

The rights between the mortgagor and the mortgagee are strictly matters of contract and are created by the indenture of mortgage. His mortgage lien is upon the lands. I am unable to conceive of any circumstances under which the state has directed or authorized any portion of the funds derived from a sale for taxes to be credited to the mortgagee unless it would be by virtue of the legal doctrine of equitable conversion. Whether or not any such right exists in favor of a mortgagee is a question of fact in each case, that is, it must be determined whether the mortgagee has been fully paid, and whether such facts exist as would entitle a mortgagee to invoke the technical doctrine of equitable conversion. The county treasurer is not legally a judicial officer. The legislature has therefore made specific provision as to the manner of determining such questions of the right of claimants to funds in his possession. Such provision is made in Section 5758, General Code, which reads:

"If the county treasurer, upon such demand, is not fully satisfied as to the right of the person demanding it, to receive it, if there are several different claimants, he shall commence a civil action by filing a petition of interpleader, in the court of common pleas of the county where the land was sold, wherein he shall make the person or persons claiming the excess, and the state, defendants, and the action shall proceed as other civil actions. The costs of the proceedings shall be paid by the person or persons claiming the excess, as the court shall order. The prosecuting attorney of the county shall attend to the action, in behalf of the treasurer."

Specifically answering your inquiry it is my opinion:

1. When a foreclosure action is brought to subject delinquent lands to the lien of the taxes accrued thereon and upon offer for sale thereunder a sale is not had for want of bidders, such property is, by force of the provisions of Section 5744, General Code, forfeited to the state, is to be sold in the manner provided in Sections 5750 et seq., General Code, and may not be re-exposed for sale in such action by virtue of an alias order of sale.

2. A mortgagee may not, pursuant to the provisions of Section 5746, General Code, redeem forfeited lands and cause the title to the premises to be vested in the mortgagee.

3. When forfeited lands are sold for a sum in excess of the taxes, assessments, penalties, interest, etc., against such property and such excess is paid into the county treasury, the county treasurer should not pay such funds to the mortgagee without legal determination of his right thereto pursuant to the provisions of Section 5758, General Code.

Respectfully,
JOHN W. BRICKER,
Attorney General.

210.

APPROVAL, BONDS OF CITY OF FOSTORIA, SENECA AND HANCOCK
COUNTIES, OHIO—\$6,000.00.

COLUMBUS, OHIO, March 14, 1933.

Industrial Commission of Ohio, Columbus, Ohio.