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IN HIGHWAY APPROPRIATIONS ACTION, TITLE TO PROPERTY PASSES TO THE STATE UPON JOURNALIZATION OF THE VERICT—LIEN OF THE STATE FOR TAXES ON REAL ESTATE—IN THE ABOVE ACTION THE TREASURER IS A PROPER BUT NOT NECESSARY PARTY TO THE PROCEEDINGS—PROPERTY THAT CARRY LIENS IN A CONDEMNATION ACTION MUST HAVE THE LIENS CLEARED IN ORDER THAT THE PROCEEDS FROM SUCH AN ACTION MAY BE USED TO PAY A TAX ASSESSMENT — THE CLERK OF COURTS MAY WITHHOLD FROM FUNDS DEPOSITED WITH COURT FROM A CONDEMNATION ACTION, AN APPROXIMATE AMOUNT OF THE TAX DUE—§5719.01, R. C.

SYLLABUS:

1. In an appropriation action for highway purposes pursuant to Section 5519.01, *et seq.*, Revised Code, title to the property acquired passes to the state upon the journalization of the verdict.

2. Under Section 5719.01, Revised Code, the lien of the state for taxes on real estate for a particular year attaches on the first day of January of that year, and in a condemnation action filed under Section 5519.01, *et seq.*, Revised Code, in which the verdict is journalized after January 1, 1962, the condemnee is obligated to pay the taxes for the entire year of 1962.

3. In an action filed under Section 5519.01, *et seq.*, Revised Code, the county treasurer is a proper though not a necessary party to the proceedings.

4. Special assessments that are a lien but not yet payable against property which is the subject of a condemnation action brought under Section 5519.01, *et seq.*, Revised Code, must be paid in order to convey title to the state free and clear of all liens and encumbrances, and said assessments may, therefore, upon proper order, be paid from the proceeds of such action.

5. When taxes for a particular year are due from the condemnee in an action brought pursuant to Section 5519.01, *et seq.*, Revised Code, and said taxes are not determined at the time of the filing of the journal entry on the verdict, the clerk of courts may, if ordered by the court, withhold from the funds deposited with the court in said action an amount determined to be the approximate amount of said taxes which amount may, upon the determination of said taxes, be paid to the treasurer of the county.

Columbus, Ohio, June 15, 1962

Hon. Geo. Cleveland Smythe, Prosecuting Attorney
Delaware County, Delaware, Ohio

Dear Sir:

I have your request for my opinion which reads as follows:

“When the Director of Highways files an appropriation action under Section 5519.01, R.C., *et seq.* in which the entire property is taken what procedure should be followed relative to the collection and payment of real estate taxes on said premises?

“If the action is filed after Jan. 1, 1962, should the taxes be paid for the entire year 1962?

“For said purpose when does the title to the real estate pass?

“Is the County Treasurer either a necessary or proper party defendant to such an action? Does the County Treasurer have a duty, or can he file a motion, to be made a party for the purpose of collecting the taxes legally due?

“Does the same rule apply relative to special assessments that are a lien but not yet payable?”

“If the taxes for the tax year 1962 are not determined at time of the award should part of the fund be held by the Clerk until the amount is determined?”

“In an attempt to answer the above questions the following authorities have been examined :

“19 Ohio Jur., 2nd, paragraph 120, under Eminent Domain.

“Cincinnati vs. Jones, 24 C.C.N.S., 374.

“Orgel—Vol. 1, Sec. 116.

“10 Ohio State Law Journal, 17.”

19 Ohio Jurisprudence 2d., page 537, Eminent Domain, Section 120, referred to in your request, reads as follows :

“Since the condemnor acquires title free from all liens and encumbrances, and these must be paid, the property owner is entitled only to the amount remaining after all liens and encumbrances, including taxes, have been removed.”

The foregoing statement is supported by *Muskingum Watershed Conservancy District v. A. A. Frautschy, et al.*, 4 Ohio Opinions, 394, and *Swetland v. Curry*, 45 Ohio Opinions, 178; and said statement appears to be the basis upon which distribution of the proceeds of any condemnation action are made. *Boyle v. Middleburgh Realty Co.*, 75 Ohio App., 368.

A statutory lien for real estate taxes is established on the first day of January of each tax year in accordance with Section 5719.01, Revised Code, which reads, in part, as follows :

“The lien of the state for taxes levied for all purposes on the real and public utility tax list and duplicate for the year 1954 and each year thereafter shall attach to all real property subject to such taxes on the first day of January, annually, and continue until such taxes and any penalties, interest, or other charges accruing thereon are paid, * * *.

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In the case of *Walsh-McGuire Co. v. Commissioner of Internal Revenue*, 97 Fed. 2nd., 983 (1938), the United States Circuit Court of Appeals for the Sixth Circuit had occasion to construe Section 5671, General Code, which contained provisions analogous to those now found in Section

5719.01, Revised Code, quoted above. As to such provisions, the court said, beginning at page 984 of the *Walsh-McGuire* case, *supra* :

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“The Ohio decisions construing the statutes which govern this question hold that the amount of the assessment, when ascertained, relates back to the date of incidence, and hence in legal contemplation both the liability and the amount of the tax are determined here as of April 12, 1931. In *Long v. Moler*, 5 Ohio St., 271, the court, considering a similar enactment in which the date of incidence was March 1, stated that the purpose of the statute was definitely to determine who was bound to pay the taxes of the current year, and declared that the fact that the amount of such taxes was not, at the date of the declared lien, ascertained, and could not at that date be paid, could not operate to avoid a lien fixed by express enactment. Section 5671, General Code of Ohio, does not require that all legal steps prerequisite to the ascertainment of the amount of the tax be taken before the second Monday in April. The legislature contemplated the computing of amounts after the date of incidence, and the assessment, when ascertained, then relates back to the time at which the tax becomes a lien. *State, ex rel. Donahey, Aud., v. Roose*, 90 Ohio St. 345, 107 N.E. 760.

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In support of the above quoted statement, in addition to the cases cited therein, your attention is directed to *H. T. Loomis, Trustee, v. George B. Von Phul, et al.*, 2 N.P. (NS), 423 (1894).

In accordance with the foregoing, it must naturally follow that when land is taken by the state pursuant to Section 5519.01, Revised Code, after January 1, 1962, the taxes for the year 1962, being a lien thereon, must be paid by the condemnee.

As to the question of the passing of title for taxation purposes, it should be noted that in the majority of cases filed under Section 5519.01, *et seq.*, Revised Code, the interest appropriated is an easement rather than a fee simple.

The relation of time of passing of title to condemned realty, to the time of accrual of the real estate tax, is usually the criterion in determining rights in respect to real estate taxes. 45 A.L.R. 2d., 543, Section 11, 45 A.L.R. 2d., 565, Section 24.

It can be argued with considerable logic that title passes when the director takes possession of the property. Chapter 5519, Revised Code, is described by some as providing for an administrative type of eminent domain, as distinguished from a judicial or quasi judicial type. The director enters a finding upon the journal of the department of highways that it is necessary for the public convenience and welfare to appropriate property which he deems needed for highway purposes. In such finding the director fixes the amount he deems to be the value of the property rights appropriated, and the finding is filed in court along with a money deposit of such value determined. Thereupon, the director may take possession of and enter upon said property (Section 5519.01, Revised Code). Further, Section 5519.03, Revised Code, provides that upon compliance with certain procedures, for the purpose of preserving evidence, the director can require the owner or occupant of a structure situated upon such land to "vacate the same within sixty days after service of notice as required under the provisions of Section 5519.01, Revised Code."

It will be seen that the legislature has very carefully set forth provisions relating to the taking of possession by the director. Further, if the director has changed or occupied the property he may not abandon the proceedings within thirty days from the final determination of the cause as provided in Section 5519.01, Revised Code (Section 5519.02, Revised Code).

It is well established that a landowner is entitled to the fair market value of his property at the time it is acquired for public purposes. 19 Ohio Jurisprudence 2d., 535, Section 118. In an appropriation case, all appraisal testimony is related to the value of the property on what is sometimes referred to as "the date of take." I have taken notice that it is the practice of many of the trial courts usually to accept such date as being the date the director elected to take possession.

It is true that possession is a species of title. *McNelly v. Langan*, 22 Ohio St., 32 (1871). However, it is only one of the "bundle of sticks" which comprise title. Possession cannot be equated with title. The transfer of real estate has always been attended with formality. A deed is one of the most formal instruments known to law.

As between the parties themselves it cannot be doubted that certain attributes of title have attached when the director takes possession. The resolution and finding do not, however, convey title, 19 Ohio Jurispru-

dence 2d., 477, Section 66; and regardless of the importance of the date of possession in an appropriation case, both by statute and in practice, the fact remains that there is no provision whereby the date of possession is entitled to record. Liability for taxes accrues against land as it is listed in the names of the parties of record as of tax lien date. *Creps v. Baird*, 3 Ohio St., 278 (1858), *Shannon v. Dresback*, 30 N.P. (NS), 301 (1933). As the legislature has provided for only one means by which land appropriated under Chapter 5519, Revised Code, can be made a matter of record, and that is the journal entry on verdict, and as a court speaks only through its journal, it is my conclusion that legal title does not pass until the journalization of the journal entry on verdict.

In reference to the third part of your request, the appropriation case of *Cincinnati v. Jones*, 24 C.C. (NS), 374 (1915), Court of Appeals of Hamilton County, reads, at page 379, as follows:

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“As to the point that the county treasurer was not made a party to the proceedings until after the money was paid over, we are of the opinion that it was not necessary that the county treasurer should have been made a party at any stage in the proceedings. He was simply the ministerial agent of the state to receive the taxes, and it was the duty of the court to see that the state taxes were paid out of the proceeds on distribution, and the lien for taxes is not divested by condemnation proceedings. * * *

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As the lien for taxes is not divested by the appropriation proceeding, and the lien transfers to the fund, the county treasurer is not a necessary party in the proceeding. That is not to say, however, that it would be improper to join the county treasurer in the action, for by virtue of the tax lien, he has an interest. It has been the practice in highway appropriation cases to name the county treasurer and to serve a notice upon him in accordance with the provisions of Section 5519.01, Revised Code, and it is my opinion that this is the better practice.

In answer to the fourth part of your inquiry, your attention is called to *Boyle, et al. v. The Middleburgh Realty Co.*, 75 Ohio App., 368, the second paragraph of the headnotes of which reads as follows:

“2.

“Where a part of a tract of land is acquired by a public authority by condemnation, the court is neither authorized, under

Section 2595, General Code, nor has general equity power, to apportion installments of special assessments to become due in the future between the land appropriated and the residue. In such a case it is the duty of the court to either make the advance payments, as provided in Section 5677, General Code, or to set aside a sufficient sum to pay, from the compensation fund, any special assessment liens payable in the future, before making any payments from such fund to the landowner."

In arriving at the above conclusion, the court in the *Boyle* case, *supra*, said, beginning at page 372 :

"The trial court ordered paid to the treasurer of Brook Park village \$1,879.87 on the special assessments for the construction of the water line in Brook Park road and further ordered that 'the sum of \$14,035.95 of said award shall be retained in the hands of this court, until further order, to provide for that portion of the special assessments levied by the village of Brook Park on parcel Nos. 1, 2, and 3, for a main outlet storm sewer, now in litigation, hereby allocated to that part of parcels Nos. 1, 2, and 3 included in said highway easement * * *.'

"After the payment of the amounts ordered by the Common Pleas Court to be paid to the county and village treasurers, there remained \$11,943.48 which the court ordered to be paid to the Middleburgh Realty Co.

"It is obvious that no distinction can be drawn between the portion of the special assessments which have accrued and are unpaid and delinquent general taxes. The same reasons which cause us to deny apportionment in the case of liens of general taxes, apply with equal force to accrued special assessments. The question then remains whether a court in distributing the funds received in a condemnation proceeding for a portion of a tract of land bearing special assessments may apportion the assessments payable in the future between the land appropriated and the residue.

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The court concluded in the *Boyle* case, *supra*, beginning at page 374 thereof with the following statement :

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"* * * The installments of the special assessments to become due in the future are as truly liens on the benefited property as are delinquent taxes or assessments. Therefore, when a part of the property bearing special assessments is acquired by a public authority, it becomes the duty of the court in distributing money

paid into court by way of compensation to pay not only the special-assessment liens already accrued but also to pay, as provided in Section 5677, General Code, or to set aside a sufficient sum to pay, the assessment liens to become due in the future before making any payments from the fund to the landowner. See *Scully v. City of Cincinnati*, 9 C.C. (NS), 63, 19 C.D., 713.

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The headnote in the case of *Scully v. City of Cincinnati*, 9 C.C. (NS), 63, cited by the court in the *Boyle* case, *supra*, reads as follows:

“The lien of a street assessment against property appropriated by the city for park purposes is merged in the higher title of the fee thereby acquired, and the city is entitled to retain the present value of assessments remaining unpaid from the amount assessed as compensation to the land owners.”

In accordance with the foregoing, and considering the general proposition stated earlier herein that the condemnor acquires title free and clear of all liens and encumbrances, I am of the opinion that special assessments against real estate existing on the date that the final journal entry is entered in an appropriation action brought pursuant to Section 5519.01, *et seq.*, Revised Code, are then a lien though not yet payable. Said assessments must be paid by the condemnee from the proceeds received in said action and the court may lawfully order said assessments to be taken from the funds paid into the court in said action.

Coming now to the final question in your request as to the ability of the clerk to hold an amount for the undetermined 1962 taxes, I find no specific statutory authority which would permit the clerk of courts on his own motion or of his own volition to hold any amount of money for such purpose. However, the clerk of courts has authority to perform his duties in accordance with the direction of the court. Section 2303.27, Revised Code, and the court of common pleas has the authority to order the distribution of funds deposited with it. 25 Ohio Jurisprudence 2d., 603, Sections 2 and 4. Accordingly, the clerk of courts could hold an amount for said taxes from the funds on deposit with the court if a court order so provided. In this regard, your attention is called to *Muskingum Watershed Conservancy District v. A. A. Frautschy, et al.* 4 Ohio Opinions, 394, wherein the court said, beginning on page 395 of said decision:

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“If the Muskingum Watershed Conservancy District desires to appropriate land free and clear of the claim of the state

of Ohio for taxes, it should include in its entry submitted to the court for confirmation of the verdict a finding to the effect that 'the defendants are the owners of the property described in the petition subject to the claims of the state for taxes which have become a lien', and specify the amount due; or if not finally determined, the approximate amount, so that the court may order a sufficient amount impounded to finally pay the amount of taxes when determined that are a lien.

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Accordingly, I am of the opinion that the clerk may, pursuant to an order of the court, withhold a sufficient amount to pay the real estate taxes for 1962 which are a lien at the time of the journalizing of the final journal entry in an action brought pursuant to Section 5519.01, *et seq.*, Revised Code.

In summary, I am of the opinion and you are advised:

1. In an appropriation action for highway purposes pursuant to Section 5519.01, *et seq.*, Revised Code, title to the property acquired passes to the state upon the journalization of the verdict.

2. Under Section 5719.01, Revised Code, the lien of the state for taxes on real estate for a particular year attaches on the first day of January of that year, and in a condemnation action filed under Section 5519.01, *et seq.*, Revised Code, in which the verdict is journalized after January 1, 1962, the condemnee is obligated to pay the taxes for the entire year of 1962.

3. In an action filed under Section 5519.01, *et seq.*, Revised Code, the county treasurer is a proper though not a necessary party to the proceedings.

4. Special assessments that are a lien but not yet payable against property which is the subject of a condemnation action brought under Section 5519.01, *et seq.*, Revised Code, must be paid in order to convey title to the state free and clear of all liens and encumbrances, and said assessments may, therefore, upon proper order, be paid from the proceeds of such action.

5. When taxes for a particular year are due from the condemnee in an action brought pursuant to Section 5519.01, *et seq.*, Revised Code, and said taxes are not determined at the time of the filing of the journal entry on the verdict, the clerk of courts may, if ordered by the court,

withhold from the funds deposited with the court in said action an amount determined to be the approximate amount of said taxes which amount may, upon the determination of said taxes, be paid to the treasurer of the county.

Respectfully,

MARK MCELROY

Attorney General