

struction, erection, alteration or repair of such building, works or improvements.”

Sections 2314, et seq., General Code, apply only to those cases where the aggregate cost of the work therein provided for exceeds the sum of \$3,000, while the provisions of Section 2365-1, supra, may apply as to the state, in all cases where the contract price does not exceed \$3,000. To hold that Section 2316 of the General Code did not have application to the bond in question would, in effect, be saying that Section 2365-1, supra, repealed by implication the provisions of Section 2316, supra. While it is true that Section 2365-1, supra, is a later enactment than Section 2316, supra, yet there is nothing in the provisions of the two sections which are inconsistent, providing the contract cost exceeds \$3,000.

As heretofore pointed out, Section 2316, supra, is a part of a series or group of statutes, to wit, Sections 2314 to 2332, both inclusive, General Code, and provision is made in said group of statutes that all contracts and bonds given under the provisions of said group must be submitted to the Attorney General and approved by him before the state may enter into said contracts. There is no such provision in Section 2365-1, supra, Sections 2314, et seq., General Code, are special sections dealing solely with buildings or structures and equipment therefor for the use of the state, while Section 2365-1, supra, deals generally with all public buildings, regardless of whether they belong to the state or to a political subdivision of the state.

Although provision is made for the bringing of such suit in the name of the state, this does not mean that any department of the state may become a party to the suit. I see no way in which the state would or could become a necessary or proper party. Under the statutes, a suit must be brought in the name of the real party in interest, and in the instant case the state is not the real party in interest.

Answering your questions specifically, it is my opinion that Section 2316, General Code, gives to laborers, sub-contractors and material men complete and sole authority to collect claims for labor and material furnished and delivered on construction work for the use of the state; and that there is no way or manner by which the state may assist sub-contractors or material men in presenting such claims against a surety company.

Respectfully,  
EDWARD C. TURNER,

*Attorney General.*

1441.

TAX AND TAXATION—DELINQUENT LAND TAX FORECLOSURE—  
ACTION MAINTAINED BY COUNTY TREASURER AS OFFICER NOT  
AS INDIVIDUAL—STATUTE OF LIMITATIONS NOT APPLICABLE—  
AUDITOR OF STATE MUST ACT WITHIN THREE MONTHS.

*SYLLABUS:*

1. *The period of three months mentioned in Section 5718, General Code, refers to the time within which the auditor of state must act; and there is no limitation applicable to the action brought by a county treasurer under said section.*

2. *The fact that certification of a delinquent tract of land, city or town lot, is made in the name of a county treasurer as county treasurer, does not preclude the succeeding county treasurer from bringing foreclosure proceedings thereon.*

COLUMBUS, OHIO, December 24, 1927.

HON. J. R. POLLOCK, *Prosecuting Attorney, Defiance, Ohio.*

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

"I wish to call your attention to Sections 5718 and 5722, G. C., upon the following statement of facts:

On June 15, 1927, the auditor of state certified to J. W. Shuter, the then treasurer of Defiance County, the delinquency of certain lands located in this county and requested that foreclosure proceedings be instituted for the sale of said lands. Mr. Shuter failed to hand these certificates to me that I might be able to prepare the necessary petitions. Mr. Shuter's term of office expired on the 3rd day of September, 1927, and C. K. McCormick, the newly elected treasurer assumed the duties of said office.

I was inclined to the opinion that foreclosure proceedings had to be instituted before the expiration of three months from the date of the certification but in Opinions of the Attorney General, Vol. I, 1922, at page 389, I find that the contrary has been held by Mr. Price.

In your opinion is this holding correct?

Would the fact that the certification was made to J. W. Shuter, as treasurer, prevent proceedings being instituted at this or a later date in the name of C. K. McCormick, as treasurer?"

Sections 5718 and 5722, General Code, read as follows:

Sec. 5718. "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; \* \* \*

Sec. 5722. "The state, by its attorney general, may bring its action for foreclosure of any delinquent land upon which the taxes, assessments, penalties and interest have not been paid for a period of four years, in the county in which the land therein described was situated, at the time of the issuance of said certificate, whether the land, city or town lot at the time of the institution of foreclosure proceeding continue to be within the county or not, in like manner as though the land, city or town lot still remained within the limits thereof."

In the opinion to which you refer, Opinions of the Attorney General, 1922, Volume I, p. 389, the syllabus reads as follows:

"The foreclosure action provided for in Section 5718, G. C., in case of delinquent land is to be brought by the county treasurer; and it is the duty of the prosecuting attorney to represent such treasurer in such proceedings. The provision of Section 5722 of the General Code for such action in the name of the state brought by the Attorney General is special.

The period of three months mentioned in Section 5718, G. C., refers to the time within which the auditor of state must act; whether or not it is directory, *quaere*. There is no limitation applicable to the action brought by the treasurer under Section 5718, G. C."

It is stated in the opinion, after quoting Section 5722, General Code, that:

"This is a strange provision, but it is clear that it applies only when the land that has become delinquent is at the expiration of the period of four years in a different county from that in which it was at the time of its delinquency. This, of course, could only come about by change of county lines. It is, however, the only case in which the Attorney General is authorized to bring the action. In cases arising under this section the proper party plaintiff is the state. In the normal actions referred to in Section 5718, the party plaintiff is the county treasurer."

The opinion also discusses the question as to whether these proceedings can be brought later than three months from the date of the filing of the delinquent land tax certificate with the auditor of state. The opinion continues:

"This statement requires consideration of the following provisions:

'Sec. 5718. \* \* \* 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; \* \* \*'

Section 5719, referring to the same action, provides in part as follows:

'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.'

Section 5713, G. C., also apparently applying to the same action, provides generally for the institution of foreclosure proceedings without any limitation in the following words:

'The state shall have the right to institute foreclosure proceedings thereon, in the same manner as it now or hereafter may be provided by law, for foreclosure of mortgages on land in this state.'

\* \* \* the phrase 'within three months from the date of filing such certificate with the auditor of state' does not relate to the filing of the action, for to make it so relate would be to contradict Section 5719 to the effect that no statute of limitations shall apply to such action. Rather this clause in Section 5718 should be construed as relating to the time within which the auditor of state is required to act. It is his duty 'to cause foreclosure proceedings to be brought in the name of the county treasurer,' yet

the statute shows that the auditor of state has no control over the action itself, not being a party thereto. \* \* \* In the opinion of this department this is all that is required of the auditor of state, and it is this action that must be taken within three months from the time the certificate is filed with him. Stated in another way, two officers must act under Section 5718. The auditor of state must 'cause foreclosure proceedings to be brought' and the treasurer must file 'his petition.' If the auditor of state acts within three months it is enough, \* \* \*."

I am in agreement with the foregoing holding and conclusion.

You also inquire as to whether the fact that the certification was made to J. W. Shuter, as treasurer, would prevent proceedings being instituted at this or a later date in the name of his successor, C. K. McCormick, as treasurer.

As previously stated herein there is no limitation as to time applicable to the action brought by the treasurer under Section 5718, General Code, and if the treasurer in office does not bring said action his successor may do so.

It is noted that Section 5718, General Code, provides that when the county auditor files 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, he shall deliver a copy thereof at the same time 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 land tax certificate. It is also provided that it shall be sufficient, having made proper parties to the suit, for the *treasurer* to allege in his petition, among other things, that the certificate has been duly filed by the county auditor. It is also provided in said section that: "The *treasurer* need not set forth any other or further special matter relating thereto;" and that the certified copy of said delinquent land 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, etc., appearing due and unpaid thereon.

It is clear from the provisions of the foregoing section that the certificate is filed in the office of the county treasurer and that the county treasurer is authorized to bring said action in foreclosure and that said grant of authority is not limited to the individual holding the office of county treasurer at the time said certificate is filed in said office.

Specifically answering your questions, it is, therefore, my opinion that:

1. The period of three months mentioned in Section 5718, General Code, refers to the time within which the auditor of state must act; and there is no limitation applicable to the action brought by a county treasurer under said section.
2. The fact that certification of a delinquent tract of land, city or town lot, is made in the name of a county treasurer as county treasurer, does not preclude the succeeding county treasurer from bringing foreclosure proceedings thereon.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*