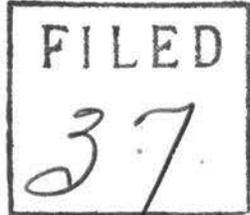


SCHOOL FUND MORTGAGE:

Personal taxes of mortgagor cannot be deducted from surplus proceeds of foreclosure sale.

November 30, 1942



Mr. Leo J. Harned
Prosecuting Attorney
Sedalia, Missouri

Dear Sir:

This will acknowledge receipt of your letter of recent date, which reads as follows:

"I would appreciate an opinion on the following question to-wit:

"Where a man had a School Fund Mortgage on his property and the property was foreclosed, and where the party owed personal taxes which were delinquent, can the surplus from the foreclosure of the School Fund Mortgage be applied by the county court to the payment of the delinquent personal taxes?"

We assume, of course, that the school fund mortgage which was foreclosed contained the provisions required by Section 10385, R. S. Mo. 1939. That being so, said mortgage provided that upon default in payment of the debt secured, "the sheriff of the county may, upon giving twenty days' notice of the time and place of sale, * * * proceed and sell the mortgaged premises, or any part thereof, to satisfy the principal and interest, * * *."

Section 10387, R. S. Mo. 1939, reads as follows:

"Whenever the principal and interest, or any part thereof, secured by mort-

gage containing a power to sell, shall become due and payable, the county court may make an order to the sheriff, reciting the debt and interest to be received, and commanding him to levy the same, with costs, upon the property conveyed by said mortgage, which shall be described as in the mortgage; and a copy of such order, duly certified, being delivered to the sheriff, shall have the effect of a fieri facias on a judgment of foreclosure by the circuit court, and shall be proceeded with accordingly."

From the two sections above quoted from, it appears that the authority of the sheriff is to sell the mortgaged premises to satisfy the debt secured by the mortgage and also to pay the costs of the foreclosure. He is given no authority to pay anything further out of the proceeds of the sale. His position in foreclosing a school fund mortgage is similar to that of a trustee under a deed of trust.

Of course, personal taxes do not constitute a lien against the land of the person against whom such taxes are assessed. It has been held in this state that the trustee under a deed of trust cannot even pay taxes against the mortgaged land out of the proceeds of a foreclosure sale. See *Scott v. Shy*, 53 Mo. 478. This case held that land sold at a foreclosure sale passed to the purchaser subject to all incumbrances prior to the one under which the sale was made. This doctrine was followed in the very recent case of *Drannek Realty Co. v. Nathan Frank, Inc.*, 346 Mo. 187, 139 S. W. (2d) 926.

In the case of *Schmidt v. Smith*, 57 Mo. 135, 137, the Supreme Court said:

"A trustee holding the naked legal title cannot, on a sale of the property, use part of the purchase money to satisfy taxes or prior incumbrances,

unless he is empowered thereto in the instrument creating the trust. In all such cases the purchaser takes the land subject to the incumbrances."

To the same effect is the case of *Brown v. Bland*, 229 S. W. 448 (Mo. App.).

In the foregoing case of *Schmidt v. Smith*, the taxes which had been deducted by the trustee from the proceeds of the foreclosure sale were taxes which were due a city, but it was agreed by the parties that under the law the taxes did not constitute a lien upon the property. In discussing the case, the court used the language above quoted and also said:

"That the sale realized more than enough to discharge the whole debt, cannot alter the case or affect the principle. When the amount secured was paid off, the residue belonged to the grantor in the deed.

"And more especially would this be the case here--where the taxes constituted a simple debt against the owner, and there was no lien against the property. No man can pay another person's debt without a request to do so, and then charge him therefor."

In the case of a sheriff foreclosing a school fund mortgage, he would have no authority other than that given him by the statutes. As pointed out above, nothing in the statutes authorizes him to pay any other than the debt secured by the mortgage and the costs of the proceeding. That being true, he would not even have the right to pay the taxes against the property itself, since his sale would pass the property subject to prior incumbrances, one of which would be taxes due. If he could not pay a prior lien against the

land, it would seem to follow that he could not pay a personal debt which the owner of the land owed.

If the school fund mortgage contained provisions authorizing the sheriff to pay taxes and other items out of the proceeds of sale, another question would be presented. We have assumed in this opinion that the school fund mortgage merely provided for the payment of the debt and costs of the foreclosure.

CONCLUSION

It is, therefore, the opinion of this office that the surplus from the foreclosure of a school fund mortgage cannot be applied to the payment of delinquent personal taxes owed by the mortgagor.

Respectfully submitted

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APPROVED:

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