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1. LANDS FORFEITED TO STATE—BOARD, COUNTY AUDITOR, COUNTY TREASURER, CHAIRMAN BOARD OF COUNTY COMMISSIONERS, DETERMINED LANDS AT FORECLOSURE WOULD NOT SELL FOR AMOUNT TO PAY TAXES, ASSESSMENTS, PENALTIES AND INTEREST—LACK OF BIDDERS—HOW OWNER MAY REDEEM SUCH LANDS—PAYMENTS—SECTION 2672-2 G. C.
2. WHERE LANDS FORFEITED TO STATE BY ACTION OF SUCH BOARD—NO AUTHORITY FOR TAXPAYER OR LIEN CLAIMANT TO REDEEM LANDS—MAY NOT ENTER INTO AGREEMENT WITH COUNTY TREASURER TO PAY TAXES, ASSESSMENTS, PENALTIES AND INTEREST TO PREVENT SALE BY COUNTY AUDITOR—SECTIONS 2672-3, 5752 G. C.

SYLLABUS:

1. Where lands have been forfeited to the state by reason of the determination of the board, consisting of the county auditor, county treasurer and chairman of the board of county commissioners, that the lands will not sell for a sufficient amount in a foreclosure sale to pay the taxes, assessments, penalties and interest standing charged against an item of property or by reason of lack of bidders in foreclosure sale, the owner or any person authorized under Section 2672-2 of the General Code may redeem such lands at any time prior to the auditor's sale upon payment of the principal amount of the taxes becoming delinquent prior to the year 1937, together with payment of all subsequent delinquencies, penalties and interest and upon payment of the current taxes.

2. Where lands have been forfeited to the state by action of such board neither the taxpayer nor a lien-claimant is authorized by Section 2672-3 of the General Code to redeem such lands by entering into an agreement with the county treasurer to pay the taxes, assessments, penalties and interest in ten annual installments and thus prevent the sale of such lands by the county auditor as required by Section 5752 of the General Code.

Columbus, Ohio, July 14, 1943.

Hon. William G. Wickens, Prosecuting Attorney,  
Elyria, Ohio.

Dear Sir:

I am in receipt of your request for my opinion, which reads:

“It has been my feeling that the Whittemore Act applies exclusively to delinquent lands, as distinguished from forfeited lands and that by the provisions of Section 2672-3, General Code, so long as the undertaking shall continue to be performed the lands on which a Whittemore undertaking has been issued shall not be entered on the foreclosure list. There appears to be nothing in the present Act to stop forfeiture proceedings. On the other hand, forfeited land laws as presently enacted, provide that redemption of forfeited lands is only worked by paying into the county treasury all the taxes, assessments, penalties and interest *due thereon at the time of forfeiture*. The payment of any lesser amount, whether under Whittemore undertaking or otherwise, apparently does not work a redemption of the land, and Section 4750, General Code, sic, provides that all lands forfeited for non-payment of taxes shall be listed, advertised and offered for sale. From the provisions of that section it would seem to be the clear present duty of the County Auditor to offer all forfeited and unredeemed lands at the forfeiture sale, whether or not a Whittemore undertaking has been issued.

In requesting your opinion, however, I call your attention to the recently amended Section 5746 as embodied in House Bill 260 and I am wondering whether or not the conclusion will not be changed under the new Act. It is no longer provided that the redemption is worked by the payment of the taxes, assessments, penalties and interest due at the time of forfeiture but it is now provided in the section soon to become effective that the redemption is worked by the payment of the taxes, assessments, penalties and interest due at the time of such payment. In other words, a lesser sum than the full amount of taxes, assessments, penalties and interest is due by reason of Section 2672-2, General Code, and it would appear that the payment of such amount, under the provisions of the new Act, will work a redemption of the property

and that no longer will it be necessary to pay the full amount due at the time of forfeiture.

The matter is presently before our office in the case of a piece of real estate forfeited in 1937. On this land the penalties and interest for the years 1936 and prior thereto were due at the time of forfeiture, and although they were declared remitted by Section 2672-2, General Code, upon tender of payment, still, under the old Act, the payment of such amount less such penalty and interest, would not work a redemption of the land under Section 5746, as that section seems to provide for the payment of all taxes, assessments, penalties and interest due at the time of forfeiture. My present question is whether or not, under the new Act the remitter authorized by Section 2672-2, General Code, can be made and whether or not the same will work a redemption of the land from forfeiture. So much for a cash payment. My next question is whether or not, as an alternative to such cash payment, a Whittemore undertaking can be issued when the new Act becomes effective and whether or not the same works a redemption of the land so that the property will be considered redeemed and title restored to the former owner. As we have several cases here involving rather large sums of money which will be governed by your conclusions, we will appreciate your prompt attention."

The statutes referred to in your request as the "Whittemore Act" are Sections 2672-1 to 2672-16 of the General Code, both inclusive. Section 2672-1 of the General Code authorizes the payment of the principal amount of taxes and assessments and the remission of penalties and interest on taxes becoming delinquent prior to the year 1937 upon payment of all taxes, penalties and interest for the subsequent years and the principal amount of such former taxes. Such section reads:

"Any person, firm or corporation charged with or legally authorized or required by law or decree of court to pay real property taxes and assessments which have become delinquent at or prior to the August or September settlement in any year, or any person, firm or corporation holding a lien upon such real property may at any time elect to pay the principal sum of such delinquent taxes and assessments as provided in this act, anything in the permanent statutes of this state relating to the payment of real property taxes, assessments, penalties and interest thereon to the contrary notwithstanding. No person shall be entitled to make such election unless all taxes, assessments and penalties for the current year then due and payable have been paid, or elected to be paid in accordance with the provisions of Section 2653 of the General Code. Provided, however, that nothing contained in this act shall be construed to abate or cancel penalties, interest and other charges on real property taxes and assessments for any year subsequent to the year 1936."

Section 2672-3 of the General Code makes somewhat similar provisions for the payment of such earlier delinquencies in ten annual installments. With such provisions you are familiar. I, therefore, do not quote such section.

The question in your mind arises by reason of the provisions of statute with reference to the forfeiting of lands to the state for non-payment of delinquent taxes for the period of time designated in such statutes. Let us examine the provisions of statute with reference to the forfeiture of title with a view of determining the nature of the title of the taxpayer and the state with respect to the land against which taxes have been assessed and have been permitted to remain unpaid for such period of time that the title has become forfeited.

Section 5705 of the General Code defines "delinquent lands" as those upon which the taxes or assessments have remained unpaid for two consecutive semi-annual installments. Such definition is not substantially changed by House Bill No. 260, enacted by the present General Assembly. Section 5717 of the General Code provides that after such lands have been certified as "delinquent lands" for a period of three years if the taxes, assessments, penalties and interest remain unpaid foreclosure proceedings may be instituted to foreclose the lien of such taxes. Subsequent sections specify the manner of conducting such foreclosure proceedings. Section 5724 of the General Code provides specifically for the redemption of delinquent land at any time before foreclosure proceedings are instituted. Such provision is:

"All delinquent land upon which the taxes, assessments, penalty or interest have become delinquent, may be redeemed at any time before foreclosure proceedings thereon have been instituted, by tendering to the county treasurer the amount then due and unpaid."

Section 5744 of the General Code provides that if the delinquent lands are not sold in the foreclosure proceedings for want of bidders the title to such lands shall be "forfeited" to the state. Such section reads:

"Every tract of land and town lot offered for sale in foreclosure proceedings, as provided in the next preceding chapter, and not sold for want of bidders, and every tract of land and town lot omitted from foreclosure proceedings and duly advertised as provided in this chapter shall be forfeited to the state. Thenceforth all the right, title, claim, and interest of the former owner or owners thereof, shall be considered as transferred to, and vested in, the state, to be disposed of as the General Assembly may direct."

Such section is amended in House Bill No. 260, enacted by the present General Assembly, to read :

“In addition to the land and town lots forfeited to the state as provided in section 5718-1c, every tract of land and town lot offered for sale in foreclosure proceedings, as provided in the next preceding chapter, and not sold for want of bidders shall also be forfeited to the state. Such forfeiture of lands and town lots offered for sale in foreclosure proceedings shall be effective when the court by entry shall order such lands and town lots forfeited to the state, which order shall be made only after representation by the prosecuting attorney that no further order of sale is to be issued. A copy of such entry shall be certified to the county auditor. Thenceforth all the right, title, claim and interest of the former owner or owners thereof shall be considered as transferred to, and vested in, the state, to be disposed of in compliance with all provisions of this chapter.”

Section 5745 of the General Code specifies the manner of the assessment of the taxes, assessments, etc., against such “forfeited lands”. Such section reads :

“The county auditor, annually, shall return, by the county treasurer, a separate list of all lands or town lots so forfeited, with the description thereof, and the amount of taxes, assessments, penalties and interest due thereon, to the auditor of state, and all such lands or lots shall be preserved on the tax lists and duplicates until sold or redeemed, and the taxes and assessments thereon regularly assessed, in the name of the state. Such taxes and assessments shall be returned, annually, by the county treasurer as delinquencies and credited to him as other delinquencies, in his settlement.”

Such section is amended in such House Bill No. 260 to read :

“All lands or lots which have been forfeited to the state shall be preserved on the tax lists and duplicates until sold or redeemed, and the taxes and assessments thereon regularly assessed, in the name of the state. Such taxes and assessments shall be returned, annually, by the county treasurer as delinquencies and credited to him as other delinquencies, in his settlement.”

Section 5746 of the General Code authorizes the “former owner” of the lands to redeem such lands by the payment of all delinquent and current taxes, assessments, penalties, interest and costs. Such section reads :

“If the former owner of a tract of land or town lot, which has been so forfeited, at any time before the state has disposed of such land or lot, shall pay into the treasury of the county in which

such land or lot is situated, all the taxes, assessments, penalties, and interest due thereon at the time of such forfeiture, with the interest which has since accrued thereon, as ascertained and certified by the auditor, the state shall relinquish to such former owner or owners, all claim to such land or lot. The county auditor shall then re-enter such land or lot on his tax-list, with the name of the proper owner."

Such section is not substantially amended by such House Bill No. 260. I, therefore, will not quote the amended section.

Section 5718-1 of the General Code provides that if a board composed of the president of the board of county commissioners, the county auditor and the county treasurer, before certification of the foreclosure list to the county prosecutor, determines that items charged on such list with respect to particular parcels are greater than that which will be realized upon sale, they may be omitted from the foreclosure list. Section 5718-2 of the General Code provides that upon advertisement of such omitted lands as therein provided they shall be "forfeited" to the state and disposed of as provided in Chapter 15 of Part Second, Title I: Taxation (Sections 5744 to 5773, General Code). Thus, when lands are "forfeited" to the state either by reason of want of bidders in a tax foreclosure action or by such board, the nature of the titles of the state and the former owner are the same.

Section 5752 of the General Code provides that after publication of the notice of sale of forfeited lands as provided in Section 5751 of the General Code the county auditor shall offer for sale at public auction each parcel thereof. Such section and the succeeding ones authorize the county auditor to sell any parcel at such sale if the highest bid is sufficient to pay the taxes, assessments, penalties and interest; otherwise, he must report the failure of sale to the board of county commissioners at their regular June meeting, at which meeting it may authorize the county auditor, at his next March auction of forfeited lands, to sell the parcel at the highest price obtainable irrespective of the quantum of taxes, assessments, penalties and interest charged against it.

From the analysis of the statutes thus far it might be argued with some weight that when lands were "forfeited" to the state either by reason of lack of bidders at a foreclosure sale or by reason of the action of the board above described absolute title was in the state. However, when we refer to some other sections of the General Code, it would seem that the rights of the "former owner", as described by statute, are inconsistent with such contention. Thus, in Section 5764 of the General Code it is provided that :

"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 auditor of state, shall have his money refunded to him from the state treasury. The state auditor shall pay it out of the money appropriated for refunding taxes twice or improperly paid."

Such section was not materially changed by the enactment of House Bill No. 260 above mentioned. From such section there is at least an inference that the "former owner" may pay the taxes, assessments, penalties, interest and costs charged against a parcel of land on the forfeited land list at any time prior to sale by the auditor. Section 5757 of the General Code reads as follows:

"If any of such forfeited lands are sold for a greater sum than the amount of such tax, assessment, interest, penalty, and costs of sale, the county auditor shall charge the county treasurer separately in each case, in the name of the supposed owner, with the excess above such amount. The treasurer shall retain such excess in the treasury for the proper owner of the forfeited lands, and upon demand by such owner, within six years from the day of sale, shall pay the excess to him."

This section was not amended by House Bill No. 260, above referred to. If the "forfeiture" of the lands to the state cut off all of the taxpayer's rights to the property, then by what theory could it be deduced that he would be entitled to such excess proceeds of sale? Likewise, in Section 5758 of the General Code it is provided that:

"If the county treasurer, upon such demand, is not fully satisfied as to the right of the person demanding, to receive it, if there are several different claimants, he shall commence a civil action by filing a petition of interpleader, in the court of common pleas of the county where the land was sold, wherein he shall make the person or persons claiming the excess, and the state, defendants, and the action shall proceed as other civil actions. The costs of the proceedings shall be paid by the person or persons claiming the excess, as the court shall order. The prosecuting attorney of the county shall attend to the action, in behalf of the treasurer."

Such section possibly infers that lien-claimants might have a prior right to the excess proceeds ahead of the taxpayers. Such view was recognized by one of my predecessors in office in Opinions of the Attorney General for 1933, No. 209, page 302.

In an opinion of one of my predecessors in office, reported in

Opinions of the Attorney General for 1933, No. 206, page 291, there is a review of the statutory provisions with reference to the title of the state with reference to forfeited lands and the rights of the taxpayer thereto, after which he comes to the conclusion stated in the syllabus that:

“When lands are ‘forfeited’ to the state by reason of the fact that no bidders were obtained at a sale in foreclosure of the delinquent tax lien against a parcel of property pursuant to the provisions of Sections 5705 et seq. General Code, and become ‘forfeited lands’ the only interest of the state in such lands is that of a holder of legal title thereof, to be disposed of, and the proceeds applied toward the payment of the taxes, assessments, penalty, interest and court costs standing charged against such parcel, and the state has no right to possession of such lands or to the rents arising therefrom, and must account to the ‘former owner’ for any sum received in excess of the amount of such taxes and charges.”

On page 297 of such report the then Attorney General stated that:

“Considering the language of the entire act with reference to its effective purpose that is, of obtaining a more convenient or practical method of subjecting lands upon which the taxes have been permitted to remain delinquent for an unreasonable time to the payment thereof, the apparent legislative intent is to vest the absolute legal title to the forfeited lands in the state of Ohio but to permit the equitable title and right of possession to remain in the former owner until such time as it is divested by sale by the state or until such legal title has been redeemed by the payment of the taxes, assessments, interest, penalties and court costs standing charged against such parcel upon the records of the county within which such property is located. In other words, the legislature has merely provided what to it seemed a better method of exposing the property to sale than by alias orders issued from the court by placing the entire control of such sale in the county auditor of the county in which the premises are located. I do not believe that the language of the act shows the intent of the legislature to divest the former owner of his right of possession until an actual sale has been effected of the lands in question, especially in view of the fact that the statute specifically provides the amount for which the property may be redeemed and further, since in Section 5745, General Code, the delinquent lands are made taxable as though owned by the former owner.”

In the opinion above referred to (Opinions of the Attorney General for 1933, No. 209, page 302), the Attorney General expressed his opinion as to the right of a mortgagee to redeem lands “forfeited” to the state as follows:

“2. A mortgagee may not, pursuant to the provisions of



Section 5746, General Code, redeem forfeited lands and cause the title to the premises to be vested in the mortgagee.”

In that opinion such Attorney General stated that “the rights of the mortgagor and the mortgagee are strictly matters of contract and are created by the indenture of mortgage.”

It is the established law of this state that upon sale by the auditor of the forfeited lands in compliance with the statutes above referred to and the issuance of a deed thereunder, the purchaser acquires title free from all claims of the former owner and lien-claimants. *Kahle v. Nisley*, 74 O. S. 328; *Cech v. Schultz*, 132 O. S. 353; 1936 Opinions of the Attorney General 652; 1937 Opinions of the Attorney General 1816.

In the opinion of my predecessor in office reported in Opinions of the Attorney General for 1937, No. 1045, page 1816, his conclusion is expressed in the first three paragraphs of the syllabus as follows:

“1. The provision of Section 5744, General Code, to the effect that after lands or lots are forfeited to the state for non-payment of taxes thenceforth all the right, title, claim and interest of the former owner or owners shall be vested in the state, was inserted in the section for the purpose of carrying to the purchaser at forfeited land sale as good a title as the owner or owners of the land or lot had.

2. The state at no time obtains an absolute, indefeasible title to forfeited lands or lots for the reason that at any time prior to sale, even though such lands or lots have been forfeited to the state, the owner can pay to the county treasurer the taxes, assessments, penalty and interest charged against such lands or lots and the county auditor must under the law, transfer such lands or lots back into the name of the owner or owners. There can be no such thing as an absolute, indefeasible title so long as an equity of redemption remains in some person or persons.

3. The most interest that the state can have in lands or lots forfeited to it for non-payment of taxes, is a lien for the taxes, assessments, penalties and interest remaining unpaid.”

In Opinions of the Attorney General for 1939, No. 1574, page 2340, is reported my opinion in which I held that:

“Amended Senate Bill No. 3 of the 93rd General Assembly was enacted for the purpose of encouraging the payment of delinquent taxes and assessments and its provisions are available to any of the persons named in Section 2672-1 thereof, including

lienholders, at any time prior to the date such delinquent lands are sold at judicial sale. \* \* \*

Similarly in my opinion No. 902, reported in 1939 Opinions of the Attorney General, page 1237, I held that:

“The benefits of Amended Senate Bill No. 3 of the 93rd General Assembly, known as the Whittemore Act, are not available when the lands were sold in a foreclosure proceedings before the effective date of the act, even though the entry of confirmation may be filed after the effective date, Section 5692, General Code, requiring the payment of all taxes, assessments, penalties and interest due thereon at the time of sale.”

Section 2672-15 of the General Code specifically grants to the parties authorized by the act the right to pay the delinquent taxes in either of the two methods specified by such act at any time prior to decree in foreclosure, upon compliance with the requirements of such section. The pertinent part of such section is:

“\* \* \* Nothing in this act shall affect the right of the prosecuting attorney to institute and complete proceedings to foreclose the lien of the state under Sections 5718-3 and 5719 of the General Code of Ohio, nor the jurisdiction and power of the common pleas court under said sections of the General Code unless prior to the date of sale, the costs incurred in foreclosure proceedings shall have been paid and an undertaking shall have been entered into pursuant to this act, covering the payment of such delinquent taxes and assessments.”

Similarly, Section 2672-3 of the General Code provides that if an installment undertaking is entered into with respect to an item of taxes prior to certification of the foreclosure, such item shall be omitted from the certified list.

Summarizing the provisions of such two sections it would appear that:

1. If an installment agreement is entered into by a taxpayer with respect to the payment of a delinquent item of taxes prior to the certification of the delinquent list for foreclosure under authority of Section 2602 of the General Code, the item is omitted from the list so certified (Section 2672-3, General Code).

2. If the item is on the certified list and foreclosure action has been instituted the taxpayer or lien claimant may, at any time prior to the sale thereunder, upon payment of the court costs, enter into such an agreement for the payment of the taxes in installments and thereupon further action in the foreclosure proceedings is stayed until default in performance of such installment contract (Section 2672-15, General Code).

3. Section 2672-16 of the General Code further provides that if in a tax foreclosure sale, an installment agreement is in effect with respect to the payment of the taxes on the parcel sold, the purchaser thereof may, upon his application, accept the title either subject to such agreement or require the remaining installments paid from the purchase price. Such section reads:

“When any property in relation to which an undertaking has been entered into under Section 3 (G. C. Section 2672-3) of this act, or any previous similar enactment, is sold at foreclosure sale the court in which such action is prosecuted may in its discretion, upon application of the purchaser, provided payments under such undertaking are not in default, order such property conveyed to such purchaser subject to the terms of such undertaking, or order the balance due under such undertaking paid out of the proceeds of such sale.”

I find no provision in such act authorizing the entering into of installment contracts except as above quoted or referred to.

As above pointed out, Section 5752 of the General Code requires the auditor to sell the forfeited lands on the second Monday of March following the forfeiture thereof, unless they have been redeemed. The method of redemption is set forth in Section 5746 of the General Code, above quoted. Such section only authorizes the redemption of forfeited lands by means of payment before sale. I am unable to find either in the sections referred to by you as the “Whittemore Act” or in “Chapter 15: Forfeited Lands” division of the General Code (Sections 5744 to 5773. General Code) any provision authorizing the redemption of forfeited lands by the making of an installment contract *for the payment* of such redemption price.

As I have above pointed out, the General Assembly has specifically provided that the entering into of such contract merely suspends the certification of the delinquent land for foreclosure for such period as there is no default in the performance of such contract, or, if foreclosure action has been instituted, stays the foreclosure proceedings until default or complete performance of the contract. It seems to me that the making of such specific provisions indicates a legislative intent not to suspend the effect of other provisions of statute except to the extent therein specifically provided. If such be true, then it would seem to follow that after forfeiture of lands for non-payment of taxes, neither the owner nor a lien-claimant could prevent the auditor's sale by entering into a contract for the payment of delinquent taxes over a ten-year period, which period would extend more than nine years beyond the time when the auditor is required to complete his sale.

I, therefore, am of the opinion that Section 2672-3, et seq. of the General Code do not authorize the treasurer to enter into an effective agreement for the redemption of forfeited lands by the payment of the redemption price over a period of ten years. It further seems to me that Sections 5752, 5746 and 5764 of the General Code, when construed in the light of the so-called "Whittemore Act," require an auditor's sale of the forfeited lands unless at the time specified in such sections the taxes, assessments, penalties and interest have been paid or extinguished as provided by law. In view of the fact that Section 2672-2 of the General Code says that "anything in the permanent statutes of this state relating to the payment of real property taxes, assessments, penalties and interest to the contrary notwithstanding," the taxes may be paid in the manner therein specified and the fact that Section 5764 of the General Code provides that the auditor's sale is void if the taxes and assessments have been regularly paid, I am unable to form the conclusion that the statutes above quoted do not authorize a taxpayer to redeem forfeited lands by payment of the taxes and assessments as authorized by Section 2672-3 of the General Code.

Specifically answering your inquiries, it is my opinion that:

1. Where lands have been forfeited to the state by reason of the determination of the board, consisting of the county auditor, county treasurer and chairman of the board of county commissioners, that the lands will not sell for a sufficient amount in a foreclosure sale to pay the taxes, assessments, penalties and interest standing charged against an item of property or by reason of lack of bidders in foreclosure sale, the owner or any person authorized under Section 2672-2 of the General Code may redeem such lands at any time prior to the auditor's sale upon payment of the principal amount of the taxes becoming delinquent prior to the year 1937, together with payment of all subsequent delinquencies, penalties and interest and upon payment of the current taxes.

2. Where lands have been forfeited to the state by action of such board neither the taxpayer nor a lien-claimant is authorized by Section 2672-3 of the General Code to redeem such lands by entering into an agreement with the county treasurer to pay the taxes, assessments, penalties and interest in ten annual installments and thus prevent the sale of such lands by the county auditor as required by Section 5752 of the General Code.

Respectfully,

THOMAS J. HERBERT,  
Attorney General.