

No. 68

**MORTGAGE—TAX DEED LAND—SUCCESSOR IN
INTEREST—CHAPTER 171, LAWS OF 1941.**

Held: Mortgagee is not entitled to purchase from county tax deed land as taxpayer or as successor in interest. Tax deed cuts off mortgagee's lien. In event date of sale has been fixed, such date determines preferential right to purchase (Paragraph 1, Chapter 171, Laws of 1941).

April 2, 1941.

Mr. Bert I. Packer
County Attorney
Teton County
Choteau, Montana

Dear Mr. Packer:

You have submitted the question whether or not a mortgagee, holding a mortgage on lands which have heretofore been sold and deeded to the county, may purchase such lands under the provisions of Chapter 181, Laws of 1939.

It must be noted Chapter 181, Laws of 1939, was repealed in toto by Chapter 171, Laws of 1941, which became effective March 19, 1941. The

pertinent part of Chapter 171, Laws of 1941, which pertains to your inquiry is as follows:

"Provided, further, that at any time before the date fixed for such sale, notice of which has been given as above provided, the taxpayer or successor in interest whose property has been deeded to the county may purchase such property subject to the reservations hereinafter provided by payment to the county of the full amount of the taxes, penalties and interest due on said land at the time of taking said tax deed and such purchase and payment may be effected by an installment contract with annual payments as hereinafter provided."

It is apparent from the foregoing provision only the taxpayer (that is, the former owner of the land) or the taxpayer's successor in interest (that is, one who acquires the taxpayer's interest in the land) may purchase such lands from the county under the preference herein contained.

The mortgagee had only a lien upon the land.

"In this state a mortgage does not pass title but creates a lien upon the property as security for the payment of a debt on the performance of an Act."

Barth v. Ely, 85 Mont. 310, 278 Pac. 1002.

As the mortgagee is not the successor in interest of the taxpayer (the former owner), he is not entitled to buy the land under the above-quoted provision of Section 1 of Chapter 171, Laws of 1941.

It appears from your inquiry a tax deed has already been issued to the county. Such tax deed would cut off any lien of the mortgage held by the mortgagee and also the mortgagee's right to redeem from such tax sale.

"The tax deed mentioned is not derivative, but creates a new title in the nature of an independent grant from the sovereignty, extinguishing all former title and liens not expressly exempted from its operation."

State v. Jeffries, 83 Mont. 111, 270 Pac. 638.

Section 2215.9, Revised Codes of Montana, 1935, as amended by Chapter 63, Laws of 1937, provides in part as follows:

"The deed hereafter issued under **this or any other law of this state** shall convey to the grantee the absolute title to the lands described therein as of the date of the expiration of the period of redemption, free of all encumbrances . . ." (Emphasis mine.)

My opinion is that a mortgagee is not the taxpayer (former owner), and neither is he the successor of the taxpayer (former owner). Therefore he is not one given the preferential right to purchase said property from the county.

Since the deed has been executed to the county, the county has a new title from the sovereignty. In the event this land has been offered for sale at public auction, as provided in paragraph 1, Chapter 171, Laws of 1941, then neither the taxpayer (former owner) nor his successor in interest may purchase the said lands, as the time in which the taxpayer or successor in interest may purchase is limited to **any time before the date fixed for such sale.**

Sincerely yours,

JOHN W. BONNER
Attorney General