

2737.

APPROVAL, BONDS CITY OF WOOSTER, WAYNE COUNTY, \$181,125.38.

COLUMBUS, OHIO, Aug. 31, 1925.

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

2738.

MIAMI CONSERVANCY DISTRICT—SHOULD BE MADE PARTY DEFENDANT TO SUITS BROUGHT UNDER SECTION 5718 G. C.—OTHER QUESTIONS CONCERNING CONSERVANCY DISTRICT ANSWERED.

**SYLLABUS:**

*The Miami Conservancy District should be made a party defendant to all suits under section 5718, General Code, in order to bind such district by the decision of the court.*

*The conservancy district is not bound by the order of the court remitting the taxes and assessments due it, the real estate having failed to sell for enough at the tax sale to pay the same.*

*Taxes and assessments due the conservancy district should not be included in the suit by the treasurer to sell property for delinquent taxes, and the conservancy district should be made a party defendant in all such suits.*

*It is necessary for the conservancy district to proceed under section 6828-54 to bring a separate action to collect taxes and assessments due it, unless suit has been brought by the county treasurer, and in such case the conservancy district should be made a party defendant so that its rights may be determined.*

COLUMBUS, OHIO, Sept. 1, 1925.

HON. L. E. HARVEY, *Prosecuting Attorney, Troy, Ohio.*

DEAR SIR:—I am in receipt of your communication as follows:

“A suit was filed by W. R. Fish, treasurer of Miami county, Ohio, against Peter H. Batty, et al., in the early part of the year 1923 to foreclose a delinquent tax lien under section 5718. Judgment was rendered for the amount of the taxes and assessments found due and unpaid. The premises were ordered sold without appraisal and did not sell for enough to pay the taxes and assessments standing against said real estate.

“A part of the taxes and assessments for which judgment was rendered and which were included in the taxes, assessments and penalties, certified to the auditor of state by the county auditor and for which foreclosure proceedings were brought in the name of the county treasurer, were taxes and assessments due the Miami Conservancy District.

"On May 7, 1923, a journal entry was filed in the case ordering the auditor to issue to the treasurer a remitter for \$74.90, being the difference between the taxes due and the amount realized from the sale of the real estate, after deducting the costs and expenses. This remitter included the Miami Conservancy District assessments and lien for taxes. This order was made in order that the purchaser of the real estate, at the delinquent tax sale, would take title free of any delinquent tax liens, he having bid the premises in at the tax sale and paid into court the amount of his bid.

"The Miami Conservancy District was not made a party defendant to this suit and now claims that the district is not bound by the order of the court remitting the amount of the taxes due the district. The district has declined to remit the taxes that were due it and forced the purchaser to pay the back taxes and assessments standing against this real estate at the time it was sold to pay the tax lien.

"Mr. O. B. Brown, attorney for the conservancy district, insists that the district must be made a party defendant in all tax cases in order that the district may protect its interests and the interest of its bond holders.

"It is further contended by the conservancy district that the county treasurer has no authority to act for the district in any capacity, except to receive the money for the taxes and assessments due the district and pay the same over to the district. This contention is based upon Sec. 6828-54 G. C., which gives the district authority to bring suit to collect delinquent assessments and taxes due the district.

"When this matter was referred to me by the auditor for an opinion, I advised him that under sections 5718 and 5719 G. C., the treasurer was authorized to bring an action to foreclose the lien of the state for delinquent taxes and assessments and that this lien included all the taxes and assessments against the property. That is, the taxes due the various taxing districts were all merged in the lien of the state so as to avoid a multiplicity of suits to collect the delinquent taxes. If this were not the case, then the taxes and assessments due the city, school district and other taxing districts would never become a lien upon the property and there is no way provided by which these taxing districts could collect the taxes due them.

"I would like, therefore, to have your opinion on the following questions:

"1st. Should the Miami Conservancy District have been made a party defendant to this suit to bind it by the decision of the court?

"2nd. Is the conservancy district bound by the order of the court remitting the taxes and assessments due it, the real estate having failed to sell for enough at the tax sale to pay same?

"3rd. Are the taxes and assessments due the conservancy district to be included in the suit by the treasurer to sell property for delinquent taxes, and, if so, why is it necessary to make the conservancy district a party defendant?

"4th. Is it necessary for the conservancy district to proceed under section 6828-54 and bring a separate action to collect the taxes and assessments due it?

"Mr. O. B. Brown, attorney for the conservancy district, says he would be pleased to mail you a brief on this question if you care to hear from him."

Section 5718, General Code, provides as follows:

"It shall be the duty of the county auditor to file with the auditor of state a certificate of each delinquent tract of land, city or town lot, at the expiration of four years, upon which the taxes, assessments, penalties and interest have not been paid for four consecutive years, and a certified copy thereof shall at the same time be delivered to the county treasurer, and it shall be the duty of the auditor of state to cause foreclosure proceedings to be brought in the name of the county treasurer, upon each unredeemed delinquent land tax certificate, within three months from the date of filing of such certificate with the auditor of state, by the county auditor; 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, 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 in the manner provided by law for the sale of real estate on execution. And the treasurer need not set forth any other or further special matter relating thereto. The certified copy of said delinquent land tax certificate, filed with the county treasurer, as hereinbefore provided, shall be prima facie evidence on the trial of the action, of the amount and validity of the taxes, assessments, penalties and interest appearing due and unpaid thereon, plus the amount of eighty-five cents due from the defendants for the delinquency of each year, for advertising and issuance of certificates, and of the non-payment thereof, without setting forth in his petition any other or further special matter relating thereto."

This section provides that county auditors shall file with the auditor of state a certificate of each delinquent tract of land at the expiration of four years, upon which the taxes, assessments, penalties and interest have not been paid for four consecutive years, and that the auditor of state shall cause foreclosure proceedings to be brought in the name of the county treasurer upon said certificate, within three months from the filing thereof. The section further provides that proper parties shall be made to such suit and that the petition shall ask for the sale of said property in the manner provided by law for the sale of real estate on execution.

Section 5790, General Code, 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 court 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. 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 land or lots stand charged on the tax duplicate as certified delinquent 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 for a judgment to be rendered for the amount found due and unpaid, with an order of the court that the premises be sold. It further provides that the proceeds shall be used to pay the costs of such suit, next the judgment for taxes, assessments, penalties and interest and the balance shall be distributed according to law, and that 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.

Section 6828-53 provides as follows:

"All conservancy assessments and taxes provided for in this act, together with all penalties for default in payment of the same, all costs in collecting the same, including a reasonable attorney's fee, to be fixed by the court and taxed as' costs in the action brought to enforce payment, shall, from date of filing the certificate herein described in the office of the auditor for the county wherein the lands and properties are situate, until paid, constitute a lien, to which only the lien of the state for general state, county, city, village, school and road taxes shall be paramount, upon all the lands and other property against which such taxes shall be levied as is provided in this act. Such lien may be evidenced by a certificate substantially in the form in the schedule herein. The certificate and tables shall be prepared in a well-bound book by the secretary of the board of directors at the expense of the district.

"Unless expressly declared to the contrary, no warranty in any warranty deed or in any deed made pursuant to a judicial sale shall warrant against any portion of any assessment or assessments levied hereunder except past and current installments payable in the year which such deed or deeds bear date."

This section provides that all conservancy assessments and taxes provided for in this act, together with other costs enumerated, shall, from the date of filing the certificate herein in the office of the auditor for the county wherein the lands and properties are situate, until paid, constitute a lien, to which only the lien of the state for general state, county, city, village, school and road taxes shall be paramount, upon all the land and other property against which such taxes shall be levied.

Section 6828-54, General Code, provides:

"The 'Delinquent Conservancy Assessment Book' of the district shall be prima facie evidence in all courts of all matters therein contained. The liens established and declared in the preceding sections may be enforced at the option of the board of directors by an action on delinquent tax bills or assessment bills, made and certified by the county auditor, which action shall be instituted in the court of common pleas without regard to the amount of the claim, within six months after December 31 of the year for which said assessments were levied. The suit shall be brought in the corporate name of the district by its attorney against the land or lands, property or properties, on which such tax or assessment has not been paid. In the event of any default in the payment of the interest or principal of any bonds issued pursuant to this act, and if the said district or its proper officers shall fail or neglect to enforce the payment of any unpaid tax or assessment, the holder of such bond may, for himself and for the benefit of all others similarly situated, enforce the said liens by suit or action against the land or lands, property or properties, on which such tax or assessment has not been paid, and against the said district, and the court shall have full power, jurisdiction and authority to apply the said tax when collected in the payment of the interest or principal upon the said bonds as justice and equity may require. The suit shall be brought in the county in which the property is situate, except when the tract or property sued upon be in more than one county, in which event the suit may be brought on the whole tract, parcel or property, in any county in which any portion thereof may be situate. The pleadings, process, proceedings, practice and sales, in cases arising under this act shall, except as herein provided, be the same as in an action for the enforcement of the state's lien for delinquent general taxes upon real estate.

All sales of lands made under this section shall be by the sheriff, as is now provided under the general law. All sheriff's deeds executed and delivered pursuant to this act shall have the same probative force as other deeds executed by a sheriff. Abbreviations shall not defeat the action. The title acquired through any sale of lands or other property under the aforesaid proceedings shall be subject to the lien of all subsequent annual installments of conservation or drainage tax or assessment. In all suits for the collection of delinquent taxes or assessments, the judgment for said delinquent taxes or assessments and penalty shall also include all costs of suit and a reasonable attorney's fee to be fixed by the court, recoverable the same as the delinquent tax and in the same suit. The proceeds of sales made under and by virtue of this act shall be paid at once to the aforesaid county treasurer and shall be properly credited and accounted for by him the same as other conservation taxes and assessments.

"If any assessment made pursuant to the provisions of this act, shall prove invalid, the board of directors shall by subsequent or amended acts or proceedings promptly and without delay remedy all defects or irregularities as the case may require by making and providing for the collection of new assessments or otherwise."

This section provides for the enforcement of the lien under section 6828-53 and permits the board of directors of the conservancy district to institute action in the common pleas court within six months after December 31st of the year for which the assessments were levied. It further provides that the pleadings, process, proceedings, practice and sales, in such cases, shall be the same as in an action for the enforcement of the state's lien for delinquent general taxes upon real estate.

It would seem on first examination of section 5718 that the method prescribed for the collection of delinquent taxes and assessments include all taxes and assessments on the duplicate in the county treasurer's hands. It is believed, however, that an examination of all the related sections will not bear this out. If this was true, it would not be advisable to give the directors of the conservancy districts the right to the same kind of an action which the county treasurer has for the collection of delinquent taxes and assessments. A further distinction will be noted, in that section 5717 provides that no proceedings in foreclosure under this act shall be instituted on delinquent lands unless the taxes, assessments, penalties and interest have not been paid for four consecutive years. In section 6828-54, proceedings in foreclosure can be brought within six months after December 31st of the year for which said assessments were levied, and for any default of the payment of interest or principal on any bonds issued by such district and failure of the officers to enforce the payment of such tax or assessment, the bond holder may, for himself and the benefit of others similarly situated, enforce the said lien by action the same as the action of the state for the collection of delinquent taxes and assessments.

Section 5718 provides that "it shall be sufficient, having made proper parties to the suit, for the treasurer to allege in his petition \* \* \*." This brings up the question of who are proper parties to the suit.

Section 5713 in part provides:

"If the taxes have not been paid for four consecutive years, the state shall have the right to institute foreclosure proceedings thereon, in the same manner as is now or hereafter may be provided by law, for foreclosure of mortgages on land in this state \* \* \*."

Section 11255 provides:

"Any person may be made a defendant who has or claims an interest in the controversy adverse to the claimant, or who is a necessary party to a complete determination or settlement of a question involved therein."

As section 6828-53 provides that the conservancy districts shall have a lien for all assessments and taxes to which only the lien of the state, for general state, county, city, village, school and road taxes shall be paramount, it would seem that the lien of the conservancy district differs from the lien of the state for the taxes enumerated in section 6828-53. If the lien of the conservancy district is different and apart from the lien of the state for the taxes mentioned, the conservancy district has an interest which is adverse to the interest of the state. If the conservancy district's taxes and assessments are a lien upon the property against which it is levied, the lien could not be extinguished except by a payment of such debt or by order of court, in which the lien holder was a proper party. The action of the state under section 5718 is an adversary action for authority to sell the real estate to pay the taxes which are a debt against such land.

In the case of *Holloway vs. Stuart*, 19 O. S., p. 472, the court in considering the act giving an administrator the right to petition for the sale of lands for the payment of debt, held:

"The administration act of 1840, and the amendatory act of April 12, 1858, give a full adversary character to the petition of an administrator for authority to sell lands for the payment of debts. Therefore the lien of a mortgagee who is not made a party to such petition remains unaffected by the order and the proceedings thereunder."

In the case of *Stewart vs. Johnson*, 30 O. S., p. 24, the court held:

"Where a senior mortgagee forecloses his mortgage without making a junior mortgagee of the same premises a party to his action for the foreclosure, the rights of the junior mortgagee remain unaffected and are not prejudiced by such foreclosure."

On page 30 of the opinion in the above case, supra, Day, C. J., said:

"The policy of the code, as evinced by this and numerous other provisions, is to avoid the necessity of a multiplicity of suits, and to preserve and enforce the rights of parties with the least possible controversy and litigation. Hence the provision, in regard to the foreclosure of mortgages, is made upon the supposition that, in accordance with other provisions of the code, all parties having an interest in the land will be parties to the action.

"Since, then, the land must be sold, and all having an interest in the land must be made parties, it makes no substantial difference, where all the claims are due, which one of several mortgagees brings the action for that purpose; and since there can be no foreclosure except by sale, there is no good reason for requiring the prior mortgagee to be paid before a junior one may proceed to subject the premises to the satisfaction of all the liens, and to this end settle in one suit the amounts and priorities of the respective liens. Accordingly, it has come to be the practice of our courts to permit any lienholder of lands to bring all the parties in interest into court for the settlement of their liens, and for the proper application of this fund arising therefrom, to the satisfaction of their respective claims.

"This, then, being the right of each of the lienholders before any legal

proceedings, how are they affected by the foreclosure of the first mortgage?"

"It is well settled in this state that the rights of lienholders, who are not made parties to the foreclosure, remain unaffected, the same as if no judicial sale had been made. *Frische vs. Kramer*, 16 Ohio, 125; *Childs vs. Childs*, 10 Ohio, St., 339."

Since the conservancy district may bring a suit in foreclosure to collect the taxes and assessments due the conservancy district at any time within six months after the 31st day of December of the year in which the taxes and assessments are due, and the state may not bring a foreclosure suit until the taxes have been in default for four years, it certainly cannot be claimed that the lien of the conservancy district is in the same category as the lien of the state. If the conservancy district may bring a suit in foreclosure within the period designated, it would necessarily have to make the state of Ohio and the county treasurer a party to such suit and it would be necessary to determine the lien of the state at such a foreclosure.

Specifically answering your question, it is my opinion:

First, that the Miami Conservancy District should be made a party defendant to all suits under section 5713, General Code, in order to bind such district by the decision of the court.

Second, that the conservancy district is not bound by the order of the court remitting the taxes and assessments due it, the real estate having failed to sell for enough at the tax sale to pay the same.

Third, that taxes and assessments due the conservancy district should not be included in the suit by the treasurer to sell property for delinquent taxes, and the conservancy district should be made a party defendant in all such suits.

Fourth, that it is necessary for the conservancy district to proceed under section 6828-54 to bring a separate action to collect taxes and assessments due it, unless suit has been brought by the county treasurer, and in such case the conservancy district should be made a party defendant so that its rights may be determined.

Respectfully,

C. C. CRABBE,  
*Attorney General.*

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2739.

GRANTING OF RELIEF TO POOR—SECTIONS 3476 ET SEQ., DO NOT CONTEMPLATE THE GIVING OF CASH TO SUCH PERSONS.

*SYLLABUS:*

*Sections 3476 et seq of the General Code, which provide for the granting of relief to the poor, do not contemplate or authorize the giving of cash to such persons.*

COLUMBUS, OHIO, Sept. 1, 1925.

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

GENTLEMEN:—Your recent communication reads:

"Sections 3476 to 3496 of the General Code govern officers in granting relief to indigent persons.

"Section 3487 G. C. reads: