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FORECLOSURE — WHERE HOLDER, MORTGAGE ON REAL PROPERTY, BUYS PROPERTY AT FORECLOSURE SALE — SHERIFF, UNDER SECTION 2845 G. C. ENTITLED TO CHARGE POUNDAGE ON MONEYS PAID TO HIM, LESS DISTRIBUTIVE SHARE OF SUCH PURCHASER.

SYLLABUS:

*If a holder of a mortgage on real property buys such property at foreclosure sale, the sheriff under authority of Section 2845, General Code, is entitled to charge poundage on all moneys actually made and paid to him less the distributive share of such purchaser by reason of his mortgage.*

Columbus, Ohio, July 5, 1940.

Hon. Paul D. Michel, Prosecuting Attorney,  
Marion, Ohio.

Dear Sir:

This will acknowledge receipt of your request for my opinion which is as follows:

“1. ‘A’, a mortgagee has a first mortgage on land belonging to ‘X’ for \$2000.00 and brings a foreclosure suit against ‘X’,

causing the same to be sold by the Sheriff on execution. 'A' buys the property for \$2000.00 and pays to the Sheriff the sum of \$2000.00, and the Sheriff deducts the court costs and taxes and pays back to 'A' the balance.

The question: To what poundage is the Sheriff entitled?

2. 'A' has a first mortgage on land belonging to 'X' for \$2000.00. 'B' has a second mortgage on the same land for \$1000.00. The property is foreclosed and the Sheriff sells the same on execution to 'B' for \$2,800.00. 'B' pays the Sheriff \$2800.00, and the Sheriff pays the taxes and court costs, the first mortgage, and returns the balance to 'B.'

The question: To what poundage is the Sheriff entitled?"

The right of the sheriff to charge poundage is regulated by Section 2845, General Code, which reads in part as follows:

"For the services hereinafter specified when rendered the sheriff shall charge the following fees, and no more, which the court or clerk thereof shall tax in the bill of costs against the judgment debtor or those legally liable therefor: \* \* \* poundage on all moneys actually made and paid to the sheriff on execution, decree or sale of real estate, on the first ten thousand dollars, one per cent.; on all sums over ten thousand dollars, one-half of one per cent, but when such real estate is bid off and purchased by a party entitled to a part of the proceeds, the sheriff shall not be entitled to any poundage except on the amount over and above the claim of such party, except in writs of sale in partition he shall receive one per cent. on the first two thousand dollars, and one-third of one per cent. on all above that amount coming into his hands; \* \* \*"

In the first situation you have presented, the property was purchased at foreclosure sale by the holder of the first mortgage. He being "a party entitled to a part of the proceeds," there was no amount over and above his claim, for his bid was insufficient to pay costs, taxes and his judgment. Hence, no poundage should be charged by the sheriff. In the case of Childs v. Perry, 16 O. C. D., 543, the second branch of the syllabus reads:

"A sheriff is not entitled to poundage on sheriffs sale under mortgage foreclosure proceedings where the property is bid in by plaintiff for less than the amount of her mortgage lien and where the purchase price is paid for in such lien in part."

See also Major v. Coal Co., 76 O. S., 200.

A somewhat more difficult problem is presented in your second ques-

tion. Here the second mortgagee was the successful bidder. The purchase price paid to the sheriff fully satisfied the first mortgage and partially satisfied the second. The exact situation was considered by the Court of Appeals for Lucas County in *Northwestern Lumber Co. v. Remusat*, 33 O. App., 183. The syllabus in this case reads:

“Where, at the sheriff’s sale in foreclosure proceedings, the real estate is purchased by holder of second mortgage and the amount realized from the sale is not in excess of sum necessary to satisfy second mortgage and liens prior thereto, but is sufficient to satisfy prior liens and a part of second mortgage debt, sheriff is not entitled to poundage under Section 2845, General Code.”

A former Attorney General in considering this case, as shown in 1929 Opinions of the Attorney General, page 965, said:

“The decision of the Court of Appeals in the case just cited, if correct, is dispositive of the question presented on the facts stated in your communication and in the letter of the sheriff accompanying the same, for the reason that although the proceeds of the sale of the property in this case were more than sufficient to pay the costs, taxes and the claim of the first mortgage holder, they were not sufficient to satisfy the claim of the second mortgage holder which bid in and purchased said property. Upon mature consideration of this question I am of the opinion that the conclusion reached by the Court of Appeals in the case above cited, cannot be supported on any possible construction of the provisions of Section 2845, General Code, above quoted.

“Moreover, in my view of this statute, it is not the amount of the purchaser’s claim set up in its cross petition and found by the court to be due it, which is to be deducted from the proceeds of the sale for the purpose of determining the amount of money upon which the sheriff’s poundage is to be computed, but in such case the amount to be deducted for said purpose is the money which such purchaser is entitled to be paid on distribution of the proceeds of the sale.”

After a careful consideration of Section 2845, *supra*, I am inclined to agree with my predecessor. The purchaser, by reason of his second mortgage, is entitled on distribution to a part of the proceeds. Therefore, the sheriff is not entitled to any poundage “except on the amount over and above the claim of such party.” The phrase “over and above”, as here used, must be regarded as meaning beyond, in excess of and outside of. Hence, the portion of the purchase price paid to judgment creditors, other than the purchaser, is over and above or outside of the claim of the purchaser and sub-

ject to poundage. Indicating this same conclusion in *Major v. Coal Co.*, 76 O. S., 200, after referring to part of Section 1230, Revised Statutes, now that part of Section 2845, General Code, heretofore quoted, it was said:

“Obviously, it was the plain purpose and intent of the legislature to thereby provide, that upon sales of real estate, poundage should be allowed to the sheriff, only upon moneys actually made and paid to him, and that in no case should poundage be allowed to, or charged by the sheriff, when the real estate sold by him is bid off and purchased by a party entitled to a part of the proceeds, *except on the amount over and above the claim of such party.*”  
(Emphasis mine.)

The same conclusion is indicated in the case of *The City of St. Ignace*, 19 Fed. 2d, 952, wherein Judge Jones remarked:

“In Ohio the sheriff is not allowed poundage on such part of the sale money as is extinguished by the distributive share of the purchase mortgage or lienor.”

Since the purchaser's claim was only partially satisfied, he is entitled to an abatement of poundage only to the extent he has been reimbursed by the sheriff.

In specific answer to your questions, it is my opinion that if a holder of a mortgage on real property buys such property at foreclosure sale, the sheriff, under authority of Section 2845, General Code, is entitled to charge poundage on all moneys actually made and paid to him less the distributive share of such purchaser by reason of his mortgage.

Respectfully,

THOMAS J. HERBERT,  
Attorney General.