

OPINIONS

September 11, 1933.

OPINION NO. 1598

TAXATION, GENERALLY; TAX
LIEN, FORECLOSURE OF.

Real property, or improvements on land validly assessed separately may be sold at a tax sale by way of foreclosure of a tax lien thereon for less than the full amount of all taxes, penalties, interest and other charges due thereon.

SAME; SAME.

Upon tax sale by way of foreclosure of tax lien, the lien is ordinarily extinguished, notwithstanding that the sale may be for less than the full amount of taxes, penalties, interest and other charges due.

Campbell Crozier, Esq.,
Deputy Tax Commissioner.
Assessing Department,
Honolulu, T.H.

Sir:

In your letter of August 31, 1933, you ask the following three questions:

“(a) Whether a tax sale of real property would be in order where the proceeds of said sale would not be sufficient to cover the amount of taxes due; and

“(b) Whether a tax sale of improvements real property would be in order where the proceeds of said sale would not be sufficient to cover the amount of taxes due; and if said sales are in order

“(c) Would the Territory continue to have a tax lien on the aforesaid property for the balance of the taxes remaining unpaid.”

After a careful and thorough consideration of these questions this office has come to the following conclusions:

In answer to question (a) it is well to point out that there are two phases to this question: one where the tax lien came into being under the provisions of Chapter 102 of the Revised Laws of Hawaii 1925, particularly Section 1372, in which event the controlling provisions of law are said Section 1372, as amended, and Section 1373 of said Revised Laws, as amended, which sections are continued in force under Section 75 of Act 40 of the Second Special Session Laws, 1932, as to such pre-existing liens; and the other where the tax lien came into being under Act 40, Second Special Session Laws, 1932, in which event it is controlled by the provisions of Sections 65 and 66 of said Act. A comparison, however, of said laws will reveal, in so far as this question is concerned, that the language of Sections 1372 and 1373, Revised Laws 1925, and Sections 65 and 66 of said Act 40, is substantially identical, and we may therefore assume that what would follow under the former would also be true under the latter, and vice versa.

It is stated in Cooley on Taxation, 4th Ed., VOL 3, Sec. 1426, pp. 2825-2826, that

“It is not infrequently provided by statute that sale shall not be made for less than is sufficient to pay all taxes, costs, etc., that may be due against the land. Such a requirement must, of course, be followed, or the sale will be invalid.”

This may have been the basis for the oral advice which appears to have been given heretofore by a former member of this office to the effect that upon a sale of real property without suit, by way of foreclosure of a tax lien, there must be bid at least the full amount of the taxes due plus penalties, interest, expenses and all other charges due. However, a study of the decisions cited in support of this statement in Cooley indicates that the

statutes under which the particular rulings have been made are clearly distinguishable from the territorial provisions above referred to. They are not therefore controlling of the present question.

Considering, now, Sections 65 and 66 of said Act 40, which, as we have seen, are substantially identical with the former Sections 1372 and 1373, Revised Laws 1925, in so far as this question is concerned, we find the following language:

Section 65 provides in part that

“ * * * every tax due upon real property shall be a paramount lien upon the property assessed. * * * Upon enforcement or foreclosure in any manner whatsoever, of any lien, all taxes, of whatsoever nature and howsoever accruing due at the time of the foreclosure sale from the taxpayer against whose property such tax lien is so enforced or foreclosed as aforesaid shall be satisfied *as far as possible* out of the proceeds of such sale remaining after payment of the costs and expenses of such enforcement and foreclosure.”

Section 66 provides in part that,

“All real property on which a lien for taxes shall exist may be sold by way of foreclosure of such lien without suit by the tax collector, and in case any such lien, or any part thereof, has existed thereon for three years, shall be sold by the tax collector, at public auction to the highest bidder, *for cash, to satisfy the lien, together with all interest, penalties, costs and expenses due or incurred on account of the tax, lien and sale*, the surplus, if any, to be rendered to the person thereto entitled.”

It is our opinion that in view of: (1) the use of the words “as far as possible,” underlined in the foregoing quotation from Section 65; (2) the fact that in said Section 66 it is not specifically provided that not less than the full amount of all taxes, interest, penalties, costs and expenses must be bid and paid for the property on foreclosure of tax liens; (3) the fact that under said Act 40 (as well as under the former Chapter 102, Revised Laws 1925) property taxes are and were made personal obligations of the owners of the property, as well as constitu-

ting liens upon the real property involved; (4) the further fact that the tax liens are limited in time to six years, after which they expire in any event, whether or not any portion thereof has been paid; and (5) the fact that the Territory does not (like most, if not all, of the jurisdictions which require the full amount of all taxes, interest, penalties, charges and expenses due upon the particular property to be paid at a tax sale of such property) have power under its statutes to buy in or forfeit the property and thereafter dispose of the same; that real property maybe sold by the proper tax officers by way of foreclosure of a tax lien thereon for a sum less than the full amount of all the taxes, interest, penalties and other charges and expenses due on account of such property, *provided*, that the sale has been fairly and properly conducted so that there can be no question of any irregularity therein or failure on the part of the tax officers to perform their duty to the full extent in attempting to secure, pursuant to law, a price for the property at least sufficient to cover all such taxes, etc. It must be remembered that property was required to be assessed at its *full cash value* under the former law, and at its *fair and reasonable value* under said Act 40, and that the property taxes usually are only a small percentage of that value—as a rule not running much higher than four per cent per year—so that in the overwhelming number of cases it ought to be possible to secure adequate bids on such property to cover all such taxes, penalties, interest, etc. It would seem, therefore, that only in rare instances where there is no doubt that there exist adequate circumstances to account for the failure to secure a sufficient bid to cover all such taxes, etc., should the tax officers consummate such a sale. On the other hand, inasmuch as the entire lien would be lost in any event within six years, if not foreclosed, it would seem that if no bidder can reasonably be secured, the Territory should not be foreclosed from the right to collect *some* of the back taxes, by a technical

construction of the law forbidding any tax sale for less than the full amount due.

Your first question therefore is answered in the affirmative with the qualification hereinabove last stated.

Question (b) is probably based more upon liens created under preexisting law (Section 1372, R. L. 1925) than upon the present provisions of said Act 40, but, be that as it may, it is the opinion of this office that the same rule set forth with respect to question (a) would apply with equal, if not greater, force to question (b). Said question, therefore, is answered in the affirmative also with the qualification hereinabove set forth with respect to question (a).

In answer to question (c), it is the opinion of this office that once the property has been sold by way of foreclosure of the tax lien, notwithstanding the fact that all of the taxes due upon the property may not have been satisfied, the lien is extinguished, at least in so far as concerns persons other than the persons to whom were assessed the taxes secured by such lien. As to the last mentioned persons, a different question might arise if the property were sold for less than the full amount of the taxes and other amounts due in connection therewith and such persons redeemed the property within the statutory period. This phase of the question, however, it is believed, need not be answered at this time, but, should it arise hereafter, this office will be glad at that time to consider the same.

I trust that the foregoing sufficiently answers your questions,

Respectfully,

C. NILS TAVARES.
First Deputy Attorney General.

APPROVED:

H. R. HEWITT,
Attorney General,