

to May 30, 1939, he should receive the same salary he was receiving on May 5, 1936.

Respectfully,

HERBERT S. DUFFY,
Attorney General.

519.

DELINQUENT TAXES—COUNTY TREASURER—COLLECTION
AFTER FORECLOSURE STARTED, WHEN—PLEADING
IN FORECLOSURE OF TAX LIEN—SERVICE OF SUM-
MONS—DEFENDANT UNKNOWN.

SYLLABUS:

1. *The law as announced in the case of Cook vs. Pomozi, 40 O. App., 566, remains the law in the circuit district where it was announced. It may or may not be accepted in other circuit districts.*

2. *Present Section 5719, General Code, neither changes nor modifies former Section 5719, General Code, in so far as its application to the questions herein involved, are concerned. The former section went out of existence by way of repeal.*

3. *The county treasurer has no authority to accept tax payments under Amendment Supplemental Senate Bill No. 87, known as the last "Whittemore Act", after he has instituted foreclosure proceedings to collect such tax.*

4. *It is not necessary in actions to foreclose the lien of the state for taxes to aver in the petition that the defendant has failed to elect to pay under the Whittemore Act.*

5. *In an action to foreclose a tax lien against a defendant concerning whom nothing is known, it is proper to use the style for defendant as follows: "A if living; if deceased, his heirs, devisees and legal representatives."*

6. *In making service in an action to foreclose a tax lien against a defendant concerning whom nothing is known, Sections 11292, General Code, et seq., should be carefully followed.*

COLUMBUS, OHIO, April 26, 1937.

HON. CHAS. S. KEENEY, *Prosecuting Attorney, McArthur, Ohio.*

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

"A campaign for the collection of delinquent taxes on real estate is being conducted in this County, and in the course of the procedure of filing petitions for foreclosure, getting proper service of process, advertisement and sale of the premises involved, numerous questions are arising. I deem it necessary at this time to have the benefit of your opinion upon the following questions :

1. Does the decision in the case of *Cook vs. Pemozi*, 40 O. A. 566, still govern in the foreclosure of delinquent land tax liens? i.e. To what extent does the present G. C. 5719 change or modify the former G. C. 5719?

2. Has the County Treasurer the authority or power to set up tax payments under the Whittemore payment plan after he has filed suit for foreclosure? We already have the benefit of your opinion (recent) that he cannot be forced so to do by the owner or claimant of the land who is party to the suit.

3. Has the Common Pleas Court the authority during the pendency of the foreclosure suit to permit the owner the right to pay his taxes under the Whittemore plan even though he had not so elected before suit.

4. Should the petition for foreclosure state that the defendant has failed to elect to pay under the Whittemore Bill?

5. In cases where the owners, as appear from the records, are unknown, addresses unknown, and the heirs, devisees and representatives are unknown, is not proper to join as parties "A, if living, if deceased, his unknown heirs, representatives and devisees?" Or should the title of the suit be "A, if living, and his unknown heirs, devisees and representatives," with the same wording followed out in the affidavit, orders for service by publication, and notice contemplated in G. C. Section 11298, 11292, 11293 and 11294.

Your opinion and comments on the above questions will be welcomed by this office."

I have endeavored to answer your questions seriatim. The case of *Cook vs. Pemozi*, 40 O. App. 566, remains the law in the Circuit District where it was announced. It may or may not be accepted in another Circuit District. In that case the court simply held that the trial court had statutory power to order premises sold for delinquent taxes without appraisal under former Section 5719, General Code, and in the absence of legislation to the contrary, such power to order sale included the power to approve the sale. It is further held in that case that the confirmation of a sale of land for taxes is within the court's sound

discretion notwithstanding the bid is insufficient to pay delinquent taxes. This appeals to me as very good law and I see no reason why it should not be followed anywhere.

The present Section 5719, General Code, neither changes nor modifies former Section 5719, General Code, in so far as its application to your question is concerned. The former section went out of existence by way of repeal when the later section became effective. While the Whittemore Act, to which you refer, states in effect that landowner or a lienholder may take advantage of the Act at any time prior to December 10, 1937, I do not believe it extends its protection to such persons after suit is brought. After the petition is filed, summons issued and served, the jurisdiction of the court has been invoked. The subject matter of the action is the collection of delinquent taxes. Before the action was filed the jurisdiction of the treasurer in the matter of the collection of delinquent taxes was exclusive and supreme, but when he went into court he surrendered it to the court and any settlement made thereafter between the treasurer and the landowner or lienholder would be worthless unless it had the stamp of the court's approval. I do not believe that even the benevolent law-givers who are responsible for the Whittemore Act ever intended that the landowner or lienholder could gamble upon the probability of an action not being filed and then secure a benefit under the law which they should have secured before being hailed into court.

The Whittemore Act does not mention the Common Pleas Court. It adds nothing to the power of such court and takes nothing away.

It is not necessary to allege in the petition for foreclosure of a tax lien that the defendant has failed to take advantage of the Whittemore Act. If averred it would likely be stricken out on motion as it is absolutely immaterial. Where nothing is known concerning the defendant in an action to foreclosure the tax lien, it is proper to style the defendant "A," if living, if deceased, his unknown heirs, representatives and devisees. This same style should be used in the affidavit for publication. If you will follow Sections 11292, et seq., General Code, strictly, you will not go wrong in the matter of service.

Respectfully,

HERBERT S. DUFFY,
Attorney General.