

209.

DELINQUENT LANDS—TRANSFERRED TO STATE AT FORECLOSURE SALE—PROCEDURE OF SELLING SUCH LAND—MORTGAGEE MAY NOT REDEEM SUCH AND SECURE TITLE—PROCEDURE OF DISTRIBUTING EXCESS ABOVE TAXES AND PENALTIES.

SYLLABUS:

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 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.*

COLUMBUS, OHIO, March 13, 1933.

HON. FRANK T. CULLITAN, *Prosecuting Attorney, Cleveland, Ohio.*

DEAR SIR:—I am in receipt of your request for my opinion on the following questions:

“(1) Whether the language contained in Section 5744, General Code, providing that when lands are not sold in a foreclosure sale of delinquent lands, they shall be forfeited to the state, that is, does forfeiture automatically take place immediately after the property has been offered for sale the first time, or does the statute permit an alias or more than one alias order of sale?

(2) Whether or not the word “owner”, as used in Section 5746, General Code, includes mortgagee; for example, in a case where the property is forfeited for want of bidders, although it is manifest that the value of the property exceeds the taxes and assessments, could a mortgagee pay the taxes and have his rights under the mortgage restored?

(3) Since, in Section 5757, General Code, it is provided that where forfeited property is sold by the auditor at his sale in March, for an amount in excess of the taxes any excess upon the taxes, assessments, penalty, interest and costs shall be paid into the county treasury to the credit of the owner, would the mortgagee have a lien on this fund and if so, how would he go about it to have the money applied to his claim? Section 5744, General Code, reads as follows:

“Every tract of land and town lot offered for sale in foreclosure proceedings, as provided in the next preceding chapter, and not sold for want of bidders, and every tract of land and town lot omitted from foreclosure proceedings and duly advertised as provided in this chapter shall

be forfeited to the state. Thenceforth all the right, title, claim, and interest of the former owner or owners thereof, shall be considered as transferred to, and vested in, the state, to be disposed of as the General Assembly may direct."

Such section is a part of an act of the legislature providing for the subjection of land to the payment of a real estate tax lien thereon. Other sections contained in the act of which it is a part, prescribe the method of the institution and prosecution of an action for the foreclosure of such lien. See Section 5718-3 et seq., General Code. Section 5718-3, provides that "the prayer of the petition shall be that the court make an order that said property be sold by the sheriff of the county * * in the manner provided by law for the sale of real estate on execution *excepting as hereinafter otherwise provided.*"

This section evidently vests authority in the court to grant such prayer of the petition upon its determination of the existence of the facts specified in such and the preceding sections. The procedure to be followed in the making of the sale by virtue of such decree must therefore have been found in the sections of the statute governing the sale of real estate on execution except to the extent such procedure has been modified by the subsequent provisions of Am. S. B. 326. Such sections are Sections 11672 et seq., General Code.

Section 11672, General Code, provides the method of appraising lands to be sold on execution. This section is not always applicable to delinquent land foreclosure sales by reason of the following language contained in Section 5719, General Code:

"* * the court shall order such premises to be sold without appraisal for not less than the total amount of such finding and costs, unless the prosecuting attorney shall apply for an appraisal, in which event the premises shall be appraised in the manner provided by section 11672 of the General Code, and shall be sold for at least two-thirds of the appraised value thereof. * *"

Sections 11678, 11681 and 11682, General Code, provide the method of advertising and the time of the sale with reference to the commencement of the advertising. Section 11696, General Code, prescribes the place of sale. Sections 11697 and 11710, General Code, make provision for alias and pluries orders of sale of lands on execution. Such sections read:

Sec. 11697. "If lands and tenements levied on, or ordered to be sold, be not sold upon execution, other executions may be issued to sell them."

Sec. 11710. "When real estate taken on execution and appraised, and advertised and offered for sale, is unsold for want of bidders, the court from which the execution issued, on motion of the plaintiff, shall set aside such appraisal, and order a new appraisal to be made, or set aside the levy and appraisal, and award a new execution to issue, as the case requires. When such real estate or a part of it has been two times appraised and thereafter advertised and offered for sale, and is unsold for want of bidders, the court may direct the amount for which it shall be sold."

Thus, there is statutory authority for re-exposing lands taken on execution to sale after they have once been offered but not sold for want of bidders. I am

unable to find any provision in Am. S. B. 326, as enacted by the 89th General Assembly, or in the intervening sections of the General Code, which purport to limit or modify the manner of sale of delinquent lands from that as on execution other than as above referred to in Section 5719, General Code.

The language of Section 5744, General Code, does not purport to limit the method of conducting the sale. It does, however, provide that if the lands are not sold for want of a legally sufficient bidder in such foreclosure proceedings the rights of the former owner therein shall be considered as transferred to and vested in the state. The evident intent of the legislature is to substitute other methods of subjecting the land to the payment of the tax when it has been offered in foreclosure sale but not sold for want of bidders, since in Section 5750 et seq., General Code, it has provided that on the second Monday in March next thereafter, after having advertised such lands, they shall be sold at public auction, and when not sold at such sale, for want of bidders the auditor may again offer them for sale on other terms. (See Section 5755, General Code.) Since the provisions of Section 5718-3, General Code, are that the sale in foreclosure shall be made in the manner provided for the sale of lands on execution, *except as provided in such taxation act*, and further since such taxation statute specifically provides that the lands shall be considered as forfeited to the state when not sold for want of bidders at the foreclosure sale and makes specific provision for the offering for sale of such lands after foreclosure, I am of the opinion that the provisions in the tax statute for the sale of forfeited lands supersede and take preference over the provisions of the statutes prescribing the method of sale of lands on execution which provide for alias and pluries orders of sale on execution. If my conclusions are correct, an alias order of sale of lands in a tax foreclosure sale, where the order of sale therein has been returned for want of bidders, would be unauthorized by statute.

From the language of Section 5744, General Code, it is evident that whenever the proceedings in a foreclosure action have been completed without resulting in a sale no further act is necessary by any official in order to complete the forfeiture of the title to such lands to the State. You will note that the language is:

“Thenceforth all the right * * of the former owner * * shall be considered as transferred to and invested in the state * *”

Your second inquiry involves a construction of Section 5746, General Code. Such section reads:

“If the former owner of a tract of land or town lot, which has been so forfeited, at any time before the state has disposed of such land or lot, shall pay into the treasury of the county in which such land or lot is situated, all the taxes, assessments, penalties, and interest due thereon at the time of such forfeiture, with the interest which has since accrued thereon, as ascertained and certified by the auditor, the state shall relinquish to such former owner or owners, all claims to such land or lot. The county auditor shall then re-enter such land or lot on his tax-list, with the name of the proper owner.”

You specifically inquire whether the word “owner” as used in this section, indicates “mortgagee”. The word “owner” is used twice in this section—once in the first line, and again in the last line. This statute gives the “former owner” of forfeited lands the right to redeem the same by payment of the taxes, assess-

ments, penalties and interest charges against such property and upon such redemption the property is to be returned to the tax list in the name of the "proper owner."

If, however, the words "or mortgagee" were inserted after the first appearance of the word "owner", I could then answer your inquiry in the affirmative. The courts on several occasions have held that the mortgagee was not the owner of the real estate described in his mortgage. See *Fidelity Mortgage Company vs. Mahon*, 31 O. App. 151; *Norwood Sav. Bk. vs. Romer*, 43 O. App. 224; *Kerr vs. Lydecker*, 51 O. S. 240; *Perkins vs. Dibble*, 10 Ohio 434; *Ragnet vs. Roll*, 7 Oh. (Pt. 1) 77; *Roll vs. Ragnet*, 4 Oh. 100.

There is a well settled rule of statutory interpretation which is tersely stated in the third syllabus of *Ohio Savings & Trust Company vs. Schneider*, 25 O. App. 259:

"Courts cannot read into a statute that which does not appear therein; it being presumed that the lawmakers placed in the statute all that was intended."

Or, as stated by Marshall, C. J., in *Stanton vs. Realty Company*, 117 O. S. 345, 349:

"* * the courts have no right to insert words not used, or to omit words used, in order to arrive at a supposed legislative intent, or where it is possible to carry the legislative provisions of the statute, into effect according to the letter."

I do not believe it is within the province of statutory interpretation to insert the words "or mortgagee" in Section 5746, General Code, which would be necessary to answer your inquiry in the affirmative. I must, therefore, answer your second inquiry in the negative.

Your third inquiry is as to the rights of a mortgagee to surplus funds in the possession of the county treasurer by virtue of the provisions of Section 5757, General Code. Such section reads:

"If any such forfeited lands are sold for a greater sum than the amount of such tax, interest, penalty, and costs, the county auditor shall charge the county treasurer separately in each case, in the name of the supposed owner, with the excess above such amount. The treasurer shall retain such excess in the treasury for the proper owner of the forfeited lands, and upon demand by such owner, within six years from the day of sale, shall pay the excess to him."

It is difficult to see how the question raised by your inquiry would normally arise, since in the foreclosure action of delinquent lands the mortgagees and lien holders would normally be parties defendant and their rights would have been adjudicated.

Prior to the proceedings out of which the funds have arisen, the title and interest of the owner of the premises has been forfeited to the state. The statute has made provision as hereinbefore referred to, by virtue of which the mortgagee has the right to pay the taxes on the mortgaged property and be subrogated to the rights of the state to such premises.

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.