

**Irrigation Districts—Delinquent Taxes—Taxation—Sale
—Tax Title—Warrants.**

Mandamus will not lie to compel county commissioners to take tax titles to irrigation district lands.

The proceeds of a sale of lands in an irrigation district should be prorated as provided in chapter 85, laws of 1927.

Further levies may be made to pay warrants not paid by reason of delinquent assessments.

An irrigation district is entitled to the interest and penalties on delinquent taxes.

April 24, 1928.

Fred E. Buck, Esq.,
Chief Engineer, Montana Irrigation Commission,
Helena, Montana.

My dear Mr. Buck:

You have submitted to me for an opinion several questions involved in connection with delinquent taxes of the Valley View Irrigation District.

It appears that the Valley View Irrigation District is located in Broadwater county and organized under the jurisdiction of the Montana Irrigation Commission. This district proceeded to complete the preliminary engineering works and issued warrants against the district in payment of such services; thereafter a levy was made against the property of the district to take care of the outstanding warrant indebtedness. Part of the taxes became delinquent and by reason thereof there were insufficient funds to redeem all of the outstanding warrants. No further levies have been made and these warrants are still outstanding; the last levy was made some five years ago. The county commissioners of Broadwater county have failed to apply for tax deeds.

Your first question is, "Can mandamus proceedings be brought against the county commissioners to compel them to take tax titles to

the land upon the expiration of thirty-six months after the taxes have become delinquent?"

The answer to your question involves consideration of several statutory provisions. In substance section 3979 R. C. M. 1921 provides for sales for delinquent taxes or assessments in irrigation districts to be made at the time and in the manner provided for county taxes. Where there is no purchaser at the sale and the property is struck off to the county the county treasurer is required to issue to the district a debenture certificate for the amount due the district with interest and penalties. In the statement of facts it does not appear whether these debenture certificates were ever issued to the district. Section 3979 contains no requirement that county commissioners shall apply for a tax deed at any particular time.

Chapter 92, laws of 1927, provides:

"Whenever a county, city or town has become the purchaser of property sold for delinquent taxes, and is the holder of the certificate of sale when the time for redemption expires, the board of county commissioners * * * **at any time thereafter deemed proper**, may order and direct the county clerk, * * * to apply to the county, * * * for the issuance to the county, * * * of a tax deed for such property, and it shall then be the duty of the county clerk, city or town clerk, to give or post and cause to be published the proper notice of the application for such tax deed * * *."

This chapter clearly vests in the commissioners discretion as to when they will apply for a tax deed. Mandamus will not lie to control discretion.

Under section 2201 R. C. M. 1921 property sold for delinquent taxes may be redeemed within thirty-six months from the date of purchase, or at any time prior to giving notice and application for deed. This section gives the purchaser, whether it be the county or an individual, the privilege of applying for a tax deed after thirty-six months but does not compel anyone to apply for the deed.

The taking of a tax deed would not in and of itself be of any benefit to the irrigation district. The writ of mandate will not issue where no benefits will result to the applicant or relator (38 C. J. 553, cases under note 22). The application for a tax deed is a step necessary before a sale of the property, and if there was a clear duty to sell the property after deed, it is possible that this step might be compelled as a necessary incident to sale. But can the commissioners be compelled by mandamus to sell the property after acquiring a tax deed? Mandamus is a proper remedy to compel the performance by an official or board of a purely ministerial duty in the performance of which they are vested with no discretion.

State v. Eie, 53 Mont. 138;

State v. Chouteau County, 42 Mont. 62.

As the statute fixes no time after acquiring deed within which the board is required to sell the property this necessarily vests discretion in the board as to when it will sell. Even though we assume for the purposes of argument that section 3979 has not been amended by chapter 85, laws of 1927, it is my opinion that the board could not be compelled to sell under that statute for the reason, first, that section 2201, to which section 3979 refers, does not fix any definite time within which redemption can be made in the absence of notice and application for a tax deed.

Assuming the right to redeem has been cut off and the deed secured, this section (3979) does not permit the board to sell for a sum less than all taxes and assessments, including state and county taxes and unless it could be clearly shown that the property could be sold for not less than this amount, it is my opinion the writ would not issue.

I assume from your questions that there is no one offering to buy the property who will pay all taxes and assessments due. Does section 3979 apply? Section 3979 is a special enactment dealing with delinquent taxes in irrigation districts and under the general rule of statutory construction would not be repealed by implication except where the intention to do so is clear. It provides:

“When the lands and premises so sold for taxes * * * are not redeemed within the time provided for by Section 2201 of this code it shall be the duty of the board of county commissioners of said county, within three months thereafter, to cause said lands and premises to be sold as provided for by Section 2235 of this code.”

At the time of the enactment of section 3979 (chapter 153, laws of 1921) section 2235 referred to therein contained a provision permitting the county commissioners upon the sale of property for delinquent taxes to accept an offer of less than the total taxes, penalties and costs if in their judgment such offer was the reasonable market value of the property.

It is therefore apparent that by reason of the exception in section 3979 as to the price for which sale can be made of lands in irrigation districts against which debenture certificates have been issued the commissioners could not upon the sale accept an offer which in their judgment would be the reasonable market value of the property but could only sell for an amount equal to all taxes, interest, etc. against the property.

Section 2235 was amended by chapter 85, laws of 1927. This section, as amended, provides that when the county has become the purchaser of any property, real or personal, sold for delinquent taxes, it may at any time upon giving proper notice, sell the same for cash or on terms but provides that no sale shall be made for a price less than the fair market value as determined and fixed by the board. By use of the word “any” it is my opinion that the legislature intended to cover lands in an irrigation district such as this. This view is confirmed by the repealing

clause in section 4, which repeals all acts in conflict but excepts chapter 89, laws of 1925, from repeal or displacement. This chapter (89) deals with delinquent taxes in irrigation districts where water has been delivered. Briefly, it provides for payment of the other taxes by the district and for assignment of the certificate of sale and for subsequent sale of the lands by the district. Thus, by excluding one class of irrigation districts from its operation it must be presumed that it was the intention of the legislature to include all others.

It is therefore my opinion that the provisions of chapter 85 control the provisions of section 3979 with respect to sales of lands in irrigation districts other than those covered by the provisions of chapter 89, laws of 1925. Having arrived at this conclusion, it is my opinion that the commissioners cannot be compelled to take tax titles to the land.

Your second question is answered by said chapter 85, assuming that a sale is made thereunder. It provides that the proceeds of such sale shall be paid over to the county treasurer who shall apportion and distribute the same in the following manner:

“2. If such proceeds shall be less in amount than the aggregate amount of all taxes and assessments accrued against such property for all funds, and purposes, without penalty or interest, then such proceeds shall be prorated between such funds and purposes in the proportion that the amount of taxes and assessments accrued against such property for each such fund or purpose bears to the aggregate amount of taxes and assessments accrued against such property for all such funds and purposes.”

Your third question is as to the power of the irrigation commission to make further levies to pay warrants not paid by reason of delinquent assessments. While such procedure would work an injustice on property owners who paid the first assessment yet I know of no rule of law that would prevent the commissioners from making as many levies as are necessary to pay the warrants. A taxpayer is not relieved from paying taxes which are generally obligations on the taxing unit because some property owners do not pay the tax and the particular property cannot be sold for sufficient to cover its prorated share.

Your fourth question is answered by section 3979 R. C. M. 1921 which, in my opinion, clearly indicates that the irrigation district is entitled to interest, penalties and costs.

Very truly yours,

L. A. FOOT,
Attorney General.