

serve a mineral reservation upon sale of county lands.

There is nothing in Chapter 65, Laws of 1933, which would authorize the commissioners to encumber county lands which it sells with any easement, exception or reservation.

July 8, 1935.

Mr. J. E. McKenna
County Attorney
Lewistown, Montana

We have before us your request for an opinion upon the question of law involved, in which you state among other things:

"Some time ago the board of county commissioners of Fergus County, Montana, entered into a tentative agreement with one S. W. Pennock, trustee, for the sale of certain real property owned by Fergus County which had been taken under tax deed proceedings by Fergus County.

"The certain lands were offered at public sale under the provisions of paragraph 1, Section 1, Chapter 65 of the Session Laws of the State of Montana for the year of 1933 and there being no bidders at the public sale at which said lands were offered, no sale was made. Subsequent to the offer of said lands at public sale, the board of county commissioners entered into the agreement to sell said lands to the said S. W. Pennock at said private sale, but it was the understanding with Mr. Pennock, trustee, and the board of county commissioners, that before said sale would be confirmed, that they first would request an opinion from your office as to whether or not the county would have a right to retain 6¼ % of the oil and gas in and under said lands."

The memoranda attached to the request further disclose that on or about the 9th day of December, 1934, Pennock bought the lands in question from Fergus County for the sum of one hundred and thirty-five dollars which was paid to the county treasurer. The notice of sale which the board of county commissioners caused to be posted and published some time

Opinion No. 135.

**County Lands—County Commissioners—Mines and Mining—
Mineral Reservations—
—Easements.**

HELD: Prior to the enactment of Chapter 154, Laws of 1935, the county commissioners had no authority to re-

prior to December 9, in accordance with the provisions of section 1, Chapter 65, Laws of 1933, was silent as to reservation of any part of the minerals underlying the lands. At the time the sale was made it was understood and agreed between the board and Pennock that the advice of the Attorney General would be sought as to the form the deed should take, and if he should advise that under the notice so given 6¼% of the oil and gas beneath the lands could be lawfully reserved to the county, it would be so reserved in the deed, otherwise not.

Sections 1, 2 and 3 of Chapter 65, Laws of 1933, provide: "Section 1. Whenever the county shall acquire any land by tax deed, it shall be the duty of the Board of County Commissioners, within six months after acquiring title, to make and enter an order for the sale of such lands at public auction at the front door of the court house, provided, however, that thirty days' notice of such sale shall be given by publication in a newspaper printed in the county, such notice to be published once a week for three successive weeks, and by posting notice of such sale in at least three public places in the county. Notice posted and published shall be signed by the County Clerk and one notice may include a list of all lands to be offered for sale at one time. It shall describe the lands to be sold, the appraised value of same and the time and place of sale, and no sale shall be made for a price less than the fair market value thereof, as determined and fixed by the Board of County Commissioners prior to making the order of sale, which value shall be stated in the notice of sale. And it shall be the duty of the Board of County Commissioners to so appraise, order and advertise for sale all lands heretofore conveyed to the county by tax deeds within ninety days from and after this Act takes effect.

"In the event any of said lands are not sold at such public sale, the County Commissioners may at any time either again appraise, advertise and offer the same at public auction or sell the same at private sale at the best price obtainable, but at not less than ninety per cent of the last ap-

praised value, and on such terms as may be agreed upon, provided the rate of interest on deferred payments shall not exceed four per cent per annum, and provided further that the terms other than price, as to each class of land, grazing, farming and irrigated, shall be uniform in each county.

"If a sale is made on terms, the chairman of the Board of County Commissioners shall execute a contract in behalf of the county, and upon the payment of the full purchase price, together with all interest and taxes, the chairman of the Board of County Commissioners shall execute a deed to the purchaser, or his assignee conveying the title of the county in and to the lands so sold.

"On the first Monday in March following the execution of such contract, the lands shall be subject to taxation in the name of the purchaser, or his assignee, and in the event the taxes are not paid, and the same become delinquent, said contract shall stand cancelled and all payments theretofore made shall be taken, treated and regarded as rent for said property.
* * *

"The County Commissioners may also, after any of said lands have been offered for sale and not sold, when it is deemed for the best interests of the county, exchange said lands for other lands of equal value where the effect of such exchange would be to acquire land which could be leased or sold to better advantage.

"Section 2. All moneys received from the sale or leasing of any such lands, or of any lands received in exchange, shall be paid into the county treasury and shall be credited to each fund as the same would have been credited had the moneys so received been paid as taxes upon said land acquired by the county by tax deed, or upon the lands exchanged, and any surplus after paying all taxes with interest and penalties shall belong to the county.

"Section 3. As to any lands received by the county in exchange the same may be sold or leased the same as might have been done with the lands exchanged."

It cannot be doubted from the lan-

guage of the Act that whether the county owned a fee simple title or less than a fee simple title to the lands, it was required to dispose of whatever estate it had therein. There is nothing in either the notice of sale or the statute itself which would authorize the board of county commissioners to encumber the lands sold with any easement, exception or reservation. While the board is the creature of the Constitution, it can dispose of county lands only under such regulations as may be prescribed by law; and it has and can have no powers or functions other than those bestowed upon it by legislative enactment. (*American Surety Co. v. Clarke*, 94 Mont. 1; *Walpole v. State Board of Land Com'rs.*, 163 Pac. 848; *Campbell v. Flying V Cattle Co.*, 220 Pac. 417.)

deed from Fergus County without any reservation of minerals.

Section 4 of Chapter 154, Laws of 1935, provides that "all mineral reservations heretofore made by counties in this state, * * * and all agreements in connection with such reservations, heretofore made, * * * are hereby ratified, confirmed and validated. The fact that the legislature deemed it necessary to pass this curative statute lends strong support to the construction we have given the quoted provisions of Chapter 65. (59 C. J. 1033, 1178.)

The word "terms," used in the Act, refers to the purchase price, the amounts of the deferred payments, when such payments must be made and the rate of interest thereon. (*City of Richmond v. Virginia Ry. & Power Co.*, 98 S. E. 691; *Nakdimen v. Ft. Smith Etc. Bridge Dist.*, 172 S. W. 272; *Murphy v. Green*, 135 South. 531.)

Had the board made an outright instead of a conditional reservation of a percentage of the minerals hereinbefore mentioned, there could not be any question but what such outright reservation would be validated by Section 4 aforesaid. (*Snidow v. Montana Home For the Aged*, 88 Mont. 337; *Weber v. City of Helena*, 89 Mont. 109; *Miller v. Limon Nat. Bank*, 296 Pac. 796; 59 C. J. 1178; 2 Lewis' *Sutherland Stat. Const.*, sec. 675.)

On the facts before us it is our view that Pennock is entitled to a