

SWAMP LANDS: Where county land patent to swamp land is void purchaser is entitled to refund of purchase money.

July 14th, 1939.



Honorable Marion R. Garstang,
Prosecuting Attorney
Linn, Missouri.

Dear Sir:

We acknowledge your request for an opinion dated July 6th, 1939, which reads as follows:

"The County Court of Osage County desire me to request an opinion on the following proposition:

"In December, 1938, Edward H. Kemple came to the former County Court and requested that a certain tract of land containing approximately 200 acres be surveyed and sold as Island or swamp land and that he be permitted to purchase same at private sale for \$1.25 an acre plus the cost of surveying. There may have been some discussion at the time as to the right of the County to sell the land, but at any rate, without any promises or agreements being made or any understanding had as to what would be done in the event the County patent did not stand up, it was agreed by the old Court and the purchaser, Kemple, that the land would be surveyed and sold at private sale for the price of \$1.25 per acre plus the cost of the survey. The land was surveyed and the cost of the survey together with the price of \$1.25 per acre made the land cost \$500.00, which

amount the purchaser paid and received the usual patent. The \$1.25 per acre part of the consideration was put into the school fund and the remainder paid over to the County surveyor to cover the cost of the survey. The patent, of course, contains no warranty and is in the usual form. At the completion of the sale nothing further was agreed or promised as to what would be done in the event the title failed.

"In the June Term of the Circuit Court of Osage County, Missouri, an adjoining land owner bought a quiet title suit against Kemple, the purchaser from the County, claiming the land as an accretion to his farm and denying that it was of island formation. The jury found that he was right and judgment was rendered vesting full title in the adjoining land owner and divesting all title out of Kemple, the purchaser from the County. No appeal was timely taken and the judgment is therefore final. The Court costs amount to between \$200 and \$300 dollars. Nothing was said to the County Court about defending the suit or about the title to the land being in question until after the judgment was rendered.

"At the July term of the County Court, Kemple the purchaser, appealed to the County Court for a refund of his \$500.00 and further requested the County to pay one-half of the Court costs in his unsuccessful attempt to defend his patent.

"That the County could not be compelled to make the refund against its wishes, no warranty or contract to that effect having been made, I take to be true without further consideration, and the purchaser is not taking that position.

"However, the County Court, desiring to be fair and equitable and not desiring to take the benefit of a sale of land that did not belong to them are seriously considering making a voluntary refund to Kemple of part or all of his request, provided they have authority to do so. They take the view that if the land was not theirs, the money is not either, and they do not desire to take advantage of the fact that the purchaser bought a defective patent.

"We therefore request an opinion on the following points:

1. Can the County Court voluntarily make a refund to the purchaser of a swamp land patent, which proved to convey nothing, of the \$1.25 an acre of the purchase price that went into the school fund?
2. Can the County Court voluntarily refund under these conditions the amount of money paid by the purchaser to cover the cost of the survey made by the County and which money has been paid out to the County surveyor for his services, by the County by warrant on General Revenue?

3. Can the County Court voluntarily make a refund of part or all of the Court costs in the case of Langendoerfer vs Kemple, a suit brought against the purchaser to try title to this land and which he lost?

4. Could the County voluntarily refund him any part of his attorney fees?

"In connection with question number two, the purchase price was computed at \$1.25 per acre plus the cost of the survey. The County sent its surveyor down to make the survey and paid him out of the general revenue. Then took part of the purchase price and put it back in General Revenue to reimburse that fund for the cost of the survey."

part: Section 11146 R. S. Mo. 1929, provides in

"* * * * *: The said court shall not, in any case, pay back any money or interest t at has been paid upon said contract, * * * * *"

Section 11148, R. S. Mo. 1929, provides:

"Whenever the county courts of this state shall have sold swamp or overflowed lands to which they are unable to make a good and sufficient title, the said courts are hereby authorized and empowered, with the consent of the purchaser, or, in case of his or her death or absence from the state, then with the con-

sent of his or her sureties or legal representatives, to cancel said contract."

In the case of State v. Adams, 61 S. W. 894, 161 Mo. 349, l. c. 368, the Supreme Court had under consideration a mandamus to compel the county treasurer of Butler County to pay a \$3900.00 warrant upon the swamp land fund which had been issued to relator pursuant to a claim for refund in a swamp land deal which did not materialize. There the Supreme Court had under consideration what is now Section 11146, supra, when it is said:

"The county having failed to comply with its contract in reference to the sale of these lands, we do not see any good reason why the purchase money paid by relator, with interest thereon, should not, in the circumstances of the case, be refunded."

Section 12162, R. S. Mo. 1929, provides:

"The county court shall have power to audit, adjust and settle all accounts to which the county shall be a party; to order the payment out of the county treasury of any sum of money found due by the county on such accounts; * * * *"

CONCLUSION

Claims against a county for money had and received are by statute intended to be audited, adjusted and settled by the county court exactly as other claims against a county are audited, adjusted and settled.

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We are of the opinion that the purchaser of this land who received a void county patent from the county court, could file a claim in the county court for return of his purchase money, and when so filed, the County Court could audit, adjust and settle said claim by refunding any sum of money yet on hand derived from the purchase money. The county has no legal claim for this \$1.25 per acre on hand for issuing a void land patent. The County Court would have no legal authority for allowing any claim for a portion of the purchase money which was used and spent for services of the county surveyor, nor would the county court have legal authority to allow any claim for court costs or attorney fees in any suit to quiet title, where the county court did not instigate the suit in the name of the county.

Respectfully submitted,

WILLIAM ORR SAWYERS,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

WOS:RV