

Opinion No. 111.

Tax Deed Land—Rentals in Event of Cancellation of Lease—Leases—Lands.

Held: Where tax deed land rented for cash rental, all paid in advance, lease providing lessee would vacate in case of sale, there is no right in lessee to repayment on sale, and no right in purchaser to proportionate part of rent.

August 23, 1943.

Mr. Carl Lindquist
County Attorney
Daniels County
Scobey, Montana

Dear Mr. Lindquist:

You submit facts showing the county commissioners leased certain tax deed land, on a cash rental basis, paid in advance. The lease, by its terms, provided it was subject to sale at any time, in which event the lessee agreed to vacate the land upon thirty days' written notice. Thereafter the land was sold at public auction.

You request my opinion as to the rights of the lessee and the purchaser and, particularly, who is entitled to the rental which was paid in advance.

The effect of the sale was to vest in the purchaser all the right, title, interest, estate, lien, claim and demand of the State of Montana, and of the county, in and to said real estate. This office has heretofore held there is no duty on the county to put the purchaser into actual possession of the land. (Volume 19, Report and Official Opinions of the Attorney General, Opinion No. 122.)

In view of the lack of duty on the county to put the purchaser into actual possession of the land, it would be improper for this office to express an opinion as to the respective rights of the lessee and the purchaser concerning any crops now growing on the land, and also the right of the purchaser to possession based upon notices heretofore served on the lessee. These matters concern the conflicting rights of individual citizens of the state, and this office is not authorized to make a determination thereof, the matter being properly intrusted to private attorneys and the courts.

As to the rental paid in advance, the matter is different, as it relates to the question whether the county must refund the rental or make an apportionment thereof to the purchaser.

While you do not enclose a copy of the lease, you have quoted certain clauses, and an examination of the quoted portions does not indicate there was any provision with reference to a repayment or an apportionment in the event of sale. It is, therefore, assumed the lease is silent as to such matter.

First, as to the purchaser: The general rule is, as between persons successively entitled to rent (i. e., original owner and purchaser), there is no right to the apportionment of rent paid in advance, the absence of statute applying thereto. (126 A. L. R. 51, 32 Am. Jur. 374, Sec. 455.) Our search of the statutes does not disclose a provision for apportionment in this state.

Second, as to the lessee: It is to be kept in mind, the lease provided for payment in advance for a term of one year, conditioned, however, if a sale were made, lessee would vacate the land. No provisions were made covering the proposition of a repayment, in the event of termination before the expiration of one year. The usual custom is to make provision in a lease covering compensation to the lessee, in the event of termination before the time provided in the lease.

To express the matter differently: The lease was a matter of contract between the county and the lessee, the terms thereof were reduced to writing, and this feature of the matter was not covered. Neither the courts, your office, nor this office may supply a provision which was omitted by the contracting parties.

However, it appears to me general principles of law may be applied to the situation.

Thus, the lessee voluntarily entered into the contract, and voluntarily made payment of the rent in advance. In doing so, he agreed, in the event of sale, to vacate the land.

It is stated in 48 Corpus Juris 734:

"It is a well settled general rule that a person can not, either by way of set off or counterclaim, or by direct action, recover back money which he has voluntarily paid with a full knowledge of all the facts, and without any fraud, duress, or extortion . . ."

Demonstrating this rule applies to rent paid, attention is directed to the following quotation from 32 Am. Jur. 386:

"It is the general rule that payments voluntarily made, although now owing, are not recoverable back, and if the payment of rent demanded of a tenant is deemed voluntary in law, the tenant cannot recover such payment even though the amount demanded and paid was not owing."

And even in a case where property is destroyed, it is held in some jurisdictions there may be no recovery back, as indicated in the following, taken from 36 Corpus Juris, 392:

"It is held that, in the absence of a provision (in the lease contract) for the return of rent required to be paid in advance, a proportionate share of the rent cannot be recovered back when the premises are destroyed or injured during the period for which it was paid, even though the lease or a statute provides for the termination of the tenancy in case the premises are destroyed."

It is apparent general principles of law preclude the purchaser from claiming a proportionate part of the rent, and also deny to the lessee a right of recovery, in view of the lack of provision in the contract covering the matter.

In addition, it must be borne in mind the board of county commissioners is a board of limited powers and jurisdiction, and may not exercise a power which is not conferred directly or by

necessary implication. Here, upon payment of the lease money to the county, distribution was made to the different funds, as provided by Chapter 171, Laws of 1941. To permit refund to the lessee now, or payment of a proportionate part to the purchaser, would result in the county being penalized, as there is no provision for charging the amount back to the different funds. In the absence of definite authority conferred on the board of county commissioners to bring about such result, authority to do so must be denied.

It is therefore my opinion the original lessee is not entitled to repayment of the rental, and the purchaser is not entitled to share, proportionately, in the rental paid.

Sincerely yours,
R. V. BOTTOMLY
Attorney General