TAXATION AND REVENUE: Disposition of surplus proceeds of tax sale.

April 5, 1935.

Hon. Joseph T. Tate,
Prosecuting Attorney,
Gasconade County,
Owensville, Mo.

Dear Sir:

A request for an opinion has been received from you under date of November 17, 1934, such request being in the following terms:

"The County Collector has requested that I secure an opinion from you regarding the disposition of surplus money collected on sale of real estate for taxes where there was a mortgage on said premises at the time of said tax sale.

In the event that you have already rendered an opinion on the subject I will appreciate receiving a copy of same."

The question presented by your letter has not been squarely settled in this State either by statute or judicial precedent, and we have only been able to discover a few cases in other states on the subject.

The only relevant statute which we have been able to discover is R. S. Missouri, 1929, Section 9959, as amended by Laws of 1933, page 425, 428, which provides as follows:

"When real estate has been sold for taxes or other debt by the sheriff or collector of any county within the state of Missouri, and the same sells for a greater amount than the debt or taxes and all costs in the case, and the owner or owners, agent or agents cannot be found, it shall be the duty of the sheriff or collector of the county, when such sale has been or may hereafter be made, to make a written statement describing each parcel or tract of land sold by him for a greater amount than the debt or taxes and all costs in the case, and for which no owner or owners, agent or agents can be found, together

with the amount of surplus money in each case, which statement shall be subscribed and sworn to by the sheriff or collector making the same before some officer competent to administer oaths within this state, and then presented to the county court of the county where such sale has been or may hereafter be made; and on the approval of the statement by the court, the sheriff or collector making the same shall pay the said surplus money into the county treasury, take the receipt in duplicate of said treasurer for said overplus of money and retain one of the said duplicate receipts himself and file the other with the county court, and thereupon the court shall charge said treasurer with said amount. And said treasurer shall place such moneys to the credit of the school fund of the county, to be held in trust for the term of twenty years for the owner or owners or their legal representatives. And at the end of twenty years, if such fund shall not be called for, then it shall become a permanent school fund of the county. County courts shall compel owners or agents to make satisfactory proof of their claims before receiving their money: Provided, that no county shall pay interest to the claimant of any such fund."

You will observe that this section, although it does not expressly provide for payment to the owner of the surplus, it nevertheless seems reasonably clear that such payment is contemplated. Furthermore, this section makes no attempt to define the term "owner".

In the case of McDuffie v. Collins, 117 Ala. 487, 23 So. 45 (1898), a statute generally similar to the Missouri statute above quoted was involved in a suit brought by a mortgagee whose mortgage was recorded but unmatured against the mortgagor, to whom payment of the surplus proceeds of a tax sale had been paid by the collector. The mortgage provided that the mortgagee could take possession before maturity of the debt if he deemed it necessary to protect his interests. The court held that such payment was improper and said:

"We think it clear that the plaintiffs were entitled to the money. They were the legal owners * * with the right to its immediate possession, subject to the superior right of the tax collector to seize and sell for taxes. * * The surplus proceeds in the hands of the collector represented the property. The right of the mortgagees to the property, as against Cannon (the mortgagor), at the time of the seizure and sale, attached to the surplus; and they were entitled, on demand, to receive it, as they would have been entitled to demand and receive the property itself, had there been no conversion of it into money through the processes of a paramount lien."

The court then referred to the statutory provision comparable to the Missouri statute above quoted and said that the provision "that 'any balance remaining shall be paid to the owner of the property' is merely declaratory of the law as it already existed. The gist of that section is the succeeding authority given to the collector to deposit the balance with the county treasurer, * * if the owner is not present at the sale, or, if present, refuses to receive it. The purpose was to relieve the collector of the duty of seeking the owner and paying him the balance, or of retaining it in his hands if the owner should refuse to receive it. It does not undertake to define what relation to the property a person must bear, in order to be its 'owner', within the terms of the section. That is left to be controlled by the general principles of law applicable to the case. If no superior claimant had made known his claim, and demanded the money, the collector would have been authorized to pay the surplus to the taxpayer from whom he obtained possession of the property; but, a claimant appearing and asserting his right, the collector, like any other holder of funds to which there are known rival claimants, necessarily, if he paid to either, took upon himself the peril of seeing that the payment was made to the party lawfully entitled."

The case just considered would seem to be a reasonable and proper construction to be placed upon a statute like the Missouri statute. The right of the mortgagee to the surplus was confirmed in the case of Brockway v. Humphrey, 4 Neb. (Unoff.) 403, 94 N.W. 625 (1903) in which the court said:

> "Plainly, the first mortgagee was entitled to a lien on the surplus."

Further, in the case of Farmer v. Ward, 75 N.J.Eq. 33, 71 Atl. 401 (1908), the court said:

> "Under what I think is a well-settled rule, the mortgagee prior to sale may pay the taxes which the owner of the equity of redemption was primarily liable to pay, and thereby acquire by a species of subrogation a lien for the amount so paid which in respect of priority occupies the same position as the tax lien. * * After sale, and before redemption, the mortgagee's interest stands practically transferred to the fund."

See also Worcester v. Boston, 179 Mass. 41, 60 N.E. 410; Sutherland v. City of Brooklyn, 156 N.Y. 605, 51 N.E. 433.

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In conclusion, it is our opinion that where a surplus exists after the sale of real estate for taxes, such surplus should be paid to the owner of the property, if only one person has any interest therein; that if the collector is satisfied that there is a valid recorded unsatisfied mortgage against the property, payment to the extent of the then mortgage debt could be made to the mortgagee and should not be paid to the mortgagor, and that if there is any doubt about the person to whom payment should be made, the safest procedure for the collector would be to turn the money into the county treasury under R. S. Missouri, 1929, Section 9959, as amended by Laws of 1933, page 425, 428, leaving proof of ownership to be made to the county court under that section.

Very truly yours,

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Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General