

Opinion No. 388**County Commissioners—Tax Deeds—
Delinquent Taxes**

HELD:: When a county is the holder of a certificate of sale and the time for redemption has expired, a board of county commissioners may at any time within three (3) years after the time for redemption has expired, order the county clerk to apply to the county treasurer for a tax deed. The board cannot be coerced by the court into so doing, but mandamus may be invoked after the three (3) years have expired.

November 15, 1933

You have asked us for an opinion on the power of a board of county commissioners, under Chapter 49, Laws of 1933, to order the county clerk to ap-

ply to the county treasurer for the issuance of a tax deed to the county for property sold to it for delinquent taxes.

Section 1, Chapter 92, Laws of 1927, reads as follows: "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, city or town council or commission, at any time thereafter deemed proper, may order and direct the county clerk, city or town clerk, to apply to the county, city or town treasurer, as the case may be, for the issuance to the county, city or town, 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 and to make the proper proof thereof, all in the manner required by Section 2209 Revised Codes of Montana 1921."

The supreme court in *State ex rel. Malott v. Board of County Commissioners*, 86 Montana 595, held that the phrase, "at any time thereafter deemed proper", found in the section, did not vest the board of county commissioners with discretion when it came to directing the county clerk to apply for the issuance of a tax deed, and stated the principle of law applicable to such cases as follows: "Although the language of the statute is in form permissive as to when tax deeds in favor of the county shall be applied for, yet, since it concerns the rights of the public and of third persons, it must be construed as mandatory. The recognized rule is that, where a public body or officer has been clothed by statute with power to do an act which concerns the public interest or the rights of third persons, the execution of the power may be insisted upon as a duty, although the phraseology of the statute be permissive and not mandatory."

The section has been amended by section 1, Chapter 49, Laws of 1933, by the insertion of the words "or hereafter become" after the words "has become", and the addition of the words "provided, however, that the Board of County Commissioners, City or Town

Council, or Commission, cannot be compelled to order and direct the County Clerk, City or Town Clerk, to apply to the County, City or Town Treasurer, as the case may be, for the issuance of a tax deed within three years after the time for redemption has expired, unless the Board of County Commissioners, City or Town Council or Commission, deems it proper to do so."

It is apparent that the legislature in amending section 1 of Chapter 92 intended to accomplish two things, namely, to place purchases made by a county after the passage of the amendment in the same position as purchases made by a county before the passage of the amendment and to modify the rule laid down by the supreme court in the *Malott* case.

As the law stands now, when a county is the holder of the certificate of sale and the time for redemption has expired, a board of county commissioners may at any time within three years after the time for redemption has expired order the county clerk to apply to the county treasurer for a tax deed, but it cannot be coerced by the court into so doing. If the board remain inactive until after the lapse of the three-year period mandamus may then be invoked against it. The words "unless the board of county commissioners, city or town council or commission, deems it proper to do so" are meaningless, or if not meaningless, perhaps invalid as an encroachment on the powers of the judiciary. If the board of county commissioners deem it proper in the first instance to make the order, it should not be necessary to drag it into court to force it to do so.

We find this paragraph in your letter: "There may also be another question on the whole proposition and that is as to whether the Board has authority to grant deferments of applications for tax deeds either on condition of partial payment or upon no payment at all."

In the case of *Yellowstone Packing and Provision Co. v. Hays*, 83 Montana 1, the Supreme Court held that a board of county commissioners was without authority to remit or compromise delinquent taxes.