

Note from the Attorney General's Office:

1936 Op. Att'y Gen. No. 36-6120 was overruled
by 1986 Op. Att'y Gen. No. 86-028.

Ohio, and is subject, to a great extent, to laws enacted by the Legislature relative to institutions of learning.

In the event the University should require lands for its purpose and an amicable arrangement cannot be made with the owner for the purchase of said lands, the same may, in my opinion, be appropriated for the uses and purposes of the university by the Department of Public Works of the State of Ohio, in pursuance of the provisions of Section 154-40, Clause 5, of the General Code of Ohio, quoted above.

Very truly yours,

JOHN W. BRICKER,
Attorney General.

6120.

COUNTY AUDITOR—MANDATORY DUTY OF AUDITOR TO MARK "TRANSFERRED" ON DEED GIVEN BY ADMINISTRATOR DISCUSSED — IMMATERIAL WHETHER COUNTY SURVEYOR HAS CHECKED AND APPROVED DESCRIPTION.

SYLLABUS:

When a holder of a deed for real estate, which has been legally purchased from an administrator or executor of an estate, through the probate court under procedure set forth in Sections 10510-2 et seq., General Code, makes application to the county auditor of the county in which the real estate is situated, for transfer of such real estate by said deed properly describing such real estate, and presents therewith the deed and order of the probate court, for the execution of such deed, it is the mandatory duty of the said county auditor to endorse on such deed "transferred", pursuant to Sections 2573 and 2768, General Code, and the county auditor may not refuse to make such transfer for the reason that the county surveyor has not checked and approved the description of the property contained in such deed.

COLUMBUS, OHIO, September 26, 1936.

HON. J. S. HARE, *Prosecuting Attorney, New Philadelphia, Ohio.*

DEAR SIR: This acknowledges receipt of your communication which reads as follows:

"In the case of William Ely, deceased, pending in the Probate Court of this county, an order was secured to sell 93 acres of land to pay debts of the deceased. The description of the

property in the decedent's name is rather lengthy because it describes the whole tract with seven exceptions heretofore deeded to various parties. There is no question about the parcel, location and acreage intended to be conveyed, and the description given in the deed is the same as that contained in the petition, appraisal, and order of sale in the proceedings in the Probate Court.

It is the practice in this county, before the County Auditor makes a transfer of real estate under the provisions of Section 2768, G. C., to require the holder of a deed to submit the deed to the County Surveyor for the purpose of keeping the tax maps up to date. The deed in this particular case was submitted to the County Surveyor and he refused to O. K. the description for transfer purposes on the theory that a survey was necessary in order to get a more concise description. If a new description is written, it will be necessary to start a new proceeding in the Probate Court, entailing much expense, because the description in the deed given must be the same as that contained in the petition and in the order of sale.

The County Auditor of this county refuses to transfer real estate under Section 2768, G. C., if the description has not been approved by the Surveyor. The Surveyor claims that he is acting under Section 6551, G. C.

Can the County Auditor legally refuse to transfer the real estate in this case, or any other case, if there is no question about the parcel, acreage and location of the real estate to be conveyed?"

From your communication, I presume that the provisions of Sections 10510-2 et seq., of the General Code, relating to the procedure for the sale of real estate by executors or administrators, has been followed. Section 10510-2, General Code, provides that when the executor or administrator finds that the personal property in his hands is insufficient to pay all debts of the deceased, etc., he shall commence a civil action in the Probate Court or Common Pleas Court for authority to sell the decedent's real estate. Section 10510-12, General Code, provides that the action shall be commenced by the executor or administrator by filing with the clerk of the court a petition duly verified. Section 10510-13, General Code, states that the petition shall contain, among other things, a *description of the real estate proposed to be sold*.

Section 10510-34, General Code, stipulates that when bond is filed and approved by the court it shall *order the sale of the real estate included in the petition*. Section 10510-41, General Code, provides that after the

petitioner has made return of his proceedings under the order of sale, and the court has examined it, it shall confirm it and *order the petitioner to make a deed to the purchaser*. Finally, Section 10510-44, General Code, states that the deed "*shall vest title to the real estate in the purchaser, in like manner as if conveyed by the deceased in his lifetime.*"

Sections 2573 and 2768, General Code, the latter of which is referred to in your communication, provide so far as pertinent here:

"Sec. 2573. *On application and presentation of title, with the affidavits required by law, or the proper order of a court, the county auditor shall transfer any land or town lot or part thereof or minerals therein or mineral rights thereto, charged with taxes on the tax list from the name in which it stands into the name of the owner, when rendered necessary by a conveyance, partition, devise, descent, or otherwise. If by reason of the conveyance or otherwise, a part only of a tract or lot, or minerals therein or mineral rights thereto, as charged in the tax list is to be transferred, the person desiring the transfer shall make satisfactory proof of the value of such part compared with the value of the whole, as charged on the tax list, before the transfer is made. The auditor shall endorse on the deed or other evidences of title presented to him that the proper transfer of the real estate therein described has been made in his office or that it is not entered for taxation, and sign his name thereto.*" (Italics mine.)

"Sec. 2768. The county recorder shall not record any deed of absolute conveyance of land or any conveyance, absolute or otherwise, of minerals or mineral rights until it has been presented to the county auditor, and by him indorsed 'transferred', or 'transfer not necessary.' * * *"

The foregoing statutory provisions had their inception from an act passed by the General Assembly on April 18, 1870 (67 Ohio Laws, 103). This act was entitled "Providing for election of county auditors, and prescribing their duties."

Section 13 of this act read:

"The county auditor shall, on application and presentation of title, with such affidavits as may be required by law, or the proper order of a court, transfer any land or town lot, or part thereof, charged with taxes on the duplicate, from the name in which it may stand into the name of the owner, whenever rendered necessary by any conveyance, partition, devise, descent, or

otherwise; and if, by reason of the conveyance or otherwise, a part only of any tract or lot, as charged on the duplicate, is to be transferred, the party or parties desiring the transfer, shall make satisfactory proof of the value of such part as compared with the valuation of the whole, as charged on the duplicate, before the transfer shall be made; and the auditor shall endorse on the deed or other evidences of title presented to him, that the proper transfer of the real estate therein described has been made in his office, or that the same is not entered for taxation, and sign his name thereto; *and no deed of absolute conveyance shall be recorded by any county recorder until thus indorsed.*" (Italics the writer's.)

It will be seen that what now appears in Section 2573, General Code, and the first paragraph of Section 2768, General Code, was contained substantially in Section 13 of the act of 1870.

In 1880, when the Revised Statutes were adopted, Section 13 of the act of 1870 became Revised Statute 1025, and the last clause of Section 13 became Revised Statute 1159.

In 1910, when the present Ohio General Code was adopted, Revised Statute 1025 became Section 2573, General Code, and Revised Statute 1159 became Section 2768, General Code.

From this history, it will be seen that it has been provided since 1870 that the county auditor *shall, on application and presentation of title with the proper order of a court, transfer any land*, whenever rendered *necessary by any conveyance, or otherwise*, and that no deed of absolute conveyance shall be recorded by any county recorder until endorsed by the county auditor.

Such language reads mandatorily that, on application and presentation of title with the proper order of a court, the county auditor *shall* transfer any land, when rendered necessary by a conveyance or otherwise. See the cases of *Cincinnati College v. LaRue*, etc., 22 O. S., 469, second paragraph of syllabus, and page 476; and *Dye v. State*, 73 O. S., 231.

From the provisions of the sections of the General Code, paraphrased in the first portion of this opinion, it can be readily seen that the order of sale of the court, its confirmation of sale, and the deed executed to the purchaser operates as a *conveyance* of the property, and certainly comes within the mandatory provisions of Sections 2573 and 2768, General Code.

Section 6551, referred to in your communication, has been repealed since 1919 (see 108 O. L., Pt. 1, page 970). I assume you have in mind Section 5551, General Code, under the chapter heading "Assessing Real Estate".

Section 5551, General Code, as just referred to, had its inception in an act passed by the General Assembly on April 6, 1892 (89 Ohio Laws, 220, 221). Such act was entitled "To provide for the keeping of a more accurate and complete record of maps and transfers of property in counties containing a city of the second grade of the first class." Such section, and Section 5552, General Code, read at the present time:

"Sec. 5551. The board of county commissioners may appoint the county surveyor, who shall employ such number of assistants as are necessary, not exceeding four, to provide for making, correcting, and keeping up to date a complete set of tax maps of the county. Such maps shall show all original lots and parcels of land, and all divisions, subdivisions and allotments thereof, with the name of the owner of each original lot or parcel and of each division, subdivision or lot, all new divisions, subdivisions or allotments made in the county, all transfers of property showing the lot or parcel of land transferred, the name of the grantee, and the date of the transfer, so that such maps shall furnish the auditor, for entering on the tax duplicate, a correct and proper description of each lot or parcel of land offered for transfer. Such maps shall be for the use of the board of equalization and the auditor, and be kept in the office of the county auditor."

"Sec. 5552. The county auditor shall appoint such draughtsmen as may be necessary and fix the salary thereof, subject to the approval of the board of county commissioners.

The salaries of the assistants shall be paid out of the county treasury in the manner as the salary of other county officers are paid."

The subject matter of that now contained in Sections 5551 and 5552, General Code, as previously indicated, was set forth in Sections 1 and 2 of such Act of 1892, as follows:

"Section 1. That in counties containing a city of the second grade of the first class, it shall be the duty of the board of county commissioners to provide for correcting, bringing down to date and keeping up the decennial maps of said county, and making tracing maps from the same, which shall show the divisions, subdivisions, and allotments of all the land in the county, which tracing maps shall be for the use of the boards of equalization and the auditor of said county, and shall be kept in his office, and shall be made and bound ready for use by the first day of April,

A. D. 1893; and to employ an expert draughtsman at an annual salary not exceeding \$1,500, who shall be under the control of the county auditor."

"Section 2. *It shall be the duty of said draughtsman to correct such original and tracing maps from time to time as the same shall be necessary; to enter thereon all new divisions, subdivisions and allotments of land in said county, whether made by the sale of parts of parcels of land, the subdivision or allotment of the same as provided by law or otherwise; to mark thereon the location of all new buildings and the materials, whether stone, brick or wood, used in their construction; to note all transfers of property, showing the lot or parcel of land transferred; the name of the transferee and the date of the transfer; to enter upon the transfer books in the office of the county auditor, a short description of lots and parcels of land offered for transfer; and to examine all deeds before they are entered for transfer, for the purpose of determining whether they contain a correct description of the lot or parcel of land intended to be conveyed, and to reject any and all deeds in which the description of the property is not correct, or the corners and lines are determined and fixed by perishable or uncertain objects or monuments, until such descriptions are carefully and accurately made and the corners and lines fixed by permanent monuments.*" (Italics ours.)

On April 12, 1900 (94 Ohio Laws, 558) the General Assembly amended Sections 1 and 2 of the Act of 1892, designating the sections as Revised Statutes 2789a and 2789b, as follows:

"Sec. 2789a. In counties containing a city of the second grade of the first class it shall be the duty of the board of county commissioners to provide for making, correcting and keeping up to date a complete set of tax maps of said county which shall show the original lots or parcels in said county, and all divisions, subdivisions and allotments of the same, together with the ownership of each parcel of land in said original lots, divisions, subdivisions and allotments, which maps shall be for the use of the board of equalization and the auditor of said county, and shall be kept in his office; and to employ an expert draughtsman at an annual salary not exceeding \$2,000, and such number of assistant draughtsmen, not to exceed three, as are necessary to perform the work and duties required in this act."

"Sec. 2789b. It shall be the duty of said draughtsman to

correct such original maps, and to replace them from time to time as the same shall be necessary, and to enter thereon all new divisions, subdivisions and allotments of land in said county to note all transfers of property thereon, showing the lot or parcel of land transferred; the name of the grantee and the date of the transfer, and to furnish the auditor for entering upon the tax duplicate, a correct and proper description of each lot and parcel of land offered for transfer.”

It will be noted that when the General Assembly passed the Act of 1892, it specifically provided in Section 2 of the act that the draughtsman had the duty “to examine all deeds before they are entered for transfer, for the purpose of determining whether they contain a correct description of the lot or parcel of land intended to be conveyed, *and to reject any and all deeds in which the description of the property is not correct.*”

However, when the General Assembly amended the Act of 1892 in 1900, this matter was completely eliminated from the section.

On April 25, 1904 (97 O. L., 459), the legislature again amended Sections 2789a and 2789b of the Revised Statutes to read as follows:

“Sec. 2789a. The board of county commissioners may appoint the county surveyor, who shall employ such number of assistants as may be necessary, not exceeding four, to provide for making, correcting, and keeping up to date a complete set of tax maps of the county, and which maps shall show all original lots and parcels of land, and, also, all divisions, subdivisions and allotments of the same, together with the name of the owner of each original lot or parcel and of each division, subdivision or lot in the same; also, all new divisions, subdivisions or allotments made in the county; all transfers of property showing the lot or parcel of land transferred, the name of the grantee, and the date of the transfer, so that such maps shall furnish the auditor, for entering on the tax duplicate a correct and proper description of each lot or parcel of land offered for transfer. Such maps shall be for the use of the board of equalization and the auditor, and shall be kept in the office of the county auditor.”

“Sec. 2789b. The board of county commissioners shall fix the salary of the draftsman at not to exceed \$2,000.00 per year; they shall likewise fix the number of assistants not to exceed four, and fix the salary of such assistants at not to exceed \$1,500.00 per year. The salaries of the draughtsman and assistants shall be paid out of the county treasury in the same manner as the salary of other county officers are paid.”

It will be noted that the subject matter of the Act of 1892 eliminated in the amendment of 1900 was not restored.

In 1910 when the present General Code was adopted, Section 2789a of the Revised Statutes became Section 5551, General Code, reading as it now reads, as previously quoted in this opinion, and Section 2789b of the Revised Statutes became Section 5552, General Code, reading as follows:

“The board of county commissioners shall fix the salary of the draughtsman at not to exceed two thousand dollars per year. They shall likewise fix the number of assistants not to exceed four, and fix the salary of such assistants at not to exceed fifteen hundred dollars per year. The salaries of the draughtsman and assistants shall be paid out of the county treasury in the manner as the salary of other county officers are paid.”

As just stated, Section 5551, General Code, now reads the same as adopted in 1910, while Section 5552, General Code, was amended in 1920 (108 O. L. Pt. 2, page 1229) to read as it now reads (see section quoted in preceding part of this opinion).

Thus it can be seen that the legislature never has restored the provision of subject matter of Section 2 of the Act of 1892, making it the duty of the county draughtsman “to examine all deeds before they are entered for transfer, and to reject any and all deeds in which the description of the property is not correct.”

Hence, it seems obvious that the county surveyor, who now performs the duties formerly on the county tax map draughtsman (see Opinions of the Attorney General for 1923, page 161), has no authority to reject any deed that has been presented to a county auditor for transfer under Section 2573, General Code.

I am therefore of the opinion, in specific answer to your question, that the county auditor cannot legally refuse to transfer the real estate under the facts set forth in your communication.

Respectfully,

JOHN W. BRICKER,
Attorney General.