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1. LAND SALE, FORFEITED—RIGHTS GOVERNED BY STATUTE—LAND DULY FORFEITED TO STATE—TITLE GUARANTEED BY SECTION 5762 G. C.—PURCHASER CAN NOT RESCIND PURCHASE ON GROUND HE BELIEVED HE WOULD RECEIVE A DIFFERENT TITLE.

2. EASEMENT ACQUIRED BY STATE FOR HIGHWAY PURPOSES—HIGHWAY CONSTRUCTED—COUNTY AUDITOR FAILED TO REDUCE TAXABLE VALUATION OF REMAINING SERVIENT ESTATE—SERVIENT ESTATE ASSESSED AT ORIGINAL VALUATION OF ENTIRE TRACT—PURCHASER MAY LAWFULLY BE REFUNDED THE DIFFERENCE BETWEEN THE SUM THAT WOULD HAVE ACCRUED TO THE COUNTY HAD ESTATE BEEN PROPERLY VALUED AND ASSESSED AND THE SUM ACTUALLY RETAINED BY COUNTY FROM PROCEEDS OF FORFEITED LAND SALE—SECTION 5561 G. C.

3. WHEN STATE ACQUIRED EASEMENT OVER LANDS FOR HIGHWAY PURPOSES—SERVIENT ESTATE SUBJECT TO EASEMENT IS FORFEITED TO STATE BECAUSE OF DELINQUENT TAXES—NO MERGER OF TWO ESTATES—PURCHASER ACQUIRES SERVIENT ESTATE SUBJECT TO EASEMENT.

SYLLABUS:

1. The rights of the parties to a forfeited land sale are governed by statute, and when the purchaser of a tract of land which has been duly forfeited to the state receives that title which is guaranteed him by the provisions of Section 5762, General Code, said purchaser cannot rescind his purchase on the ground that he believed that he was to receive a different title.

2. When an easement over lands has been acquired by the state for highway purposes and a highway has been constructed, and the county auditor has failed to reduce the taxable valuation of the remaining servient estate in accordance with Section 5561, General Code, and said servient estate has been assessed at the original valuation of the entire tract, one who purchases the servient estate at a forfeited land sale may lawfully be refunded the difference, if any, between the sum that would have accrued to the county had said servient estate been properly valued and assessed, and the sum actually retained by the county from the proceeds of the forfeited land sale.

3. Where the state has acquired an easement over lands for highway purposes, and the servient estate subject to said easement is forfeited to the state because of delinquent taxes, there is no merger of the two estates, and a purchaser at a forfeited land sale acquires said servient estate subject to said easement.

Columbus, Ohio, September 20, 1948

Hon. Carson Hoy, Prosecuting Attorney
Hamilton County, Cincinnati, Ohio

Dear Sir:

I have before me your request for my opinion, which request is as follows:

"In 1942 the then owners of two parcels of land in Hamilton County, Ohio, executed a deed to the State of Ohio in which they granted 'a perpetual easement and right-of-way for public highway and road purposes' over the property therein described. This deed was recorded in the Recorder's Office of Hamilton County, Ohio, but no transfer of same was made in the Auditor's Office. The State of Ohio subsequently constructed a highway over this property, which highway is presently in use.

"During the 1946 sale of forfeited lands by the Auditor of Hamilton County the two parcels in question were sold. These two parcels of property were listed among a group advertised under the heading of 'Miscellaneous Parcels' which consisted principally of streets, roadways, alleys, sidewalks, steps and various other easements. Before offering these various parcels for sale, the Auditor announced to those in attendance at the sale that anyone purchasing any of this particular group of parcels would be doing so at his own risk as the Auditor was of the opinion that the property could not be put to proper use. When the deeds for this group of parcels were delivered to those who purchased them, the Auditor attached a little note reminding the purchaser of the statement made by the Auditor before the sale.

"The Auditor has now received a request from the purchasers at the Auditor's sale for a refund of the purchase price on the grounds that they now find that the property they purchased is a part of the property acquired by the State of Ohio for highway purposes and upon which the State of Ohio has actually built a highway. It is our opinion, with reference to sales of this kind, that the doctrine of caveat emptor applies and that the Auditor, in the absence of specific statute, has no authority to refund the purchase price. We are further cognizant of your opinion dated December 3, 1946, and numbered 1411, in which you held that a conservancy district under similar circumstances lost its title to the purchasers at said forfeited sale. Inasmuch as the property involved is property acquired by the State of Ohio for road purposes, this matter is being submitted to you for opinion with the specific request that you consider the following questions:

"1. Does the Auditor have authority to refund the purchase price?

"2. Does the doctrine of caveat emptor apply in a case of this kind?

"3. Does the State acquire such a title by forfeiture as to merge the easement previously acquired by the State with the title acquired by forfeiture proceedings so that the subsequent conveyance by the Auditor conveyed the property free of said easement?

"4. Should you determine that there was such a merger, would an easement by implication in favor of the public generally exist?"

I believe that the conclusions which I have reached can best be set out by discussing your questions in a different order from that set out above, and for that reason I direct attention to your second question. That question asks whether the doctrine of caveat emptor applies to the facts set out in your request. Apparently the purchaser at the forfeited land sale now seeks to rescind his purchase and to recover the purchase price on the ground that while he thought he was bidding on the unencumbered title to an entire parcel of land, he in fact received only the title to a servient estate in that parcel subject to a dominant use of the state for highway purposes.

It seems to me that in this situation a discussion of the doctrine of caveat emptor is beside the point. That is a common law doctrine, meaning literally "let the buyer beware," which is one of the principles considered in weighing the interests of buyer and seller in cases where the buyer is dissatisfied. But the subject of forfeited lands is entirely statutory. No matter what the purchaser believed or was led to believe, his purchase was subject to the power of the legislature to say what title should be passed to the purchaser of forfeited lands. The legislature has dealt with that problem in clear and unmistakable language in Section 5762, General Code, which provides in part as follows:

"* * * When a tract of land has been duly forfeited to the state and sold agreeably to the provisions of this chapter, the conveyance of such real estate by the county auditor shall extinguish all previous title thereto and invest the purchaser with a new and perfect title, free from all liens and encumbrances, except taxes and installments of special assessments and reassessments not due at the time of such sale, and except such easements and covenants running with the land as were created prior

> to the time the taxes or assessments, for the nonpayment of which the land was forfeited, became due and payable."

The purchaser got exactly what the statute says he should get, and since the whole transaction was governed by statute, that concludes the matter.

It is therefore my opinion that the rights of the parties to a forfeited land sale are governed by statute, and that when the purchaser of a tract of land which has been duly forfeited to the state receives that title which is guaranteed him by the provisions of Section 5762, General Code, said purchaser cannot rescind his purchase on the ground that he believed that he was to receive a different title.

Directing attention now to your first question, you ask whether the Auditor has authority to refund the purchase price. I have already discussed the question of rescission of the entire sale. But there remains the question of refunding a portion of the purchase price if the county received more from the forfeited land sale than it was entitled to receive.

In order to make perfectly clear the conclusions which I have reached in regard to this question, I believe that it is in order for me to review the facts set out in your request.

In 1942 the state of Ohio was deeded a perpetual easement for highway purposes over certain parcels of land. Subsequently the proposed highway was constructed, and it has since been continuously used as a public highway. The real estate tax consequences of such a procedure are set out in Section 5561, General Code, which provides as follows:

> "The county auditor shall deduct from the value of such tracts of land, as provided in the next preceding section, lying outside of municipal corporations, the amount of land occupied and used by a canal or used as a public highway, at the time of such assessment."

This section means what it says, and has been construed by one of my predecessors to require that the value of land used as a public highway must be deducted from the value of the grantor's land by the county auditor at the time he assesses the remaining property for taxation. Opinion No. 4611, Opinions of the Attorney General for 1932, page 1042.

No record of the transfer was made in the Auditor's office, and from correspondence with you I am informed that "the Auditor did not remove

the value of the land used for highway purposes in the instant case from the tax duplicate as required by Section 5561, General Code." As a result, the property in question continued on the tax duplicate at the value ascribed to it before the construction of the highway, and it was assessed accordingly. The taxes assessed were not paid, the parcels became delinquent land (Section 5705, General Code), and were eventually forfeited to the state (Sections 5718-1, 5744-5773, General Code). In 1946 the parcels were sold at the annual sale of forfeited lands.

Your request does not set out the price for which the parcels were sold, and the statute, Section 5752, General Code, does not prescribe any minimum amount which must be realized from a forfeited land sale. It is prescribed by Section 5757, General Code, that if a sum greater than the amount of taxes, assessments, interest, penalty, and costs, against a parcel of forfeited land is realized from its sale, such excess shall be held for the former owner of the land. Since the disposition of this excess, if any, is governed by statute, I will not consider it further, but proceed to a consideration of the problems presented by that sum of money which was retained by the county from the forfeited land sale.

It is clear that if the Auditor had properly performed the duty enjoined on him by Section 5561, supra, at the time the highway was constructed, the listed valuation of the parcels in question would have been reduced by the value of the dominant estate used for highway purposes. It is equally clear that the reduced value of the servient estate would have remained on the tax duplicate, and that this reduced value would properly have been subject to assessment. So, in any event, the county, acting for the state, is entitled to the full amount of taxes, assessments, penalties, and interest which might properly have accrued as a result of the servient estate's being listed at its reduced valuation. And if this amount represents all that was realized on the forfeited land sale, there is no authority to make any refund to the purchaser.

But if more than the amount of taxes, etc., properly assessable against the reduced value of the servient estate was realized by the county from the forfeited land sale, that amount represents money which improperly accrued to the county as a result of the Auditor's failure to perform his statutory duty. Is there authority to refund this excess?

At the outset it should be emphasized that you do not ask whether the Auditor is under a duty to refund this excess, nor whether he could successfully be subjected to an action by the purchaser to recover it, and I do not undertake to answer those questions. I confine myself to the question of whether the Auditor properly can refund to the purchaser the difference, if any, between that amount which would have been due the county in taxes, etc., had the land been properly valued according to the statute, and the amount actually retained by the county from the proceeds of the forfeited land sale.

It is my opinion that such difference can properly be refunded. I base my conclusion on the principle that moral obligations of political subdivisions can lawfully be recognized and paid. This principle is well stated in the syllabus of Opinion No. 3467, Opinions of the Attorney General for 1931, page 1024, which syllabus reads as follows:

> "A claim against a political subdivision, whether sounding in tort or contract, even though it may not be enforceable in a court of law, may be assumed and paid from the public funds of the subdivision as a moral obligation if it be shown that the claim is the outgrowth of circumstances or transactions whereby the public received some benefit, or the claimant suffered some loss or injury, which benefit or injury or loss, as the case may be, would constitute the basis of a strictly legal and enforceable claim against the subdivision, were it not that because of technical rules of law no recovery may be had."

This opinion is cited with approval in Opinion No. 1330, Opinions of the Attorney General for 1939, page 1966, and Opinion No. 3199, Opinions of the Attorney General for 1940, page 1177. I do not deem it necessary to discuss further the reasoning of those opinions nor the authorities collected there.

The facts upon which the 1931 opinion was based were as follows:

A board of county commissioners voted to improve a certain road, and pursuant thereto awarded a contract to one S. After S had done some $1200 worth of work an injunction was granted against continuation of the improvement because of the failure of the county auditor to certify available funds. It was held by my predecessor that S could properly be reimbursed for the fair value of the improvements completed under the void contract.

The 1940 opinion dealt with a similar set of facts and reached a similar conclusion.

Each of these opinions based its conclusion in part on the case of State, ex rel. Hunt v. Fronizer, 77 O. S. 7. In that case a contract had been let by a board of county commissioners for the construction of a bridge, and the bridge had actually been constructed and turned over to the county. It then developed that there had been no certificate of available funds, but the claim of the contractor was nevertheless honored and paid. It was held that the prosecuting attorney could not recover the money paid the contractor, even though he had specific statutory authority to recover money illegally drawn from the county treasury. This is simply another way of saying that the claim lawfully could be recognized and paid in the first instance.

There remains the question of whether the facts of the instant case are within the principle which I have discussed and approved above. It is my opinion that they are governed by the same principle. The county received a benefit in that money was paid into the treasury. Some of this money would not have been paid had the county auditor properly performed the duty enjoined on him by statute. The payment of this excess amount would constitute the basis of an enforceable claim against the county if it were not for the fact that no statutory provision has been made for refunding such payments. Under these circumstances a moral obligation exists which legally can be recognized and paid.

It is probably not necessary to point out that in view of the provisions of Section 2570, General Code, the Auditor alone has no authority to allow this claim. The claim must be presented to the County Commissioners, and if allowed by them can properly be paid by the Auditor.

In view of the above, and in specific answer to your first question, it is my opinion that when an easement over lands has been acquired by the state for highway purposes and a highway has been constructed, and the county auditor has failed to reduce the taxable valuation of the remaining servient estate in accordance with Section 5561, General Code, and said servient estate has been assessed at the original valuation of the entire tract, one who purchases the servient estate at a forfeited land sale may lawfully be refunded the difference, if any, between the sum that would have accrued to the county had said servient estate been prop-

erly valued and assessed, and the sum actually retained by the county from the proceeds of the forfeited land sale.

Your third question asks whether the title to the servient estate acquired by the state through forfeiture proceedings merged with the dominant estate already in the state, so that the subsequent conveyance at forfeited land sale conveyed the property free of the easement for highway purposes.

The general rule as to the modern application of the rule of merger of estates is stated in Am. Jur., Vol. 19, pp. 589-591, as follows:

> "* * * The modern doctrine is that merger is not favored either at law or in equity. * * *
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> "Since a court of equity or a modern court invoking equitable principles is not bound by the old legal rule of merger, such a court will prevent or permit a merger of estates according to the intention of the parties, either actually proved or implied from the fact that merger would be against the interest of the party in whom the several estates or interests have united, * * *
>
> "In ascertaining whether the party holding two estates intended a merger to take place, the courts examine the acts and conduct of the party, the facts and circumstances surrounding the acquisition of the different interests, and the situation and incidents of the property involved. * * *"

It seems clear that nowhere in this entire transaction is an intention expressed or implied that the buyer at the forfeited land sale should receive more than the state acquired through its forfeiture proceedings. Section 5762, supra, expressly states that the title of the purchaser shall be subject to easements, created before the delinquent taxes accrued, and it is only by accident in this case that the easement is in the state which also acquired the fee.

While it is true that in a strict sense the "state of Ohio" is a legal entity in which all estates in a parcel of land can merge, it is also true that many activities of the state are carried on independently of one another. One department of the state spent public funds to acquire an easement over this land for highway purposes. The county, exercising another function of the state's power, forfeited the remaining estate for delinquent taxes. It is the clear intent of the applicable statutes that these functions are and should remain entirely separate. Only a strict applica-

tion of the rule of merger could prevail over this intention, and as I have pointed out above, such a strict application is not required in this case.

In view of the above, and in answer to your third question, it is my opinion that where the state has acquired an easement over lands for highway purposes, and the servient estate subject to said easement is forfeited to the state because of delinquent taxes, there is no merger of the two estates, and a purchaser at a forfeited land sale acquires said servient estate subject to said easement.

Because of my answer to your third question, it is not necessary to answer the fourth one.

Respectfully,

HUGH S. JENKINS,
Attorney General.