Opinion No. 118.

Taxation—Tax Sales—Delinquent Taxes—County Treasurer—Refunds—Void Tax Sales.

HELD: 1. Where property has once been sold for delinquent taxes, and has been purchased by the county, such property may not again be sold for delinquent taxes until the period for redemption has expired, and such an attempted sale is void, and a tax deed based thereon would be invalid.

2. Since the issuance of a tax sale certificate is not jurisdictional to the validity of the sale or of the tax deed, and since the statute fixes no time within which such certificate must be made and delivered, the certificate may be made and delivered at any time subsequent to the sale.

3. Money paid to the county on an attempted, void tax sale of land for delinquent taxes may be refunded under section 2222, R. C. M. 1921.

June 15, 1935.

Mr. H. H. Hullinger
County Attorney
Conrad, Montana

You have submitted the following:

1. In 1927, a tax sale was had of certain real property on account of delinquent taxes, at which, there being no other bidders, the county became the purchaser. The county treasurer, however, failed to issue a tax sale certificate. In 1928, the taxes again being delinquent, the land was again sold and a tax sale certificate issued to the county. Thereafter, other taxes became delinquent and another party has offered to pay the taxes and take an assignment. Inquiring of the county treasurer as to the amount of taxes due, he paid over the amount demanded and asked the county treasurer to prepare the assignment. In furnishing the statement the county treasurer did not include the 1927 taxes, but before making the assignment, has now asked that the 1927 taxes be paid also. While the money has been paid to the treasurer, it has not yet been spread upon the county treasurer's books. You have asked whether the assignment may be made without payment of the 1927 taxes.

Section 2231 R. C. M. 1921 provides: "In case property assessed for taxes is purchased by the county, pursuant to provisions of Section 2191 of this code, it must be assessed the next year for taxes in the same manner as if it had not been so purchased. **But it must not be exposed for sale,** and the sale thereof, under such assessment, **must be adjourned** until the time of redemption under the previous sale shall have expired."

It will be seen that the above section expressly forbids the sale of property for delinquent taxes in case such property has once been sold for taxes and has been purchased by the county, until the period of redemption from the sale has expired. The 1928 sale, being forbidden by statute, is therefore void and no valid certificate of sale was obtained thereby. See Volume 13, Opinions of the Attorney General, page 151, and cases cited therein. The county can only make assignment of the taxes when the amount for which the property was sold in 1927, together with the subsequent taxes, are paid (Section 2207, R. C. M. 1921).

The 1927 sale is not invalid because no tax sale certificate was issued. The issuance of such certificate is not jurisdictional to the validity of the sale or the tax deed, should one be obtained thereon. Since the statute fixes no time within which the cer-

tificate of sale provided for therein must be made and delivered, it may be made and delivered any time subsequent to the sale. (Bruno v. Madson, (Utah) 113 Pac. 1030). In the Utah case the court said:

"It will be observed that the statute fixes no time within which the certificate of sale provided for therein must be made and delivered. Nor does the statute prescribe the consequences which shall follow in case delivery of the certificate is delayed or not made and delivered to the purchaser. * * * We have been unable to find a case, either of this or any other court, where, under statutory provisions like ours, a tax sale was held void upon the sole ground that the tax certificate of the sale was not issued at the time of the sale or within a reasonable time thereafter. Nor can we conceive of any good reason, and none has been suggested, why a sale should be held void upon this ground alone. It is reasonably clear that the certificate of sale is not intended as the only evidence of the sale, since, as we have seen, by section 2621, supra, the treasurer is required to keep a book in which a description of the property, the amount of the taxes and costs, and other proceedings incident to the collection of taxes and sale of property for nonpayment are required to be recorded. The certificate, therefore, is in the nature of a memorandum of sale which is given to the purchaser. * * * All this is important only as showing that the certificate is not intended as the only evidence of the sale, but that in some respects it is merely a copy of some permanent record which the law requires to be kept. The certificate of sale, therefore, seems to be issued for the convenience of the purchaser as prima facie evidence at least of the facts recited therein. Such a certificate certainly does not partake of any of the essential or jurisdictional acts upon which a tax deed must ultimately rest."

To the same effect are People v. Cady, 105 N. Y. 299, 11 N. E. 810 and Pace v. Wright (N. M.), 181 Pac. 430. In the last named case the court said: "If the record of the sale had been made by the county treasurer who made the sale, it is probable that his successor could have legally issued the certificate of sale."

In Clooten et al. v. Wong (N. D. 1929), 224 N. W. 198, the court, after reviewing the cases and in following the Utah case, supra, said: "We believe rule laid down in Utah case is better one, based on sounder reasoning. Ordinarily, failure to do an act required to be done subsequent to the sale, should not invalidate the sale. The certificate is evidence of the sale but is not a muniment of title."

It was held in Otoe County v. Brown, 16 Neb. 394, 20 N. W. 641, that the fact that a certificate of sale was not issued until a long time after the tax sale, would not prejudice the rights of the owner of the land which was sold for taxes. See also Muirhead v. Sands, 111 Mich. 491, 69 N. W. 826 and Pentecost v. Stiles, 5 Okla. 500, 49 Pac. 921. In the Oklahoma case the court said: "* * * that the county treasurer should, within a reasonable time after the tax sale, make and sign such a certificate, and deliver it to the purchaser, * * * but failure to do this would in no way affect the validity of the tax sale. * * * The tax sale, so far as the owner of the property is concerned, may be as valid without this certificate as with it."

We conclude, therefore, that a tax sale certificate may be issued for the 1927 tax sale. No doubt the county treasurer kept a record of the sale as required by Section 2196, R. C. M. 1921, and such record is evidence of the sale.

Since the party desiring to obtain the assignment was not the purchaser at the sale, we do not believe he is limited in a refund by the provisions of Chapter 131, Laws of 1929. See Volume 13, Opinions of Attorney General, pp. 151, 152. A refund of the money paid by him is authorized by Section 2222, R. C. M. 1921. See our opinion to County Attorney Hauge, dated May 15, 1935.

2. You have also submitted the following facts: When Pondera County was created out of Teton County, the 1918 and 1919 delinquent taxes for these years were not transferred to the Pondera County Treasurer's records. Subsequent taxes being delin-

quent, Pondera County sold the property and became the purchaser. An assignment was made to John Doe, who afterwards took a tax deed without knowledge of the prior delinquent taxes. Your statement of the facts is not clear but I assume that a sale was made by Teton County on account of the 1918 delinquency. You ask whether the 1918 and 1919 taxes are a lien on the land.

As we have observed above, the subsequent sale, if made prior to the expiration of the period of redemption, or if made afterwards without the order of the county commissioners, is invalid. See Sections 2231 and 2232, R. C. M. 1921, and Volume 13, Opinions of Attorney General, p. 151. Since the sale is invalid the tax deed based thereon is also invalid. Tax sales are exclusively statutory proceedings and the statute granting the power of sale must be strictly followed. If one step or one condition precedent fail it is as fatal as if all failed, and the validity of the proceeding cannot be aided by the courts. Lyon v. Alley, 130 U. S. 177, 32 L. Ed. 899; Eastman v. Gurrey, 15 Utah 410, 49 Pac. 310; Preston v. Hirsch, 5 Cal. App. 485, 90 Pac. 965.

For reasons stated above, we believe that the money paid to the county treasurer can be refunded under the provisions of Section 2222, R. C. M. 1921.

If no sale had been made by Teton County on account of the 1918 delinquent taxes, the prohibition as to further sale in Section 2231 would not apply and a sale for subsequent delinquent taxes could then be validly made. A tax deed based thereon would give grantee an absolute title free and clear of all encumbrances, including prior tax for which no sale had been made. (Section 2215, R. C. M. 1921; Volume 13, Opinions of Attorney General, p. 153.