



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

December 28, 1988

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751

ATTORNEY GENERAL OPINION NO. 88-175

Ms. Constance M. Achterberg
Saline County Counselor
118 S. 7th Street
P.O. Box 1697
Salina, Kansas 67402

Mr. Joseph O'Sullivan
Reno County Counselor
315 W. 1st St.
P.O. Box 2066
Hutchinson, Kansas 67504

Re: Taxation -- Judicial Foreclosure and Sale of Real Estate by County -- Order of Sale; Deed, Execution and Recordation; Tax Liens

Synopsis: K.S.A. 79-2804 gives fee simple title to purchasers at tax foreclosure sales subject only to valid covenants running with the land, valid easements of record, and taxes and interest that have become a lien on the property subsequent to the date upon which the judgement was rendered. Taxes do not become due and current until November 1 of the year. At that time those taxes become a lien upon the property. If the tax foreclosure judgment is rendered before the attachment of a tax lien, a purchaser takes subject to that lien. To the extent that Attorney General Opinion No. 77-167 conflicts with conclusions contained herein, it is hereby withdrawn. Cited herein: K.S.A. 79-1804; K.S.A. 1987 Supp. 79-2004; K.S.A. 79-2804; L. 1945, ch. 362, § 4.

* * *

Dear Ms. Achterberg and Mr. O'Sullivan:

As county counselors for the counties of Saline and Reno, you request our opinion concerning K.S.A. 79-2804. You specifically inquire whether it is proper to charge the purchasers of real property at a tax foreclosure sale the taxes that have become a lien upon the real property during the year of the sale, but subsequent to the time judgment was rendered. You believe this may occur if the foreclosure judgment is entered before November 1 of the year. You both disagree with certain conclusions contained in Attorney General Opinion No. 77-167 and ask that we review and reassess that opinion.

K.S.A. 79-2804 states in pertinent part:

"[W]hen said deed is filed for record in the office of the register of deeds of the county where such real estate is situated it shall vest in the purchaser or grantee therein named, as against all persons, including, but not limited to, corporations and municipal corporations, parties to such proceedings, a fee simple title thereto, subject only to valid covenants running with the land and valid easement of record in use and subject to taxes and interest which have become a lien thereon, subsequent to the date upon which such judgment was rendered, and said deed shall be prima facie evidence of the regularity of all proceedings prior to the date of filing the same for record as aforesaid. . . ." (Emphasis added).

Thus, the statute clearly contemplates that the fee simple title vested in the purchaser may be subject to taxes and interest which have become a lien thereon subsequent to the time judgment is rendered in the tax foreclosure proceeding.

Attorney General Opinion No. 77-167 states:

"The purchaser at a tax sale is entitled to a deed conveying a clear title good against the world. Any unpaid current taxes and interest thereon, which have accrued between the time the action in foreclosure was begun and the time the cause was ripe for judgment, should be

computed and included in the amount of judgment in rem." (Emphasis added).

The opinion goes on to state that because the lien relates back to and is on property owned as of January 1st of the year, these taxes are currently owed before November 1st. The opinion therefore approved a procedure whereby the district court includes in the tax foreclosure judgment the amount of taxes owed for the entire year, even if the judgment is rendered before November 1. We do not believe that K.S.A. 79-2804 dictates such a procedure.

Opinion No. 77-167 relied upon Shawnee County Commissioners v. Abbott, 155 Kan. 154 (1942), which stated:

"This court holds that the unpaid current taxes and interest thereon which accrued between the time the action in foreclosure was begun and the time the cause was ripe for judgment should be included in the amount of judgment in rem rendered in favor of plaintiff. So that this may be done this cause is remanded to the district court with instructions to modify its judgment in accordance with the views herein expressed." Id. at 158, 159.
(Emphasis added).

The facts in Abbott concerned a judicial foreclosure sale commenced after the 1941 taxes became due and payable (November 10, 1941). The county contended that all of the current taxes for 1941 had accrued and were therefore in default, while the taxpayer claimed a right to pay the 1941 current tax in December of 1941 and the second half in June of 1942. The court stated that from the first day of November the current taxes assessed became a lien on real property, and that taxes currently due and owing at the time of the judgment should therefore be included in the judgment. Id. at 159. We concur with this conclusion. We do not agree with the language in Attorney General Opinion No. 77-167 stating that, for tax foreclosure purposes, taxes owed for the year are "currently owed" before November 1, nor does a close reading of Abbott support such a conclusion.

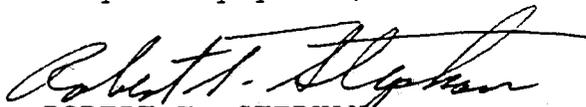
A companion case to Abbott reiterated that K.S.A. 79-2804 judgments should include all current taxes owed on the property. See Wyandotte County Commissioners v. Adams, 155 Kan. 160 (1942). Relying upon the intent of K.S.A. 79-2801 and K.S.A. 79-2804 to convey fee simple, the Adams

court stated that there was a "legislative purpose to extinguish all liens and pass a clear and unencumbered title to the purchaser." Id. at 164. Both 1942 cases clearly require the foreclosure judgment to include current taxes. However, neither case mandates the inclusion of taxes that become due and owing subsequent to the rendering of the judgment.

After these 1942 cases, legislative purpose was clarified by amendment to K.S.A. 79-2804 which now clearly states that the purchaser takes subject to "taxes and interest which have become a lien thereon, subsequent to the date upon which such judgement was rendered." See L. 1945, ch. 362, sec. 4. Thus, K.S.A. 79-2804 clearly allows the fee title transferred to a purchaser to be subject to tax liens that attach subsequent to the date of the judgment.

K.S.A. 79-1804 provides that a tax does not become due and owing until November 1 of the year and, therefore, it is not a lien upon the property until that November 1st date. It is therefore our opinion that K.S.A. 79-2804 does not mandate the inclusion in the judgment of taxes which have not as yet become current. If a tax lien attaches subsequent to the tax foreclosure judgment, K.S.A. 79-2804 clearly contemplates the purchaser taking title subject to such subsequent tax liens. To the extent that Attorney General Opinion No. 77-167 conflicts, it is hereby withdrawn.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Theresa Marcel Nuckolls
Assistant Attorney General