CRACRAFT *v.* MEYER.

Opinion delivered July 29, 1905.

1. AUDITOR'S DEED OF FORFEITED LAND—PRESUMPTION.—The effect of the act of March 5, 1838, providing that a deed of forfeited lands executed by the Auditor "shall be evidence that all things required by law to be done to make a good and valid sale were done both by the collector

and Auditor," was to cast the burden of proof upon the assailant of a tax title acquired from the Auditor by making the deed *prima facie* evidence of title in the purchaser. (Page 453.)

2. LAND COMMISSIONER'S DEED—EFFECT.—When the office of State Land Commissioner was created in 1868, and the control and disposition of forfeited lands were conferred upon him, instead of upon the Auditor, the laws previously applicable to the Auditor's deeds, including the statutory presumption in favor of their regularity, became applicable to the deeds of the Land Commissioner. (Page 455.)
3. SAME—REQUISITES.—A tax deed executed by the State Land Commissioner, which names the purchaser, describes the property sold, states a consideration, and contains apt words conveying all the right, title and interest of the State, is *prima facie* evidence of title in the purchaser, although it does not contain recitals showing that the requisite steps have been taken to give the State title. (Page 455.)
4. SAME—WHEN PRESUMPTION NOT OVERCOME.—The statutory presumption in favor of a tax deed executed by the State Land Commissioner is not overcome by proof that the land was once held by the State as Real Estate Bank land, being exempt from taxation while so held, and that the record deeds does not show any conveyance from the receiver of the Real Estate Bank or from its successors. (Page 456.)
5. REAL ESTATE BANK LAND—EVIDENCE OF SALE.—Under the act of February 6, 1867, exempting the lands of the Real Estate Bank from taxation while in the hands of the receiver, and requiring the receiver, upon their sale, to furnish the assessor "with the correct list thereof for assessment in the name of the purchaser," it will be presumed, where lands of the bank were listed for taxation, that they had been sold. (Page 457.)
6. SAME.—Where the receiver of the Real Estate Bank reported that he was convinced that his predecessor had sold certain lands, the original deeds having been exhibited to him, and such report was confirmed by the court, such report and confirmation are evidence that the land was sold. (Page 457.)

Appeal from Chicot Circuit Court.

ZACHARIAH T. WOOD, Judge.

Affirmed.

B. F. Merritt, J. F. Robinson and *Rose, Hemingway & Rose,* for appellant.

1. No interlocutory proceeding constitutes *res judicata.* 1 Freeman, Judg. 325. The difference between orders which work no estoppel and judgments is explained in 11 Enc. Pl. & Pr. 828; 56 S. W. Rep. 971; 11 S. W. Rep. 950. Mere orders create no estoppel. 75 N. Y. 599; 1 Cow.

482; 35 Pac. 796; 45 Pac. 724; 76 Fed. 761; 108 *Id.* 564; 34 Ala. 135; 14 Gratt. 48; 86 Va. 625; 6 How. Pr. 321; 24 Kans. 442; 104 Ind. 373; 33 Minn. 419.

2. The admission of appellee as to appellant's title make a *prima facie* case, and cast the *onus* on him to show a better title in himself or a stranger. There is no showing that the State abandoned or parted with her title. The deed of the Commissioner did not pass the State's title, and she is not estopped by her tax deed. Kirby's Dig. § 4914. The State's rights have always been protected against the erroneous and unauthorized acts of her officers. 75 Ark. 146; 39 Ark. 315; 56 *Id.* 276; 64 *Id.* 576; 33 *Id.* 17; 39 *Id.* 580; 40 *Id.* 251; 42 *Id.* 118; 54 *Id.* 251; 62 *Id.* 188.

N. B. Scott, E. A. Bolton, Garland Street and *Jas. P. Clarke,* for appellees.

Any rights of appellant were derived from act May 23, 1901, p. 360, § 1. This act does not include the lands claimed by appellant. *Scott v. Mills,* 49 Ark. 226; 19 Ark. 262; 4 Ark. 592; 38 Ark. 574; 45 Ark. 81. Being a proceeding analogous to the action of a probate court in authorizing a sale of lands of an intestate. it is essentially *in rem,* and can be invalidated only by some direct proceeding in time by some one who has a right to question same. 19 Ark. 499; 44 Ark. 267. Worthen was acting as an officer of court, and when his action was confirmed it became the act of the court. 57 L. R. A. 910. Title will be presumed after long lapse of time. 1 Gr. Ev. § 45; 120 U. S. 534; 56 Ark. 84.

P. C. Dooley, also for appellees.

The authority of the commissioner to sell does not rest alone on the act of 1901, *supra,* which is an amendment to section 4678 Sand. Hill's Dig. See § § 4622-3-7, Sand. & Hill's Dig. The sole issue is, were the lands the property of the State when the alleged forfeiture occurred under which Mrs. Meyers claimed? If so, the forfeiture was a nullity. Sand. & Hill's Dig. § 4675. The action was final unless set aside by a judgment of a court having jurisdiction. Sand. & Hill's Dig. § 4670. The conduct of the land office shows no intention to abandon. State officers are the agents of the State whose

power of authority is the statutes of the State, beyond which they are powerless to bind the State. 23 Ark. 642; 23 Ark. 610; 54 Ark. 269; 98 U. S. 433. Nor will the State be bound by the mistake or unlawful acts of its officers. 40 Ark. 526; 95 U. S. 316. See also 49 Ark. 266; 75 Ark. 146; 40 Ark. 256; 93 U. S. 689. The State is not estopped to deny the acts of its officers beyond their authority. 54 Ark. 269, 270, 271. The burden was on Mrs. Meyers to show a conveyance by some one authorized by law to make it before 1874. 41 Ark. 97.

B. F. Merritt, J. F. Robinson and *Rose, Hemingway & Rose,* for appellant in reply.

The act of 1901 authorized the sale of the land. Sec. 4914, Kirby's Dig. The only presumption in case of a tax deed is that the forfeiture was legal. 42 Ark. 118. It will not be presumed that the State made a grant. 92 U. S. 343. Appellant was not barred. 45 Ark. 81. When a party takes expressly subject to another claim, his possession will continue in subordination till he disclaims and asserts hostile possession. 56 Ark. 492.

WOOD, J. Appellee is in possession of certain tracts of land in Chicot County, Arkansas, under deeds from the State Land Commissioner based upon a forfeiture of the land for the non-payment of taxes. Her deeds are dated December 24, 1891, and July 23, 1897, respectively. She has made valuable improvements, and has been in the adverse possession of the lands since the deeds were executed.

Appellant brought ejectment against appellee for the lands in controversy, claiming title by deed of the State Land Commissioner dated July 14, 1902, based upon an alleged Real Estate Bank foreclosure.

First. As early as March 5, 1838, our Legilature passed an act requiring the Auditor to execute deeds to purchasers of lands forfeited to the State for the non-payment of taxes, and prescribing that such deeds "shall convey to the purchaser all the right, title, interest and claim of the State thereto"; also that the deeds "shall vest in the grantee, his heirs or assigns, a good and valid title, both in law and equity, and shall be received in all courts in this State as evidence of good and valid title in such grantee, his heirs or assigns, and shall be evidence that all things required by law to be done to make good and

valid sale were done both by the collector and the Auditor." Rev. Statutes, c. 128, § § 133, 134.

In *Steadman* v. *Planters' Bank,* 7 Ark. 427, this court, passing upon this statute, said: "Our statutes have changed the rule of law that it is incumbent upon the purchaser of lands sold for taxes to show that the sale was regular, and that the prerequisites to the sale existed and were strictly complied with. The Auditor's deed, executed in accordance with the provisions of the statute, vests in the purchaser all the right, title, interest and estate of the former owner in and to such lands and also all right, title, interest and claim of the State thereto, and is declared to be evidence in all courts of this State of a good and valid title in such grantee, his heirs, and assigns, and that all things required by law to make a good and valid sale were done both by the collector and Auditor." In *Merrick* v. *Hutt,* 15 Ark. 331, this court, speaking of this statute, said: "A more comprehensive provision could hardly be found, and it might seem, at first view, to make the tax title derived from the Auditor valid against all objection. But that was not the design. The evil to be remedied was that the entire burden of proof was cast on the purchaser to show that every requisite of the law had been complied with, and the deed of the officer was not even *prima facie* evidence of the facts therein stated. * * * The intention and scope of the statute was to change this rule, so far as to cast the *onus probandi* upon the assailant of the tax title by making the deed *prima facie* evidence of title in the purchaser, subject to be overthrown by proof of non-compliance with the substantial requisites of the law." In *Patrick* v. *Davis,* 15 Ark. 393-6, it is said: "In the same category may be included that capital provision of the statute, according to the legislation of several of the States, which, when the deed is regular upon its face, reverses the *onus probandi,* and subjects the tax title, when thus sustained, to be overthrown only by proof of a nonconformity in the proceedings to some one of the substantial prerequisites to the sale." In *Biscoe* v. *Coulter,* 18 Ark. 423, it is held "that the Auditor's deed for land forfeited for the non-payment of taxes and sold under the statute is to be treated in the courts as *prima facie* evidence that all things required by law to be

done to make a good and valid sale were done by the collector and Auditor; and it is incumbent upon the party assailing the title of the purchaser to *show affirmatively* a non-compliance with some substantial requisite of the law;" citing cases just quoted in 15 Ark.

When the office of Commissioner of Immigration and State Lands was created (Acts 1868, p. 62; Sched. Const. 1868, § 3), and the control and disposition of forfeited lands was given to the Land Commissioner (sec. 9, act 1868), *ipso facto* the laws applicable to the deed of the Auditor for these lands became applicable to the deed of the Land Commissioner. *Helena* v. *Hornor,* 58 Ark. 151. And section 4 of the act of December 13, 1875 (erroneously digested as section 4 of the act of March 10, 1879, in Kirby's Digest, § 4807), continues in substance and legal effect the act of March 5, 1838, with reference to deeds to forfeited lands. That section provides that all deeds issued by the State Land Commissioner to forfeited land "shall convey to the purchaser, his heirs and assigns, all the right, title and interest of the State to said land, and that such deed shall be received as evidence in any court in the State." It will be observed that, under the statutes, deeds to forfeited lands are not required to contain recitals showing that the requisite steps have been taken to give the State title. "It is sufficient to give *prima facie* evidence of title in the purchaser if the deed names the purchaser, describes the property sold, states a consideration, and contains apt words conveying all the right, title and interest of the State." *Merrick* v. *Hutt,* 15 Ark. 331; *Walker* v. *Taylor,* 43 Ark. 543; *Thornton* v. *Smith,* 36 Ark. 508. In *Scott* v. *Mills,* 49 Ark. 266, Judge BATTLE speaking for the court, said: "The statute having provided that the title to the land forfeited shall vest in the State upon the performance of certain acts by the clerk, it is clear that the object of the Commissioner's deed is to convey that title to the purchaser from the State, and that the deed was intended to be *prima facie* evidence of that title. Such has been the policy of the State, as a general rule, in respect to tax deeds long prior to and at all times since the exactment of the statute under which appellant's deed was executed. It was in pursuance of this favorite policy that the

deed of the Commissioner of State Lands to lands forfeited for taxes was made *prima facie* evidence of title in the purchaser to the lands conveyed. As of all such legislation, the object is to relieve the grantee and those holding under him from making proof until evidence is introduced showing or tending to show that the deed conveyed not title. It was not, therefore, necessary for appellants to have proved that all things necessary to vest title in the State were done. Their deed was *prima facie* evidence of that fact."

"Generally, when an official act has been done which can only be lawful and valid by the doing of certain preliminary acts, it will be presumed that these preliminary acts have also been done." 1 Greenleaf, Ev. pp. 38, 135. But the almost universal rule, in the absence of an express statute to the contrary, was to treat the acts of officers in connection with tax deeds as an exception to the general rule. Thus, one claiming under such a deed was required to show *affirmatively* that every step necessary to establish the regularity of the proceedings had been taken. Tax deeds, in the absence of a statute, did not furnish *prima fecie* proof that all the requirements of the law had been complied with. 3 Elliott on Ev. § 2053, and many authorities cited in notes; *Hogins* v. *Brashears,* 13 Ark. 242. Now, as I have shown, our lawmakers, almost from the beginning of our history as a State, changed this prevailing doctrine with reference to tax deeds, and, in concrete form, applied to the deeds of the Auditor, and, later, of the State Land Commissioner, the rule applicable to official acts in general, making the deeds of these officers to forfeited lands *prima facie* evidence that all preliminary steps, necessary to title, had been taken. I have quoted liberally from our decisions, showing the significance of the rule, that it has been consistently followed, and that the policy, whether wise, or otherwise, has become firmly imbedded in our real estate law, and is a settled rule of property, upon which many titles are based. Appellee invokes the rule to protect her possession and all other rights under her deed. In this defense alone she is secure, unless appellant, having the burden of proof, has shown that some one of the prerequisites to title in appellee was omitted.

Second. Appellant, having a land commissioner's deed to

the lands as Real Estate Bank lands, assails appellee's title, contending that at the time of the alleged forfeiture to the State the lands belonged to the State as Real Estate Bank lands, and were not subject to forfeiture and sale for taxes. To support his contention, he shows that the lands passed into the hands of the receiver of the Real Estate Bank by foreclosure proceedings, and from that time, to-wit, October 23, 1867, to the date of appellant's deed, June 14, 1902, the record of deeds of Chicot County do not show that there had been recorded in the recorder's office of such county any deed of conveyance to any person for the land in suit from the receiver of the Real Estate Bank or any of his successors. But this evidence falls far short of showing that the lands were not sold. Purchasers of land often fail to place their deeds of record. If any presumption of non-sale follows such a failure to find a deed on record showing a sale, then such a presumption, at most, is but a weak and disputable one of fact. The finding such a deed of record was not an essential in the proceedings by which the lands were forfeited, and title was vested in the State. Appellee might rest here, and upon conflicting presumptions alone she would prevail, because her deeds are prior in time, and the presumptions attending them are of equal dignity and cogency with those of appellant's deed, and it is incumbent upon appellant to overcome her title.

But if eveidence of an affirmative character were required of appellee; "to make assurance doubly sure," certain facts in the record would fully warrant the finding of the lower court in her favor.

(1.) The act of 1867, exempting lands of the Real Estate Bank from taxation while in the hands of the receiver, required such receiver "upon sale by him of any of such lands, to furnish the assessor of the county in which the same are situated with the correct list thereof for assessment in the name of the purchaser." Section 3, act of February 6, 1867. The lands in suit were listed for taxation as early as 1873. This tends strongly to show that the lands were sold by the receiver after he acquired them by forclosure of the vendor's lien in 1867.

(2). In a proceeding by the State in the chancery court of Pulaski County to wind up the affairs of the Real Estate Bank, the receiver was directed to make a list of all the lands

in his hands or subject to his control as receiver, to the end that the same might be offered for sale preliminary to closing the trusts. He accordingly made such list, and on the 26th day of October, 1880, he, as receiver of the court, was directed to offer the same at public sale on the 8th day of January, 1881. In making his report of the sale conducted by him as receiver, Worthen included therein this statement: "Your receiver found before the sale that the following land had been disposed of by his predecessor, but no mention of the fact has been made in or upon the records, *and he, being fully convinced that the bank had disposed of its interest, by exhibition to him of the original deeds from the receiver in some instances, and conclusive evidence in all cases,* did, under instructions from your Honorable Court, omit the same from sale." Then follows a list of thirteen tracts, in which is included the land in controversy here. On the 17th of January, 1881, the sale and the report thereof were in all things confirmed by the Pulaski Chancery Court. After that, the estate of the Real Estate Bank having been fully administered, the receiver was directed to "turn over to the Commissioner of State Lands all the accounts, books of said Real Estate Bank now in his possession, and the mortgages given to the said bank now in his possession, and all papers and assets in his possession, pertaining to his receivership, and take a receipt for same." While this finding by the receiver and confirmation by the court may not be conclusive of the facts found, and binding upon the State or her grantees as an adjudication, yet it is evidence of a high probative character, it was received and acted upon by the lower court without objection, and tends *to strengthen the presumption that the land was sold.*

Third. Thus far we all agree, and I have voiced the opinion of the court. I shall now express my own views of another phase of the case, in which Judge RIDDICK concurs.

The deed of the State Land Commissioner, under the express terms of the statute, and in express words, conveyed "all the *right, title and interest of the State to said lands.*" In my opinion, after the execution of the deed to the appellee by the duly authorized and only agent of the State for conveying title to her lands, this same agent could not convey to another pur-

chaser the same lands without first canceling the first purchaser's deed, which could only be done upon proper grounds laid in a proper proceeding therefor, in a court of chancery. It is the duty of the Land Commissioner, before executing deeds to the State's lands, to investigate the sources of his title. He is presumed to do so, and when he executes his deed he conveys "all the right, title and interest" that the State has, provided he has made no mistake, and no fraud has been perpetrated by the purchaser. And if a mistake has been made, as the State is not bound by the mistake of her agents, she may take advantage of it, and cancel and set aside the deed made by her agent. But there is no authority for her to sell this right, or transfer, by her deed to another, the right to cancel the outstanding deed of another purchaser. The State can do no wrong, and her agents have no power, for her, and in her name, to speculate in lawsuits to the injury of her citizens. If she has sold her lands for too much or too little, or her agents have made a mistake as to the lands sold, or as to her title, she may correct the mistake of her officers. But she has no power, with or without consideration, to transfer this right to another. Section 759 of Kirby's Digest provides: "Where by law the Commissioner of State Lands is required to execute any deed of conveyance or patent for any lands sold, or granted by the State, such deed of conveyance or patent, when executed by such Commissioner under his official seal, shall convey *all the right and title of the State in and to said lands to the purchaser,* and may be recorded in the office of the recorder of the proper county, and the original, or a duly certified copy of the same taken from the record thereof, shall have the same effect as evidence as if such deed or patent had been acknowledged and recorded under the existing laws of this State." Act of December 31, 1850. This statute settles this controversy in favor of appellee. It is in harmony with section 4807, *supra,* under which appellant claims the deed was executed. Neither of these statutes make any exceptions or places any limitation upon the interest conveyed. And the Land Commissioner and the courts can make none. The words *"all the right, title and interest of the State"* say what they mean, and mean what they say. *They are plain words.*

Appellant invokes the following statute: "No tax title shall be valid or binding against the equitable or legal interest of this State in or to any real estate whatever; but such tax titles are and shall be void, so far as the same shall conflict with the interest of the State, and shall be treated and considered as null and void in all courts." Kirby's Digest, § 4914. It is obvious, from what I have said, that such statute has no application here. It had no reference whatever to titles conveyed by the State Land Commissioner, or, if so, it is only the *interest of the State* in the land that can be affected by it. The State has parted with all her interest in this land. At least, she is not here attempting to assert any interest.

The judgment is affirmed.

BATTLE, J., not participating.