

As a part of the files relating to the purchase of the above described tract of land, you have submitted to me by letter under date of January 15, 1936, corrected contract encumbrance record No. 8. This contract encumbrance record has been properly executed and the same shows an unencumbered balance in the appropriation account to the credit of your department under Item G-1 Lands, to pay the purchase price of this property, which purchase price is the sum of \$3,600.00. It appears further in this connection from a recital contained in said contract encumbrance record, as well as from the certificate of the Controlling Board which you have submitted, that the purchase of this property has been approved by the Controlling Board and that said Board has released from the appropriation account the money necessary to pay the purchase price of this property.

I am accordingly approving the title of Edward J. Smith in and to the above described property subject only to the exceptions above noted with respect to the undetermined taxes on the property for the year 1935 and to that noted with respect to the easement of the Lancaster Traction and Power Company on that part of the above described land which lies within the right of way of said company. The corrected abstract of title, warranty deed, contract encumbrance record and other files submitted to me relating to the purchase of this property are likewise approved by me, and all of said files are herewith returned to you to the end that a proper voucher covering the purchase price of this property may be prepared by your department and submitted with these files to the Auditor of State for warrant.

Respectfully,

JOHN W. BRICKER,  
*Attorney General.*

5103.

FORECLOSURE SALE—SHERIFF MUST PAY ALL DELINQUENT TAXES, ETC., FROM PROCEEDS, WHEN—RIGHTS OF MORTGAGEE WHO PURCHASES REAL ESTATE DISCUSSED.

*SYLLABUS:*

1. *When real estate is sold in a mortgage foreclosure action, the sheriff must pay from the proceeds of such sale all taxes, penalties, assessments then due, and interest thereon, which are a lien on the real estate sold, at the time of the sale.*

2. *A mortgagee who purchases real estate at a mortgage foreclosure sale, may not under the provisions of Senate Bill No. 359, of the 91st General Assembly, elect to pay one-tenth of the delinquent taxes and assessments on such real estate.*

COLUMBUS, OHIO, January 16, 1936.

HON. DONALD J. HOSKINS, *Prosecuting Attorney, Columbus, Ohio.*

DEAR SIR: This will acknowledge receipt of your recent communication, which reads as follows:

"We respectfully request your written opinion on the following questions which have arisen in connection with the provisions of Senate Bill 359, recently enacted at the special session of the 91st General Assembly, or the so-called Whittemore Act.

(1) May a sheriff, in distributing the proceeds of a sale in a mortgage foreclosure case pay to the County Treasurer only the amount of the taxes and special assessments for the current year, together with one-tenth (1/10) of the delinquent taxes and special assessments by virtue of the provisions of Senate Bill No. 359; or, in other words, may the sheriff only pay to the Treasurer in distributing the proceeds of a sale in foreclosure the first installment due under the so-called Whittemore Act?

(2) In the event that the purchaser at the sheriff's sale in a mortgage foreclosure case is the mortgagee, may the purchaser take advantage of the said Whittemore Act and pay to the Treasurer only the current taxes and assessments and one-tenth (1/10) of the delinquent taxes and assessments?"

Section 5671 of the General Code reads in part as follows:

"The lien of the state for taxes levied for all purposes, in each year, shall attach to all real property subject to such taxes on the day preceding the second Monday of April, annually, and continue until such taxes, with any penalties accruing thereon, are paid."

Section 5692 of the General Code, as amended in 116 O. L., page 386, reads, in so far as is pertinent to your inquiry:

"When land \* \* \* or real estate is sold at judicial sale \* \* \*, the court shall order the taxes, penalties, assessments then due, and interest thereon which are a lien on such land or real estate at the time of the sale, be discharged out of the proceeds of such sale. \* \* \*"

Senate Bill No. 359 of the 91st General Assembly, which provides for the payment of delinquent real estate taxes, less penalties and interest, reads in part as follows:

### Section 1.

"Any person, firm or corporation charged with or legally authorized or required by law or decree of court to pay real property taxes and assessments which have become delinquent at or prior to the August or September settlement in the year 1935, or any person, firm or corporation holding a lien upon such real property may at any time prior to the thirty-first day of December in the year 1936 elect to pay the principal sum of such delinquent taxes and assessments as provided in this act, anything in the permanent statutes of this state relating to the payment of real property taxes, assessments, penalties and interest thereon to the contrary notwithstanding. \* \* \*"

### Section 2.

"If, within the time mentioned in section one of this act, such person tenders to the county treasurer a sum equal to one hundred per centum of the principal sum of such taxes and assessments, so delinquent, less penalties, interest and other charges (including interest charges under a prior undertaking entered into pursuant to this act), the county treasurer shall accept and receive such amount in full payment of all such taxes, assessments, penalties, interest and other charges."

### Section 3.

"Any such person being the owner of such real property may at such times, in lieu of making a tender as authorized by section 2 of this act, enter into a written undertaking in such form as shall be prescribed by the bureau of inspection and supervision of public offices, to pay the full principal amount of such taxes and assessments, so delinquent, less penalties, interest and other charges, in six annual installments payable at the time prescribed by law for the payment of the second half of current real property taxes and assessments, with interest at the rate of four per centum per annum, payable annually, from the date of such undertaking. The first five said annual installments shall be for ten per centum each of the full original principal amount plus interest as hereinbefore prescribed and the next annual payment shall be for the balance of said principal amount plus interest as hereinbefore prescribed."

Under the terms of Section 5671, supra, the state lien for taxes attaches as soon as such taxes are assessed. In the case of *The Securities Trust Company vs. Root*, 72 O. S., 535, the court in construing the

language of the above section, held that the lien of the state for taxes was paramount to other liens upon the property.

While Senate Bill No. 359, *supra*, provides that delinquent taxes, less penalties and interest, may be paid in installments, anything in the permanent statutes relating to the payment of real property taxes to the contrary notwithstanding, yet it can hardly be contended that Section 5692, *supra*, is a statute relating to the payment of taxes. In other words, Senate Bill No. 359 provides for exceptions to those permanent statutes relating to the payment of taxes, and does not in any way affect the law relative to the distribution of the proceeds of a foreclosure sale. Moreover, it must be borne in mind that statutes providing for exceptions to general laws must be strictly construed. In the case of *Hoglen vs. Cohan*, 30 O. S., 436, it was held that all taxes due and payable shall be discharged out of the proceeds arising from a judicial sale.

By the terms of Section 2653, General Code, a person charged with taxes due and payable, may elect to pay such taxes in two installments, one in December and the other in the following June. This section was enacted in its present form in 1859 (56 O. S., 101), and was in force and effect at the time of the above decision. If it could be said that, under the provisions of Senate Bill No. 359, *supra*, the sheriff would be required to distribute only one-tenth of the delinquent taxes, then under Section 2653, General Code, only one-half of the current taxes then due could be distributed, which, of course, is contrary to the holding in the *Hoglen* case, *supra*. In view of the above, it would therefore appear that from the proceeds of a foreclosure sale, all taxes, penalties and interest thereon should be discharged.

If such is the case, obviously a mortgagee who purchases real estate at a mortgage foreclosure sale, could not enter into an undertaking to pay delinquent taxes and assessments in installments, as provided for in Senate Bill No. 359, *supra*, inasmuch as all delinquent taxes and assessments are discharged after the distribution of the proceeds of the sale by the sheriff.

Therefore, in specific answer to your questions, it is my opinion that :

1. When real estate is sold in a mortgage foreclosure action, the sheriff must pay from the proceeds of such sale all taxes, penalties, assessments then due, and interest thereon, which are a lien on the real estate sold, at the time of the sale.

2. A mortgagee who purchases real estate at a mortgage foreclosure sale, may not under the provisions of Senate Bill No. 359 of the 91st General Assembly, elect to pay one-tenth of the delinquent taxes and assessments on such real estate.

Respectfully,

JOHN W. BRICKER,  
*Attorney General.*