

192.

TAX LIST—DELINQUENT—PROVISIONS SECTIONS 5718-2 AND 5750 G. C. MANDATORY — SALE, FORFEITED LANDS—DUTIES, AUDITOR OF STATE, COUNTY AUDITOR—PURCHASER, LAND FORFEITURE SALE ACQUIRES ABSOLUTE TITLE, WHERE LEGAL COMPLIANCE WITH STATUTORY REQUIREMENTS — STATUS, TAXES AND ASSESSMENTS, PENALTIES, COSTS OF SALE.

**SYLLABUS:**

1. *While the provisions contained in sections 5718-2 and 5750, General Code, for the publication of the lists of lands to be forfeited, and the forwarding of the lists of forfeited lands to the Auditor of State are mandatory, the forwarding of such lists to the Auditor of State between the first Monday in November and the first day of January is directory only as to the time of forwarding the same. When such list is forwarded to the Auditor of State after the first day of January, a sale of such forfeited lands may be legally held on the second Monday in March if the Auditor of State corrects any errors and omissions and returns such*

*list to the county auditor in time to permit the county auditor to complete advertisement of such list prior to the sale.*

2. *A purchaser at a land forfeiture sale acquires an absolute title to the property, free from all previous encumbrances, where there has been a legal compliance with all statutory requirements.*

3. *Taxes and assessments against forfeited lands should be regularly assessed in the name of the state, and when forfeited lands are sold under the provisions of section 5752, General Code, all taxes, assessments, penalties and interest then due and payable should be paid, together with the costs of sale, from the proceeds thereof.*

COLUMBUS, OHIO, February 23, 1939.

HON. WARD C. CROSS, *Prosecuting Attorney, Jefferson, Ohio.*

DEAR SIR: This is to acknowledge receipt of your recent communication, which reads as follows:

“Ashtabula County officials have been actively engaged, during the past two years, in an attempt to force payment of delinquent taxes.

Following the August Settlement, 1938, which was not completed until late in the year, a list of omitted lands was advertised in pursuance of section 5718-2, General Code. Owing to the fact that the August settlement was not completed until late in the year 1938, it was impossible to advertise this list for two full weeks prior to January 1, 1939. However, the list was advertised for two consecutive weeks, the first advertisement appearing in the paper dated December 23, and the advertisement being completed on January 6, 1939.

Following the completion of the advertisement, a certified copy of the forfeited list was filed with the Auditor of State, in pursuance of Section 5745 of the General Code. The fact that our advertisement was not completed by January 1, 1939, has given rise to the question as to whether or not we can continue with our forfeited land sales after advertising the sales for two consecutive weeks prior to the second Monday in March.

In other words, whether or not, having failed to complete our advertisement prior to January 1, 1939, we must now wait until 1940 to advertise the forfeited lands for sale.

It is our opinion that the statute which requires the omitted lands list to be advertised for two consecutive weeks prior to January 1st, is directory and that substantial compliance is sufficient, when, owing to the lateness of the August settlement it is impossible to complete the advertisement within the time prescribed in the statute.

Two other questions have arisen in connection with this matter: First: Whether or not the purchaser of lands at forfeited land sale who has complied with the terms of purchase and obtained an Auditor's Deed, takes title free of the claim of any mortgage, judgment or other lien holder. Second: Whether all taxes due at the time of the sale are to be paid from the proceeds of the sale, or whether only those due at the time of the forfeiture can be deducted."

Section 5718-1, General Code, provides for a board composed of the president of the board of county commissioners, the county auditor and treasurer. The duty of this board is to examine the list of lands upon which taxes have been certified delinquent for a period of three years and make a list of such properties as will not in their opinion, bring upon sale a sufficient sum to pay all taxes, assessments and penalties thereon in arrears, together with costs of foreclosure. The board may order such lands to be omitted from foreclosure proceedings. Section 5718-2, General Code, reads as follows:

"In the event that the board so orders omitted from the foreclosure proceedings any of the property in the manner set forth in the preceding section, the county auditor shall cause a list of the lands, lots, or parts of lots, so omitted to be published as herein provided; and upon completion of such publication the lands, lots and parts of lots included in the list so published shall be forfeited to the state and disposed of as provided by chapter fifteen of this title, unless the taxes, assessments, penalties, interests and charges shall have been paid. Such publication shall be made once a week for two consecutive weeks in two newspapers of opposite politics in the English language published in the county and of general circulation therein."

The publication ordered therein is apparently the publication which you say your auditor made on December 23, 1938 and completed on January 6, 1939. You will note that no time is set for such advertisement in section 5718-2, so that a forfeiture was completed "upon completion of such publication." Chapter fifteen, referred to in section 5718-2, General Code, provides for the sale of forfeited lands. Section 5744, General Code, provides that 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.

Section 5745, General Code, reads as follows:

"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.”

Again, it will be noted that aside from the list being returnable to the Auditor of State annually, no time is set for filing such return from the Auditor of State.

Section 5750, General Code, reads in part as follows:

“The auditor of state, annually, shall enter in the book provided for in the next preceding section, all lands forfeited to the state for the non-payment of taxes. The several county auditors, annually, between the first Monday of November and the first day of January, shall make a list of all forfeited lands and lots, and forward it to the auditor of state, who, after comparing it with the record of forfeited lands in his office, and correcting any errors or omissions therein, shall return it to the several county auditors, who shall sell the forfeited lands and lots, agreeably to the provisions of this chapter.”

Section 5751, General Code, provides for the sale of forfeited lands, as follows:

“The auditor of each county on receiving from the auditor of state such list of lands within his county, if the taxes, assessments, penalties, and interest due thereon have not been paid on or before the fifteenth day of January next ensuing, shall cause notice thereof to be advertised once a week for two consecutive weeks prior to the second Monday of March in two newspapers in the English language of opposite politics and of general circulation printed in his county. Such notice shall state that if the taxes, assessments, penalties, and interest charged against the lands forfeited to the state for non-payment of taxes are not paid into the county treasury and the treasurer’s receipt produced therefor before the time specified in this chapter for the sale of said lands, which day shall be named therein, each tract, so forfeited, on which the taxes, assessments, penalties, and interest remain unpaid will be offered for sale on the second Monday of March thereafter, at the court house in such county, in order to satisfy such taxes, assessments, penalties, interest and costs,

and that such sale will continue from day to day until each of such tracts is sold or offered for sale.”

Although section 5750, General Code, provides for the forwarding by the county auditors of their lists of forfeited lands to the Auditor of State between the first Monday in November and the first day of January, it is obvious that the forfeiture is not predicated or dependent upon such forwarding, such list being a list of lands already forfeited. Neither is such forwarding included in any of the steps outlined for the sale of such lands. The object is to apprise the Auditor of State, who supervises the work of the county auditors, and to permit the Auditor of State to correct any errors or omissions in such list prior to taking the steps necessary to conduct the sale of such forfeited lands.

I am, therefore, of the opinion that the provision requiring county auditors to make a list of such forfeited lands and forward the same to the Auditor of State between the first Monday in November and the first day of January is directory only and is for the purpose of giving the Auditor of State sufficient time to correct and return the list in time to permit advertisement as provided in section 5751, General Code, prior to the second Monday of March, the date of sale. Hence, when the county auditor is delayed in forwarding such list to the Auditor of State, but receives such list back from the Auditor of State in time to permit publishing the required notice of sale prior to the second Monday in March, the sale may be legally held on that date. It is not necessary to wait until the following year to advertise and conduct such sale.

Your second question was partially considered by one of my predecessors in Opinion No. 5807, rendered under date of July 6, 1936, the second branch of the syllabus of which reads as follows:

“Under the terms of Section 5762, General Code, the certificate of sale which is given to the purchaser of lands which have been forfeited to the state of Ohio, conveys the lien only of the state for taxes and penalties charged on said lands at the time they were sold. The deed given to such purchaser by the county auditor pursuant to the provisions of said section conveys to the purchaser a fee simple title to said lands.”

As discussed in that opinion, some confusion has arisen as to whether a purchaser of forfeited lands takes only a lien for the amount of unpaid taxes, as indicated in section 5766, General Code, or a fee simple title.

Section 5766, General Code, is as follows:

“The purchaser of such lands, his heirs, or assigns, from the day of such purchase, shall be held in all courts as the assignee of the state of Ohio. The amount of taxes and penalties charged on

the land at the time it was sold, with all legal taxes afterward paid thereon by such purchaser, his heirs or assigns, shall be a lien on it, and may be enforced as any other lien."

Section 5762, General Code, provides for an auditor's deed, as follows:

"The county auditor on making a sale of a tract of land to any person, under this chapter, shall give to such purchaser a certificate thereof. On producing or returning to the county auditor the certificate of sale the county auditor, on payment to him by the purchaser, his heirs, or assigns, of the sum of one dollar and twenty-five cents shall execute and deliver to such purchaser, his heirs, or assigns, a deed therefor, in due form, which deed shall be prima facie evidence of title in the purchaser, his heirs, or assigns."

When read in conjunction, these two sections indicate that the purchaser on receipt of a certificate of sale receives a lien for the amount of unpaid taxes and assessments. Upon exchanging his receipt, he receives a deed which shall be prima facie evidence of title in the purchaser.

The Supreme Court considered the title of the purchaser of forfeited lands in the case of *Kahle vs. Nisley*, 74 O. S. 328, and held as follows:

"Where, under section 2899, Revised Statutes, lands have been duly forfeited to the state for the non-payment of taxes and penalty, a valid sale and conveyance of such lands by the county auditor, extinguishes all previous titles thereto, either legal or equitable, and invests the purchaser with a new and perfect title to said lands, discharged from all previous liens and incumbrances."

The same question was again considered in the case of *Cech vs. Schultz*, 132 O. S. 353, the third branch of the syllabus reading as follows:

"Sections 5744 and 5762, General Code (114 Ohio Laws, 838 and 841), plainly indicate that a purchaser at a land forfeiture sale acquires, as against the owner, not merely a lien, but a prima facie and absolute title to the property, where the statutory proceedings have been legally complied with and no constitutional rights of the owner have been abridged."

On page 359, the Court in its opinion said:

"Conferring upon the purchaser 'prima facie evidence of title,' must be construed as meaning that if the proceedings under which the sale of forfeited lands has been made have been legally

complied with and no constitutional rights of the owner have been abridged, the title of the purchaser is absolute.”

I am, therefore, of the opinion that the purchaser of forfeited lands at a sale held in compliance with all statutory requirements receives a fee simple title, free from all previous encumbrances.

In answer to your third question, it will be noted that section 5745, General Code, quoted above, provides that forfeited lands shall be preserved on the tax lists and duplicates until sold and the taxes and assessments regularly assessed in the name of the state. Sections 5755 and 5756, General Code, definitely indicate that the taxes, assessments, penalties and interest are to be deducted from the sale price in so far as possible, and, as I have noted in answer to your second question, the sale is to be made free from all encumbrances, including taxes.

Answering your last question specifically, it is my opinion that when forfeited lands are sold under the provisions of section 5752, General Code, all taxes, assessments, penalties and interest due and payable up to the time of sale should be deducted from the sale price, the excess to be retained, as provided in section 5757, General Code, for the owner.

Respectfully,

THOMAS J. HERBERT,

*Attorney General.*