. Jur., 852, Section 201.

It should be observed, of course, that provision is made in Article IV, Section 7 of the Constitution for combining the common pleas and probate courts in counties having a population of less than sixty thousand. Such a court would naturally have general equity powers, but it should be further noted that the Constitution provides that “such courts shall be combined and shall be known as the court of common pleas.”

Section 5718-3, General Code, furnishes the prosecuting attorney with his authority for bringing an action to “foreclose the lien of the state” for delinquent taxes and assessments. This section, so far as it is in any respect pertinent to your inquiry, is as follows:

“It shall be the duty of the prosecuting attorney of the county,

except as hereinafter provided, upon the delivery to him by the county auditor of a delinquent land tax certificate, to institute a proceeding thereon in the name of the county treasurer to foreclose the lien of the state, *in any court of competent jurisdiction* within nine months thereafter unless the taxes, assessments, penalty, interest and charges are sooner paid, and to prosecute the same to final judgment and satisfaction. \* \* \* *The proceedings for such foreclosure shall be instituted and prosecuted in the same manner as is now or hereafter may be provided by law for the foreclosure of mortgages on land in this state*, excepting that if service by publication is necessary, such publication shall be made once instead of as provided by section 11295 of the General Code, and the service shall be complete at the expiration of three weeks after the date of such publication. It shall be sufficient, having made proper parties to the suit, for the treasurer to allege in his petition that the certificate has been duly filed by the county auditor; that the amount of money appearing to be due and unpaid thereby is due and unpaid and a lien against the property therein described, without setting forth in his petition any other or further special matter relating thereto, and the prayer of the petition shall be, that the court make an order that said property be sold by the sheriff of the county, or if the action be in the municipal court, by the bailiff, in the manner provided by law for the sale of real estate on execution excepting as hereinafter otherwise provided. In such proceedings the county treasurer may join in one action all or any number of lots or lands, but the decree shall be rendered severally or separately, and any proceedings may be severed in the discretion of the court for the purpose of trial error or appeals, where an appeal is allowed, and the court shall make such order for the payment of costs as shall be deemed equitable and proper. \* \* \* " (Emphasis mine.)

The procedure being the same as that provided by law for foreclosure of real estate mortgages with only the exceptions noted in Section 5718-3, General Code, it is necessary to determine whether the probate court is a court of competent jurisdiction within the meaning of the section.

In *Hummer v. Parsons, et al.*, 110 O. S., 595, the first branch of the syllabus reads:

"An action to foreclose a lien upon real estate and to subject property pledged to the satisfaction thereof, whether such lien is a mortgage or a mechanic's lien, is a chancery proceeding, and is appealable."

See also 16 O. Jur., 226.

I assume that no one would question the chancery powers of the com-

mon pleas courts. Some of the municipal courts have jurisdiction of actions to foreclose real estate mortgages, but as has been previously pointed out, the probate court has only such chancery powers as are provided by law and has no jurisdiction in foreclosure actions. Lacking these powers, it follows that a tax lien foreclosure action can not be originally commenced in the probate court.

There still remains the question of the right of the county treasurer, if a party to a land sale proceedings in the court, to have the tax lien foreclosed upon his cross-petition. While the county treasurer might be considered a proper party in land sale proceedings in the probate court, certainly he is not a necessary party therein. When lands are placed on the delinquent list, Section 5713, General Code, provides that the state shall have the first and best lien thereon for the amount of taxes, assessments, penalties and interest. It is further provided in Section 5692, General Code, that:

“When \* \* \* real estate is sold at judicial sale, or by administrators, executors, guardians, or trustees, the court shall order the taxes, penalties, assessments then due, and interest thereon, which are a lien on such land or real estate at the time of the sale, to be discharged out of the proceeds of such sale or election.”

Further provision for the payment of taxes in such land sales is found in Section 10510-46, General Code, wherein it is provided that from the proceeds of the sale the costs and expenses of the sale shall be first paid, then the “payment of taxes, penalties and assessments then due.” So it is evident that the state has a first and best lien on the real estate for delinquent assessments, penalties and interest which must be paid from the proceeds of the sale. This is the rule regardless of whether or not the county treasurer becomes a party and files a cross-petition claiming such lien. So far as the land sale proceedings are concerned, this lien continues until the delinquent taxes, assessments, penalties and interest have been fully paid. As said in *Grafton v. Mong*, 134 O. S., 416, 419:

“By the express terms of section 5671, General Code, taxes continue a lien upon real property until paid.”

It is apparent from a careful reading of Sections 10510-1 to 10510-48, inclusive, General Code, being the provisions for the sale of lands by executors, administrators and guardians, that the authority granted and purpose of that portion of the act is to provide for the sale of real estate in connec-

tion with the administration of estates. It does not contemplate nor provide for the foreclosure of mortgages or liens of any kind. The only provision is that lienholders must file pleadings setting forth the nature of their claims in order that the court if satisfied "that the prayer of the petition should be granted, \* \* \* may determine the equities and priorities of the lien of the several lienholders on such real estate." Section 10510-21, General Code. If the county treasurer should file a cross-petition under assumed authority of such section, the most it could possibly be contended the court could do would be to determine the validity of such taxes and the priority of the lien, all of which has been accomplished by the statutory provisions previously noted. A cross-petition could not enlarge the court's jurisdiction nor make it a court of competent jurisdiction for the foreclosure of mortgages on land in this state.

Answering your question specifically, I am of the opinion that actions for the foreclosure of the lien of the state for delinquent taxes, assessments, penalties and interest may be instituted and prosecuted only in courts having jurisdiction of mortgage foreclosure actions. The jurisdiction of the probate court is limited to the powers given it by the Constitution and legislative enactment, and having received no authority to hear and determine actions for the foreclosure of mortgages and marshalling of liens other than in land sale proceedings, it has no jurisdiction of actions to foreclose delinquent tax liens as provided in Sections 5718-3 and 5719, General Code.

Should the county treasurer file a cross-petition in a land sale proceedings pending in the probate court, there is no authority for the court to order the satisfaction of all taxes, assessments, penalties, interest and charges, if the amount applicable thereto and paid to the county treasurer be deficient.

Respectfully,

THOMAS J. HERBERT,  
Attorney General.