

Taxes—Assessment—Mortgagees.

Where a taxpayer owns both real and personal property the personal property and real property should be assessed together.

A mortgagee who has paid the taxes upon real property covered by his mortgage may have the mortgagor's personal property assessed separately under the provisions of chapter 113, laws of 1927.

July 24, 1928.

R. M. Hattersley, Esq.,
County Attorney,
Conrad, Montana.

My dear Mr. Hattersley:

You have requested my opinion on the following statement of facts:

"A was the owner of land upon which B held a real estate mortgage. In January, 1927, this land was sold to C under execution and sheriff's certificate issued to C sometime in January, 1927. C was the owner on the first Monday in March, 1927, of a large band of sheep. The county assessor of this county, in the exercise of his discretion, assessed the land to C as the owner thereof under its sheriff's certificate of sale, but assessed the sheep separately under the personal property list. C refused to pay the personal property tax, contending that the same should be assessed with the land as a lien upon the land, the title to which is held under such sheriff's certificate.

"B, the mortgagor, paid the taxes in order to protect the lien under the mortgage, so that there were no delinquent real estate taxes on this property for the year 1927, nor was the personal property belonging to C assessed against this property for the year 1927, but the same was assessed separately under the personal property list, as stated.

"In 1928 the mortgagee, under the provisions of section 2153 of the Revised Codes of Montana of 1921, as amended by chapter 113 of the laws of Montana, 20th legislative session, 1927, served a written request upon the county assessor of this county to have the personal property and real estate of C assessed separately. The county assessor in compliance with such request assessed the real property to C, the holder of the sheriff's certificate of sale, C being now entitled to sheriff's deed, and assessed the personal property of C separately under the personal property list.

"The demand was made upon C for the payment of the personal property tax, but C refuses to pay the same, claiming that it should be assessed with the real estate, and that under the provisions of section 2153 quoted the mortgagee in this particular instance was not entitled to have the real estate and personal property assessed separately as there are no delinquent taxes, either real estate or personal, due upon such real estate held by C under such sheriff's sale for the year 1927. I might add that all of the taxes on the land have been paid and that there are no delinquent taxes of any kind or character against such land.

"Sometime in May the judge of this district court handed down a decree providing for the foreclosure of the mortgage owned by B and the sale of the land in question by the sheriff. The land is now being advertised for sale and will be sold sometime in July.

"The question is whether or not the mortgagee, B, under the facts stated, was entitled to have the personal property of C for the year 1928 assessed separately, or whether under the facts stated this personal property should have been assessed with the real estate."

While the provisions of section 2238, as amended by chapter 102, laws of 1923, under the provisions of which these questions are presented, have never been passed upon by our courts, I am inclined to the view that the personal property tax on the sheep assessed against C, under your first statement of facts, should have been assessed with the land.

It is true that this statute provides that the assessor may certify the tax to the county treasurer as a personal tax when in his opinion the tax is not a lien upon real property, but it is doubtful as to whether the legislature by an act of this kind can place this matter in the discretion of the county assessor, but in any event the court would no doubt hold that the assessor could not abuse this discretion, and therefore if the land rightfully stood in the name of C at the time the assessment was made the land and the sheep should have been assessed together.

Your second statement of facts, however, presents a different situation. Section 2153, as amended by chapter 113, laws of 1927, provides that the mortgagee can have the personal property assessed separately

when the owner has failed to pay the taxes for one or more years and does not provide that the taxes on the property itself must be delinquent for one or more years.

Under the facts submitted it appears that C did not pay the taxes on the land in question for 1927 but that the same was paid by B, the mortgagee, and this being so, it is my opinion that B has the right under chapter 113, supra, to protect his mortgage by taking advantage of the provisions therein contained, and that the personal property of C was rightfully assessed separately for the year 1928.

Very truly yours,

L. A. FOOT,
Attorney General.