convey, whether it existed at the time the property became liable to satisfy the judgment or was acquired afterward shall thereby be vested in the purchaser. Notwithstanding all the safeguards the statutory law throws around purchasers at tax sales, the doctrine of caveat emptor applies to him who purchases at such sales. The statutory steps herein outlined are jurisdictional, and must be substantially followed.

In this case, suit was brought to foreclose the delinquent tax lien and such proceedings were had that the land was offered for sale, but as stated "did not sell." I assume that it did not sell for want of bidders. Under such circumstances, it became the duty of the prosecutor to follow his case up and see to it that the land was placed on the forfeited list and offered by the county auditor at forfeited sale. In no other manner could title be carried to anyone.

Coming now to your main question:

> "Can an individual pay the amount of delinquent taxes, the court costs, and go into possession and retain the same against all the world but the heirs? In short, what are the rights of a volunteer who pays all liens to date?"

When you use the word "volunteer," I take it that the person in question has no interest in the land, not even as a lienholder, consequently, he could not be subrogated to the rights of the state. It is only the purchaser at a regularly conducted tax sale that is subrogated to the rights of the state for the protection of his title.

This opinion is voluminous on purpose, in the hope that it may serve prosecuting attorneys upon whose backs will fall the burden of collecting delinquent taxes in the years to come.

Respectfully,

HERBERT S. DUFFY,

Attorney General.

38.

APPROVAL—ABSTRACT OF TITLE, WARRANTY DEED, ETC., TO LAND IN ERIE TOWNSHIP, OTTAWA COUNTY, OHIO, OWNED BY MYRTLE B. MOORE.

COLUMBUS, OHIO, January 25, 1937.

HON. EMIL F. MARX, *Adjutant General, Columbus, Ohio.*

DEAR SIR: You recently submitted to this office for examination

and approval an abstract of title, warranty deed, contract encumbrance record No. 194 and other files relating to a tract of land which is owned of record by one Myrtle B. Moore in Erie Township, Ottawa County, Ohio, and which is more particularly described in the option obtained by you for the purchase of this land and in the deed tendered by Myrtle B. Moore to the state, as follows:

> Beginning at the northwest corner of southwest quarter of Section Twenty-eight (28) Erie Township; thence east along half section line 627 feet; thence south parallel to west line of Section Twenty-eight (28) a distance of 1716 feet 6 inches; thence west parallel to south line of Section Twenty-eight (28), a distance of 210 feet 7 inches; thence south parallel to west section line a distance of 1765 feet to the LaCarpe ditch; thence in a westerly direction along center line of LaCarpe ditch a distance of 433 feet to the west line of Section Thirty-three (33); thence north along west line of Section 33 and 28 a distance of 3370 feet to the place of beginning.
>
> Containing 42.14 acres of land, more or less, but subject to all legal highways.

Upon examination of the abstract of title submitted to me, I find that I am unable to approve the purchase of the above described property by the state for the reason that it does not appear that Myrtle B. Moore has a full and complete record title to that part of the above described property which is situated in the northwest quarter of Section 33 in said township, which quarter section is contiguous to and immediately south of the southwest quarter of Section 28 in which a part of the above described property is located. Whatever title Myrtle B. Moore now has in and to the lands described in said option and deed is such as was formerly owned and held by her father Charles L. Allyn who, together with his brother George W. Allyn, took title to the above described and other property in the southwest quarter of Section 28 and in the northwest quarter of Section 33 by devise from their father Frederick A. Allyn who, it appears, died some time in the year 1891. George W. Allyn, co-tenant of Charles L. Allyn in the fee simple title to lands in the southwest quarter of Section 28 and in the northwest quarter of Section 33, died testate some time prior to March 19, 1910, leaving his undivided one-half interest in this property to his two sons George W. Allyn, Jr., and Andrew F. Allyn, subject to the dower interest therein of his widow Esther K. Allyn. On March 19, 1910, Esther Allyn, widow of George W. Allyn, together with George W. Allyn, Jr., and Andrew F. Allyn, sons of George W. Allyn, deceased, executed a quit claim deed

to Charles L. Allyn apparently thereby intending to convey to Charles L. Allyn the undivided interest in said lands in the southwest quarter of Section 28 and in the northwest quarter of Section 33 which they then owned and held in said lands as successors in title to George W. Allyn, deceased, brother of said Charles L. Allyn. This deed carried out the intention of the grantors by conveying to Charles L. Allyn all of their right, title and interest in the southwest quarter of Section 28. However, with respect to the lands in Section 33, this deed erroneously described the same as follows:

> "Also the north part of the *southwest* quarter of Section 33 of said township and range, containing 42.19 acres." (Italics the writer's).

It does not appear from the abstract of title or from any other information at hand that Frederick A. Allyn, in the first instance, or George W. Allyn, after him, ever owned and held title to any lands in the southwest quarter of Section 33 of said township and it is quite obvious that in the deed above referred to the grantors therein intended to convey to Charles L. Allyn all of their right, title and interest in a tract of land in the northwest quarter of Section 33 which was owned and held by George W. Allyn and to which said grantors succeeded upon his death. However, the fact remains that the widow and sons of George W. Allyn did not by this deed or by any other deed in the lifetime of Charles L. Allyn convey to said Charles L. Allyn the interest which they owned and held in the *northwest* quarter of Section 33.

Myrtle B. Moore and Frederick L. Allyn succeeded by inheritance to the title in and to lands which Charles L. Allyn owned at the time of his decease intestate some time prior to October 31, 1913. By the affidavit of inheritance with respect to the lands of Charles L. Allyn, deceased, which was filed on said date, to wit, October 31, 1913, this property in Section 33 was likewise erroneously described as "Also the north part of the *southwest* quarter of Section Thirty-three (33) containing 42.19 acres." In this connection, it is noted that on the same day Myrtle Moore and her husband executed a quit claim deed to Frederick L. Allyn of her interest in lands which they took by inheritance from their father Charles L. Allyn and in this deed said lands in Section 33 are likewise described as "the north part of the *southwest* quarter of Section 33, containing 42.19 acres." At the same time Frederick L. Allyn and Bell Allyn, his mother, executed a quit claim deed of this property in Sections 28 and 33 without reference to quarter sections, the property therein described by metes and bounds being apparently partly in the

southwest quarter of Section 28 and in the northwest quarter of Section 33.

Apparently, the error above noted in the descriptions of the several deeds and other instruments as to the property in the northwest quarter of Section 33 to which George W. Allyn and Charles L. Allyn succeeded on the death of their father Frederick A. Allyn, was not discovered by any of the persons in interest until on or about October 28, 1927. Upon this date George W. Allyn, (Jr.) and Mabel Allyn, his wife, and Andrew F. Allyn and Gertrude Allyn, his wife, executed a deed to Charles L. Allyn in such form as was intended in the execution of the deed under date of March 19, 1910, above referred to, and in which the land in Section 33 was correctly described as "the north part of the *northwest* quarter of Section No. 33, Township No. 7, Range No. 16, containing 42.19 acres." This deed executed by the above named grantors under date of October 28, 1927, contains the following recital:

> "This deed is made for the purpose of correcting the description of the real estate described in a deed dated March 19, 1910, and recorded in Volume 58 at page 600 Records of Deeds of Ottawa County, Ohio."

It appears, however, that at the time this deed was executed Charles L. Allyn, the grantee named therein, was dead and had been dead for a number of years. In this situation, it is difficult to see how any effect can be given to this deed as an instrument conveying legal title to any of the property therein described, for, as noted by the Supreme Court, in the case of *Sloane* vs. *McConaly*, 4 Ohio, 157, 170:

> "It is indispensable to the validity of a grant, that the grantee be capable of receiving it; that is, he be a person in being at the time of the grant made."

In Thompson on Real Property, Vol. 4, Sec. 2945, it is said:

> "A deed or grant to a person who is not in existence at the time of the grant is void."

The abstract does not show whether the words "his heirs and assigns" followed the name of the grantee in either the granting or habendum clause of the deed. Giving effect to the general rule which is supported by the greater weight of the authorities upon this question, it is noted that the presence of such words following the name of a deceased grantee does not make the deed effective with respect to such heirs or assigns.

As to this, it has been said that "A deed to a person not living at the time of its execution and his heirs is void, there being no person to take under it, as the word 'heirs' is a word of limitation and not of purchase." Thompson on Real Property, Vol. 4, Sec. 2979. See *Baker* vs. *Lane,* 82 Kan., 715, 28 L.R.A. (N.S.), 405; *Hunter* vs. *Watson,* 12 Cal., 363, 73 Am. Dec., 543; *Neil vs. Nelson,* 117 N.C., 393, 53 Am. St. Rep., 590; *Wiehl* vs. *Robertson,* 97 Tenn., 458, 39 L.R.A., 423. However, it serves no useful purpose to speculate upon the language of the deed following the name of the deceased grantee, as this can be disclosed by a further abstract of said deed. In this connection, I am not unmindful of the rule, recognized in some jurisdictions, that where the parties to a transaction of this kind knew that the grantee named was dead, the inference is that by the use of that name they meant to designate some existing person or persons, and that a court of equity will inquire into the situation, the general design of the parties, and the equities between them, to ascertain who was intended as the grantee or grantees in such deed. See *City Bank of Portage* vs. *Plank,* 141 Wis., 653. However, the state desires an unimpeachable legal title to the property described in the deed tendered to it by Myrtle Moore, without being required to resort to a court of equity to establish such a title. In this situation, it is suggested that George W. Allyn and Andrew F. Allyn and their respective spouses, Mabel Allyn and Gertrude Allyn, execute a quit claim deed to Myrtle B. Moore of all of their right, title and interest in and to this property.

Aside from the considerations above noted as an apparent objection to the title of Myrtle B. Moore to that part of the property described in the tendered deed which is situated in the northwest quarter of Section 33, the following exceptions are noted with respect to her title to the property described in this deed:

1. On March 20, 1926, Myrtle Moore and Bertelle Moore, her husband, executed a written agreement apparently with all the formalities of a deed, to The Ohio Public Service Company, in and by which instrument they granted to said company the right to construct, maintain and operate a line for the transmission of electric energy for any and all purposes for which electric energy was then or might thereafter be used by said company with all necessary poles, wires, cables, fixtures and appliances over and on the following described premises situated in Erie Township, Ottawa County, Ohio:

> "Within the Port Clinton-Bono Highway Number 23 on north side from eastern boundary to western boundary line of the west part of the southwest quarter of Section 28, being all of said southwest quarter except that part thereof now owned by Fred Allen and Norma Allen."

The abstract of title does not advise me as to what, if anything, in the way of pole line construction has been constructed by said company under the easement granted to it by this instrument. You or your agents in charge are doubtless familiar with the facts as to this matter and this easement is here noted simply for the reason that the same is an apparent encumbrance upon the property.

2. On August 11, 1930, Myrtle Moore granted an easement for highway purposes to the State of Ohio. The line of said easement, as the same is described in the deed, is as follows:

> "Beginning at two points in the property line between said party of the first part and W. F. Kirk, which said property line passes through station 268+48 in the center line of survey made by the Department of Highways and Public Works, Division of Highways, said two points being at the intersection of the boundary lines of the right of way herein bargained, sold and conveyed, and the property line first above stipulated in this description, being a strip of land running thence in a southeasterly direction, 30 feet from and parallel with the center line of said survey, and on both sides thereof, equally distant therefrom, in and through the property of the party of the first part to two similarly located points in the property line between said party of the first part and Fred F. Allyn which said property line passes through station 275+69, in the center line of said survey, the said two points being intersections of the boundary lines of the right of way herein conveyed, with the last named property line in this description, as shown by plans on file in the office of the Department of Highways and Public Works, Division of Highways, Columbus, Ohio."

I am not advised from the abstract of title or from other information in the files submitted as to highway construction work done by the Department of Highways under this easement. It is not at all probable that this roadway will in any wise interfere with the use which your department desires to make of this property. This easement is here noted for the reason that there may be some possibility that it is an encumbrance which would affect your use of the property in question.

3. On January 12, 1934, Myrtle B. Moore and B. E. Moore, her husband, executed a mortgage deed to the Land Bank Commissioner of Louisville, Kentucky, to secure the payment of their promissory note of even date therewith in the sum of $2400.00. This mortgage has not been canceled of record and the same is a lien upon the above described property to the extent of the amount remaining unpaid upon the note

secured thereby, together with accrued interest. Needless to say, provision should be made for the payment and satisfaction of this note and mortgage before the transaction for the purchase of this property is closed by you.

4. It appears from the abstract of title that the undetermined taxes on this property for the year 1936 are unpaid and are a lien upon the property. Provision should likewise be made for the payment of these taxes before closing the transaction for the purchase of the property here in question.

This abstract of title is certified by the abstracter under date of November 25, 1936. By reason of the lapse of time since the certification of this abstract, it is suggested that a further check be made with respect to the title of the property to see whether any other or further liens have been placed on or charged against this property.

The warranty deed tendered by Myrtle B. Moore has been properly executed and acknowledged by said grantor and by Bertelle E. Moore, her husband. And assuming that before the delivery of this deed to the state George W. Allyn and Andrew F. Allyn and their respective spouses execute to Myrtle B. Moore the quit claim deed hereinbefore suggested, the deed here in question will be sufficient in form to convey to the State of Ohio a fee simple title in and to the property therein described, free and clear of the inchoate dower interest of Bertelle E. Moore, the husband of Myrtle B. Moore, with a covenant of warranty that the property is free and clear of all encumbrances whatsoever.

Upon examination of contract encumbrance record No. 194, I find that said instrument has been properly executed and that there is shown thereby a sufficient unencumbered balance in the appropriation account to the credit of your department to pay the purchase price of this property, which purchase price is the sum of $4,000.00. In view of the provisions of section 154-40, General Code, authorizing the Director of Public Works to purchase property required by the state or by the several departments and institutions thereof, it is suggested that before these files are submitted to the Auditor of State with your voucher covering the purchase price of this property, this contract encumbrance record be submitted to the Director of Public Works for his approval. This will obviate any question with respect to the authority of the Auditor of State to issue his warrant for the purchase price of this property.

In conclusion, it is noted that the purchase of the above described and other property needed for the enlargement of the Camp Perry site has been approved by the Controlling Board and that said board has

released from the appropriation account the money necessary to pay the purchase price of this property.

Respectfully,
HERBERT S. DUFFY,
Attorney General.

39.

APPROVAL—BONDS OF PAINT CONSOLIDATED No. 2 RURAL SCHOOL DISTRICT, HIGHLAND COUNTY, OHIO, $15,600.00

COLUMBUS, OHIO, January 26, 1937.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

40.

APPROVAL—LEASE TO LAND IN PERRY AND NORTH PERRY TOWNSHIPS, LAKE COUNTY, OHIO, FOR STATE GAME REFUGE PURPOSES. FRANK W. DAYKIN, CLEVELAND, OHIO.

COLUMBUS, OHIO, January 26, 1937.

HON. L. WOODDELL, *Conservation Commissioner, Columbus, Ohio.*

DEAR SIR: You have submitted for my examination and approval a certain lease No. 2380, executed by Frank W. Daykin of Cleveland, Cuyahoga County, Ohio, to the State of Ohio, on a parcel of land in Perry and North Perry Townships, Lake County, Ohio, containing 430 acres of land. By this lease, which is one for a term of five (5) years, this land is leased and demised to the state solely for state game refuge purposes; and it is noted in this connection that acting under the provisions of section 1435-1 and other related sections of the General Code, the Conservation Council, acting through you as Conservation Commissioner, has set this property aside as a state game and bird refuge during the term of said lease.

Upon examination of this lease, I find that the same has been properly executed and acknowledged by said lessor and by the Conservation Council acting on behalf of the state through you as Commissioner.