

the demand is not complied with within ten days to the satisfaction of the general assembly or the governor, the office of treasurer of state shall be held to be vacant, and the governor shall appoint a treasurer of state to fill the vacancy. The person so appointed shall give and file a bond and take the oath of office as required by law, and shall have the powers, perform the duties and be subject to the liabilities, of a duly elected and qualified treasurer of state."

There is little doubt in my mind but that the bond required by Section 297, conditioned "for the faithful discharge of the duties of his office", protects the State of Ohio and the sanitary districts against loss of funds after their delivery to the State Treasurer pursuant to Section 6602-79, General Code. It is obvious that the protection of such funds is one of the statutory duties imposed upon the Treasurer of State as such. Should it appear that an additional bond is necessary in view of the amount of sanitary district funds held by the Treasurer, the Governor has ample authority to require such additional bond under Section 298, General Code.

Respectfully,

HERBERT S. DUFFY,

Attorney General

2375

FORFEITED LAND--SALE-- PROVISIONS SECTION 5751 G. C.
MANDATORY--DELINQUENT TAX LIST--PUBLICATION
MANDATORY--DISCHARGE IN BANKRUPTCY--BANK-
RUPT NOT DISCHARGED FROM PAYMENT OF TAXES--
WHITTEMORE ACTS--LAND OWNER UNDER INSTALI-
MENT PLAN--STATUS WHEN DELINQUENT.

SYLLABUS:

1. *Section 5751, G. C., providing for the publication of notice of sale of forfeited lands, is mandatory. Such notice must be given in the form prescribed by Section 5754, G. C., within the time provided in Section 5751, G. C., and the sale must be held on the date provided by such section.*

2. *Section 5704, G. C. requiring publication of the delinquent real estate tax list, is mandatory. It is so declared by such section and the prosecuting attorney has no authority to institute proceedings to foreclose the state's lien for delinquent taxes until such publication is made.*

3. *A discharge in bankruptcy does not discharge the bankrupt from the payment of his taxes, Section 35, Title II, United States Code Annotated.*

4. *A land owner who has sought to take advantage of the ten annual installment plan of payment as provided by the Whittemore Acts and makes default, is in no better position than if he had not entered into the undertaking therein provided for and by the provision of the Acts, upon default being made his delinquencies are carried back to the duplicate and must be included in the delinquent land list and published in manner and form as other delinquencies are published.*

COLUMBUS, OHIO, April 25, 1938.

HONORABLE J. EWING SMITH, *Peoples Commercial Bank Building, Prosecuting Attorney of Logan County, Bellefontaine, Ohio.*

DEAR SIR: I am in receipt of your communication of recent date, viz:

"The County Auditor of Logan County has been unable to advertise forfeited lands so that they may be offered for sale in March, according to law. Assuming all other provisions of law have been complied with, may the auditor now proceed to advertise these lands and sell them at any convenient time?"

"The County Auditor of Logan County has been unable to advertise lands to be foreclosed. Assuming that all other provisions of law have been complied with, does the omission effect the right or obligation of the Prosecuting Attorney's office to institute foreclosure proceedings?"

"Does the bankruptcy proceedings which are pending against a delinquent taxpayer (real or personal) prevent the publication of the tax payer's delinquency?"

"In cases where a delinquent tax payer has made a partial payment on his delinquency, or where he has paid his delinquency under a contract plan, duly executed, do the payments or contract remove the necessity of publication of the particular tax payer's delinquency?"

I will answer your questions seriatim.

The important feature in the sale of forfeited lands is to carry a good title to the purchase.

When Section 5744, General Code, is considered, it would seem that the real estate owner has a very remote interest therein after forfeiture. I quote Section 5744, General Code:

"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."

The "next preceding chapter" referred to in the section is Chapter 14, which deals with "Delinquent Lands". While by forfeiture the state becomes vested with all the right, title, claim and interest of the former owner or owners in the forfeited lands and lots, it can only dispose of them in the manner and by the means provided by the General Assembly.

The General Assembly has made provision for such disposition. Section 5748, General Code, provides as follows:

"The lands, in lots, out lots and parts of lots which are forfeited to the state for non-payment of taxes, or otherwise, shall be sold and disposed of by the state agreeably to the provisions of this chapter." (Italics, the writer's.)

This language has a mandatory sound, but we cannot depend on sound altogether in determining whether a statute is mandatory or directory. It is said that "A man is known by the company he does not keep, but a particular law is known by its associates."

The ultimate purpose of the forfeited land laws is to convert private property (and real estate at that) into money for the use of the state. To that end the General Assembly makes what we might call in modern parlance, a "legal set-up" for that purpose and declares in so many words that it must be followed.

It is an old rule that unless time is of the essence of an act, such act is not mandatory as to the time within which a duty therein required to be performed, shall be performed. Taxes are levied and collected annually. The taxing machinery is geared for one year known as the "fiscal year" and the failure of taxing officials to perform their duties within the time fixed by statute, simply throws the machinery out of gear.

I do not deem it necessary to quote all the code sections relating to the sale of forfeited lands, but will state their substance as I extract it.

Section 5745, General Code, requires each county auditor to return through the county treasurer to the auditor of state a separate list of forfeited lands. This list shall contain a description of such lands and set out the amount charged against them. Such lands shall be carried on the tax duplicates of the county until they are sold or redeemed and

such taxes and assessments shall be returned annually by the treasurer as delinquencies and he shall receive credit in his settlement therefor.

Of course the primary purpose of this section is to advise the auditor of state as to the forfeited list in each county so that he may know whether or not the state is receiving its share of the tax from the particular county. The county auditor is the bookkeeper for the county, and the auditor of state is the bookkeeper for the county auditors.

Section 5746, General Code, provides that the owner of forfeited lands may redeem same at any time before sale.

Section 5747, General Code, requires the county treasurer to likewise report all redemptions to the auditor of state.

Section 5748, General Code, was quoted verbatim at the outset of this opinion.

Section 5749, General Code, requires the auditor of state, in effect, to keep a book containing a record of forfeited lands. It is a matter of common practice in the different counties to keep a record of forfeited lands on the tax duplicate, carrying it forward from year to year and it is usually denominated as the "red list".

Section 5750, General Code, requires the auditor of state annually to enter in his book all lands forfeited to the state. For the purpose of "making assurance doubly sure", 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 send it to the auditor of state for verification and correction, if necessary. After verification and correction the auditor of state is required to return such list to the various county auditors who shall sell such forfeited lands and lots "agreeably to the provisions of this chapter." Now note this provision:

"Lands and lots so forfeited which for any cause have not been so offered, shall be offered for sale under this chapter and if not sold for want of bidders, shall be again advertised and offered for sale by the county auditor at the next subsequent sales by him made under this chapter, until such lands and lots are sold."

Permit me to call attention to the continual use of the terms "annually" and "agreeably" in the provisions of this chapter. They are valuable side-lights in determining whether or not the provisions requiring forfeited sales to be held at a certain, specified time and giving notice thereof between certain specified dates, are mandatory or directory.

Section 5751, General Code, provides in substance that upon receipt by the county auditor of the forfeited list from the auditor of state, such county auditor shall enter for sale all forfeited lands and lots upon which

all charges have not been paid on or before January 15th of each year, and shall cause notice thereof to be advertised once a week for two consecutive weeks 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 courthouse 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 said tracts is sold or offered for sale. (Italics the writer's.)

Section 5752, General Code, provides in substance that the auditor in each county *on the second Monday of March* shall sell each tract of land contained in the list at public auction to the highest bidder. There are other provisions in the section not germane to your inquiry.

Section 5753, General Code, has been on our statute books for many years prior to October 14, 1931, when our law with reference to forfeited land sales was revamped. See Volume 114, Ohio Laws, Page 841. Section 5753 was formerly Section 2904, Revised Statutes of Ohio, and provides:

"If the county auditor by inadvertence or mistake, has omitted to cause the list of forfeited lands of the county, with notice of the sale thereof to be published as provided in this chapter, and the taxes and penalty with which the lands and town lots stand charged upon the forfeited list have not been paid before the first day of March of the next succeeding year after securing the list from the auditor of state, he forthwith shall cause the list with notice of the sale thereof to be published as provided in Section 5751. Such notice shall specify that sale will begin on the second Monday of April next, and the county auditor beginning with such day, shall sell the whole of each tract of land as contained in the list in the manner provided in the next preceding section."

The then Section 5751, General Code, referred to in the section above quoted simply provided that if taxes and penalties were not paid on or before October 15th next ensuing after the county auditor received the forfeited list from the auditor of state, he should advertise the forfeited lands for sale on the second Monday of December next thereafter.

The "preceding section" referred to in the above quoted section

was the then Section 5752, General Code, which provided in substance that the county auditor should attend on the second Monday of December and conduct the sale. The General Assembly by repealing this curative section, indicated that the new law relative to forfeited tax sales should be followed to the letter. In other words, that such law was mandatory.

The present Section 5754, General Code, provides the form of notice that the county auditor shall use in advertising forfeited lands for sale. This notice provides that unless the taxes, assessments, penalties, interest and costs are paid on or before the second Monday of March next, that the lands will be sold on such date at forfeited sale and the form further provides that the county auditor shall not only sign but date such notice.

This resume of the law relative to forfeited land sales was made for the purpose of showing the association and relation of Section 5751, General Code, which is the section providing the time when, and the manner in which the notice of sale shall be given to other cognate sections, as bearing upon the question as to whether or not such section is mandatory. I am of the opinion that such section is mandatory, and in a case where the auditor failed to give the prescribed notice of sale, so that the sale could be held thereunder on the second Monday of March thereafter, he is through so far as forfeited land sales for that particular year are concerned, and all he can do is to carry his forfeited list through to the next year and give his notice in manner and form and at the time prescribed by law.

Your second question evidently deals with delinquent lands. An examination of Section 5704, General Code, effective October 26, 1936, reveals the express provision:

"It shall be mandatory upon the county auditor to cause a list of the lands on such delinquent land list and duplicate to be published"

as therein provided, and the prosecutor has no authority to institute foreclosure proceedings, until such publication is made. (Italics the writer's.)

When the General Assembly says that a particular section of the code "shall be mandatory", that settles it, and such section must be strictly followed.

Bankruptcy does not relieve from taxes.

Section 35, Title 11, U. S. C. A., provides:

"A discharge in bankruptcy shall release a bankrupt from all his provable debts except such as (first) are due as a tax

levied by the United States, the state, county, district or municipality in which he resides * * *."

From your fourth question, I assume the land owner sought to take advantage of one of the Whittemore Acts. All these acts, and if I mistake not, taking into consideration the one in effect now, we have had four of them relative to the payment of delinquent taxes, provided in substance that the land owner could enter into a written undertaking in form to be prescribed by the bureau of inspection and supervision of public offices, to pay the principal amount of the delinquent taxes and assessments in ten equal annual installments. If the land owner complied with his undertaking, he would be relieved from penalties, interest and costs, but if he failed to comply therewith, the county treasurer was required to enter the fact and date of such default, cancel the undertaking and certify the fact to the county auditor, thereupon such officer and all other officers required by the permanent law of the state to act in the premises, were required to proceed to enforce the collection of the delinquent taxes, assessments, penalties and interest in the manner prescribed by the permanent laws of the state, making the necessary adjustment for any and all sums of money paid under the provisions of the undertaking. In short, such land owners delinquent taxes and assessments went back into the tax hopper to be dealt with as if no undertaking had ever been made.

Answering your question specifically, if the land owner has made default in his undertaking, publication must be made of his delinquency just the same as that of any other person.

Respectfully,

HERBERT S. DUFFY,

Attorney General