Fees — County Commissioners—Tax Deed—Counties—Notices.

A county commissioner is not entitled to charge $3.00 for giving notice of application for tax deed on behalf of the county under section 2212 R. C. M. 1921.

John B. Muzzy, Esq., May 13, 1926.
County Attorney,
Stanford, Montana.

My dear Mr. Muzzy:

You have requested my opinion on the following question:

"Has a county commissioner a legal right to charge and collect from the county the sum of $3.00 for posting and serving notices of application for tax deed made by the county upon a tax sale certificate issued to, and held by, it where this sum has been collected by the county treasurer upon redemption by the owner as provided in section 2212. R. C. M. 1921?"

The general rule of law is well settled that an officer is not entitled to fees unless he can point to some statute specifically authorizing it. There is no authority under our statutes for a county commissioner to charge and collect the $3.00 referred to in section 2212 R. C. M. 1921.

The reasoning applied in the case of State vs. Borstead, 147 N. W. 380, in the concurring opinion of Judge Goss, applies equally to the question you have submitted. In that opinion it was said:

"As to the right of the defendant to fees or for the charge made for receiving application for seed grain, which is explained

to have really been made for time spent in purchasing seed for the county and distributing it by orders to the needy, the better rule is against the legality of a charge therefor. If the board of county commissioners as the fiscal, superintending and administrative board of the county desires such work done, it should authorize the proper officer or engage an agent or employee to do the same, or else, if done by one of their number, make or allow no charge for such services rendered or time spent. When a county commissioner is not acting with the board and as a member thereof, he acts as an individual, or, if in behalf of the county, as an agent for the county. Public policy condemns employment by the board of their individual members as county agents, or agents of the board, as to do so is to mingle private interests of the individual commissioner with the performance of his duties in office. There may be presented an inducement to so act officially as to create or perpetuate employment for the individual commissioner, and official duties become apportioned as private jobs. When the point is reached that a member of a board has a private interest in the performance of the board's official business, that moment that individual is disqualified to, with propriety, act officially."

The method of procedure by which a county is to obtain a tax deed is by no means certain in this state.

The court has held in the case of Harrington vs. McLean, 70 Mont. 54, that the county must give the notice provided for in section 2209, and referred to in section 2212, the same as an individual.

Under similar statutes applicable to the state, then in force in California, the supreme court of that state, in San Francisco & Fresno Land Co. vs. Banbury, 37 Pac. 801, said:

> "The state can act only through officers or agents, and the duties of its officers or agents must be defined by statute, and the officer or agent who would give this notice must show his authority therefor under some statute."

The court in that case held that an agent appointed by the comptroller and attorney general was without authority to serve this notice. It appeared that the comptroller had practically the same authority as to state affairs that a board of county commissioners has regarding county affairs in this state.

In the later case of San Francisco & Fresno Land Co. vs. Banbury, 39 Pac. 439, the court reconsidered the question and adhered to its former ruling, saying:

> "A re-examination of the question serves to convince the court of the soundness of the views thus expressed. The legislative enactments contemplate that the state, in procuring a deed, shall resort to the same processes made necessary for a private purchaser, the scheme of which is set forth in section 3785, Pol. Code. But in so doing the legislature—by oversight, seemingly—failed to empower any officer or agent to give the

requisite notice. Certainly, it has failed to empower either the attorney general or controller. It is a simple, and not unusual, case of legislative lapse. While this court will go all reasonable lengths in interpreting the powers vested by the legislature in the ministerial officers of the state, to give effect to the laws and subserve the ends of justice, it will not, by construction, confer upon such officers authority which the legislature has seen fit to withhold. The dangers of such judicial legislation would far exceed any temporary advantage to the state which might arise from it."

I have considerable doubt whether any provision has been made by our legislature for the giving of this notice on behalf of the county. If anyone has been given this authority it is my opinion that it has been given to the sheriff of the county—this for the reason that under subdivision 8 of section 4774 the sheriff must "serve all process or notices in the manner prescribed by law."

Section 4773 R. C. M. 1921, provides that:

"'Notice' includes all papers and orders (except process) required to be served in any proceeding before any court, board or officer, or when required by law to be served independently of such proceeding."

For serving notices the sheriff is allowed a fee of $1.00 on each person and mileage at the rate of 10 cents per mile (section 4916, R. C. M. 1921) but, of course, no fee must be charged the county. (Section 4893, R. C. M. 1921.) I believe, however, that mileage may properly be allowed.

It seems clear to me that if any officer of the county has authority to give the notice required by section 2209 it must be done without the payment of any fee. This seems evident from section 4893 and from the fact that under section 2206 it is provided that while the county treasurer is entitled to charge $3.00 for making out a deed (to be received from the purchaser) no such charge shall be made when the county is the purchaser. It also provides that there shall be no fee for taking acknowledgment of such deeds.

And section 2191 provides that:

"No charge must be made for the duplicate certificate when the county is a purchaser."

Very truly yours,

L. A. FOOT,
Attorney General.