1831

1. FORFEITED LAND SALE — WHERE PURCHASER OF TRACT OF LAND FINDS IT IMPOSSIBLE TO IDENTIFY TRACT PURCHASED—NO RIGHT OF ACTION AGAINST COUNTY FOR PURCHASE PRICE PAID.

2. WHEN COUNTY COMMISSIONERS FIND SUCH TRACT CAN NOT BE IDENTIFIED OR LOCATED, ON BASIS OF MORAL OBLIGATION, COMMISSIONERS HAVE POWER TO REFUND TO PURCHASER AMOUNT PAID FOR TRACT —O. A. G. 1948, OPINION 3782, PAGE 453; OPINION 3922, PAGE 508, APPROVED AND FOLLOWED.

SYLLABUS:

1. When the purchaser of a forfeited land sale finds it impossible to identify the tract which he has purchased, he has no right of action against the county for the purchase price which he has paid.

2. When it is found by the county commissioners, after investigation, that a tract of land purporting to have been sold at a forfeited land sale cannot be identified or located, it is within the power of the county commissioners, on the basis of a moral obligation, to refund the purchaser the amount which he has paid on account of such sale. Opinions of Attorney General for 1948, Opinion No. 3782, page 453, and Opinion No. 3922, page 508, approved and followed.

Columbus, Ohio, September 11, 1952

Hon. Harry C. Johnson, Prosecuting Attorney
Guernsey County, Cambridge, Ohio

Dear Sir:

I have before me your letter requesting my opinion and reading as follows:

> "A question has arisen under a deed for the sale of forfeited lands by the County Auditor of Guernsey County, Ohio, to one G. S., the grantee therein. (G. C. 5744 to G. C. 5773, inclusive.)
>
> "Said deed is dated May 18, 1946. The following is a description of the land purported to be conveyed by said deed to-wit:
>
> > " 'Being PT NE ¼ Section 12 Township 1 Range 3 Jackson Township containing 13 acres. (Property formerly carried on tax duplicate in name of A. M. Cale.)'

"Grantee has checked the Recorder's records of Guernsey County for said deed in the name of 'A. M. Cale'. The description in that deed was not helpful as it refers to 42 acres, more or less, in Section 11, Township 1 and Range 3, Jackson Township, Guernsey County, Ohio.

"Said grantee believes that said deed is void because said description therein describes no land that can be located by him; and grantee, therefore, believes that he is entitled to a refund of his money from the County Treasurer of Guernsey County, Ohio, on the grounds that there was a total failure of consideration; That grantee received no consideration whatever for the purchase price paid by him.

Mulvey v. King, 39 O. S. 491.

"A remedy is suggested in 38 O. J., P. 1191, Sec. 378, Note 17, in the following words, to-wit:

> 'And where the sale of a part of a tract is invalid in that the description in the auditor's certificate of tax title is so indefinite that the premises bought cannot be located, the purchaser is entitled to recover the taxes paid, with interest, and for such sum he has a first lien on the entire tract.'

"We feel, however, that grantee's application for relief under said principle of law might be defeated by the fact that grantee cannot locate a larger tract of which the land purported to be conveyed to him by said Auditor is a part. * * *

"At your earliest convenience, will you kindly render us your opinion as to whether or not this grantee is entitled to reimbursement from Guernsey County in the amount of the price paid by him for said land; the correct procedure for Guernsey County to follow in making this reimbursement; as to whether or not said grantee has any remedy under G. C. 5766, 5767 or any other law or statute."

From a reading of your letter, it would appear that you are relying largely on the statements of the claimant that he has not been able to identify the land which he purchased with that owned by A. M. Cale, in whose name the forfeited land purchased by him purported to stand. That suggests the possibility that a careful investigation by your office may reveal facts which would clear up that irregularity. However, I will endeavor to answer your question on the assumption that the tract sold to the claimant cannot be identified.

Section 5762, General Code, provides that a deed to a purchaser at a forfeited land sale "shall be prima facie evidence of title in the purchaser, his heirs, or assigns." This section further provides:

> "* * * 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 non-payment of which the land was forfeited, became due and payable."
>
> (Emphasis added.)

It has been held repeatedly that such sale and deed are invalid if the land is not described upon the duplicate so that it can be identified with reasonable certainty from such description. Nassie v. Long, 2 Ohio, 287; Humphreys v. Huffman, 33 Ohio St., 395.

Section 5767, General Code, has undertaken to give certain protection to one who has purchased land at forfeited land sale but who finds his title is invalid. But it will be observed that his only protection is against the claimant of the land who recovers the land from him. The statute provides that in such case, the successful claimant must refund to the purchaser the amount of his purchase price, together with all taxes, etc., which he has subsequently paid, with interest.

Section 5766 gives him a lien on the land. There are many cases sustaining these rights. Among others:

Friendly v. Weber, 52 Bull., 535, affd., 76 Ohio St., 617;

Younglove v. Hackman, 43 Ohio St., 69;

R. R. Co. v. Carman, 71 Ohio App., 508.

In your letter you quote from 38 Ohio Jurisprudence, 1191 as follows:

> " 'And where the sale of a part of a tract is invalid in that the description in the auditor's certificate of tax title is so indefinite that the premises bought cannot be located, the purchaser is entitled to recover the taxes paid, with interest, and for such sum he has a first lien on the entire tract.' "

That is the proposition announced in Friendly v. Weber, supra, but the recovery is from the owner and not from the county.

So far as the statutes of Ohio are concerned, there appears to be no provision requiring or authorizing any reimbursement from the public treasury to a purchaser at a forfeited land sale who finds his deed to be void for any reason, except where the sale is void because it is found that the taxes on the tract sold had been regularly paid. In such case it is provided by Section 5764, General Code:

> "The sale of any tract or lot of land under the provisions of this chapter, on which the taxes and assessments have been regularly paid previous to such sale, is void and the purchaser, his heirs, or assigns, on producing the certificate of sale to the county auditor shall have his money refunded to him from the county treasury."

I find no Ohio decision either recognizing or denying the right of such purchaser to recover from the county under any other situation which has rendered the sale void and left him without any title to the land which he has purchased. There is, however, abundant authority in other jurisdictions to the effect that he has no such right. In 77 A. L. R. 824, a long list of citations from many states is introduced with the following statement:

> "There is little dissent from the rule that the holder of a tax certificate or deed issued at an invalid tax sale cannot, in the absence of statute, obtain reimbursement from the taxing authorities. The courts assign a number of reasons in support of the rule. It is said that the doctrine of caveat emptor applies with full force to tax sales, that payment made by the purchaser is voluntary, that he takes without warranty as upon conveyance by mere quitclaim, that he purchases a mere chance with the expectation of large profits, that the tax records are open to his inspection to be disregarded at his peril, and, lastly that the rule is necessary to avoid uncertainty in public finances."

Among the cases noted is Lyon County v. Goddard, 22 Kansas 389, where the court said:

> " 'A purchaser at a tax sale is a mere volunteer in the payment of the tax. Buying, as he does, property from a person who is not the owner, such party comes strictly and rigidly within the rule of caveat emptor. He has the same means of knowing whether the proceedings relating to the assessment of the taxes, the tax sale, and the issuance of the certificate are valid or not,

> as the county has, and he is bound to inquire whether the officers have authority to make the sale. As all the proceedings are matters of record, it is not only prudent for such a purchaser to examine into the matter for his own safety, but if he fails to inform himself of the authority of the officers, he does so at his own risk, excepting that he may have his money refunded *where the statute expressly makes such provision*, if he pursues the remedy pointed out. The officers of a county can only act in accordance with positive law; and neither the board of commissioners nor the county treasurer can refund any moneys upon the failure of tax titles, except as some statute requires it."
>
> (Emphasis added.)

The editor states that there are minority decisions to the contrary, and cites such cases. In 116 A. L. R. 1408 the same general rule is emphasized and additional cases cited, the editor stating that all cases decided since 77 A. L. R. affirm the majority rule above stated. No Ohio cases are noted in either instance.

However, our supreme Court has recognized the principle of caveat emptor which appears to underly the general rule above noted. In the case of Younglove v. Hackman, supra, the court while holding that a purchaser at a tax sale which proves to be invalid may recover from the owner the taxes which he has paid, said:

> "There is no doubt that the rule of *caveat emptor* applies to purchasers at tax sales, but we have a statute that defines what the owner of the land shall pay to remove the cloud of an invalid tax sale."

The court then quoted a statute then in force which is similar to Section 5767 which I have above set out.

It may be said that the remedies pointed out in the foregoing discussion cannot be of any assistance to the complainant referred to in your communication, since it is stated that he is unable to find any land answering to the description of that which he purchased, and therefore no owner from whom he may claim reimbursement. The question under consideration, however, relates only to the authority and obligation of the county in such case.

If we apply the principle of caveat emptor to its full extent, and if we find no authority given by law to the county even in such extreme case, we must hold that the complainant took a chance that may result in a total loss to him, which the county is without authority to make good.

I do not consider that resort can be had to Section 5764 supra, which provides for a refund to one who has purchased a property on which the taxes have been regularly paid. There it is only necessary to present the certificate of sale to the auditor, who needs only to look at his record to see that the tax has been paid. This statute is designed to cover a simple case of mistake, with a simple remedy, whereas the case you present is one of confusion which would involve investigation and search of other records and probably the exercise of discretion, which should be exercised by the county commissioners who are charged by law with responsibility for the conduct of the county's business and the care and disposition of its funds.

From the foregoing, I reach the conclusion that the county, in the case you present, has no legal duty to refund to the purchaser the amount he has paid, even though he is unable to identify and take possession of the land he supposed he was purchasing; and that it could not be held, in a legal action, liable to make such refund. There remains however, the question whether the county could recognize a moral obligation, and reimburse the purchasers on that basis.

It would appear that if a county is justified under any circumstances in recognizing and discharging a moral obligation this is such a case. The county has sold to a purchaser something which either does not exist or which cannot be located; it has received money, representing a delinquent tax on such non existent real estate; it can never apply the money so received toward the payment of tax on any property. It is money in its hands for which it has given no consideration and which represents a loss on the part of the purchaser.

That a county, as well as other political subdivision, may recognize and discharge a moral obligation has been repeatedly held. Among others, we may note: Opinion No. 3467, Opinions of Attorney General for 1931, page 1024; No. 1330 for 1939, page 1966; No. 3199 for 1940, page 1177; No. 3982 for 1948, page 453; No. 3922 for 1948, page 508.

The two opinions last cited dealt with refunds on forfeited land sales. In Opinion No. 3782, it was held:

> "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."

This ruling was based solely on the recognition of a moral obligation. In Opinion No. 3922, the syllabus reads:

> "When a parcel of land has been erroneously listed and assessed as having thereon a building of a certain value, when in fact there is and has been no building on the parcel, one who purchases that parcel at a forfeited land sale may lawfully be refunded the difference, if any, between the sum that the county auditor should have withheld from the purchase price had the parcel been properly valued and assessed, and the sum actually withheld by him from the proceeds of the forfeited land sale."

In the course of the opinion, the writer stated that he was following the principle of this earlier opinion, and after quoting its syllabus, said:

> "This conclusion was based on the proposition that the county had received money to which it was not entitled through the actions of one of its officers, and that the county had the power to meet this moral obligation."

Concurring in these holdings, I am of the opinion that if the county commissioners, after investigation find the facts to be stated, and that no land can be located corresponding to that purchased, they would be authorized, as a recognition of a moral obligation to order a refund to be made to the purchaser.

Respectfully,

C. WILLIAM O'NEILL
Attorney General