

Opinion No. 233.

Offices and Officers—Time for Performance of Official Act—Taxation—Tax Deed Lands, Sale of—Appraisal—County Commissioners.

HELD: 1. Rules regarding the time within which a public officer must perform statutory duties are set forth.

2. The provisions of Section 1 of Chapter 65, L. 1933, regarding time for appraisal of tax deed lands before sale, are directory and not mandatory; and a substantial compliance therewith in other respects, after lapse of the 90 day period, is sufficient.

January 24, 1936.

Board of County Commissioners
Yellowstone County
Billings, Montana

You have requested our opinion upon the scope and effect of Section 1 of Chapter 65, Laws of 1933. It appears that your Board did not and could not complete the appraisal of lands conveyed to Yellowstone county by tax deeds prior to the passage and approval of the Act until July 31, 1933. On that day the order for the sale of said lands was made

and the direction for notice of such sale given. Thereafter, on the day designated and after notice, some or all of such lands were sold at public auction at the front of the courthouse. The question to be determined, then, is this: Were the proceedings of the Board valid in view of the provisions of Section 1 of Chapter 65?

Section 1 reads as follows:

"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 appraised 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.

"Whenever any of such lands have been offered for sale at public auction and not sold, the County Commissioners may, if deemed for the best interest of the county, lease said lands upon the best terms obtainable, provided that such lease shall not extend over a period longer than five years, except of lands to be or within a legally created grazing district, when such lease may run for a period of not to exceed ten years.

"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."

The general rule is that a statute prescribing the time within which public officers are required to perform an official act, is directory only, unless it contains negative words denying the exercise of the power after the time specified, or the nature of the act to be performed or the language used by the legislature shows that the designation of time was intended as a limitation. (*French v. Edwards*, 13 Wall. (U. S.) 506, 20 L. Ed. 702; *State v. Park City School Dist.*, 133 Pac. 128; *Board of County*

Com'rs v. Union Pac. R. Co., 165 Pac. 244; *Federal Crude Oil Co. v. Yount-Lee Oil Co.*, 52 S. W. (2d) 56; *Daly v. Fisk*, 134 Atl. 169; *Davidson v. Board of Education*, 7 S. W. (2d) 1056; 59 C. J. 1073-1075.) Where a public officer is by law enjoined to perform a ministerial duty within a time certain and neglects to perform it, he may do so, after the expiration of the prescribed time, unless prohibited by some negative language in the statute, or too late to accomplish the desired result. (*Village of Oakley v. Wilson*, 296 Pac. 185.) It is well settled that the public cannot be deprived of the benefits of a statute, because a public official charged with the duty of carrying out the statute is tardy or neglectful of his duty. Unless it is otherwise prescribed by the statute, his duty to act continues, and although the time has passed within which it was contemplated he would act, the duty continues and follows him until discharged. (*Ottinger v. Voorhis*, 148 N. E. 784.) It is a general rule that, if a duty is imposed by statute upon public officers at a designated time to do acts which affect the rights of others entitled to insist that these acts shall be done, and which it is possible effectually to do at a later time, the failure of the officers to act promptly, at the time fixed by law, does not take away the right of persons on whose behalf the acts ought to be done to insist on performance, unless the language of the statute shows a clear legislative intent that the duty and power of the officers to do such acts shall end with the expiration of the time fixed by statute for doing them. (*Town of Dublin v. State*, 152 N. E. 812.) A positive act of the legislature may not be nullified or suspended by the neglect of an official to perform a duty enjoined upon him by law. (*Home Ins. Co. v. Cobbs*, 103 South. 165.) Provisions regulating the duties of public officers and specifying the time for their performance are in that regard generally directory. Though a statute directs a thing to be done at a particular time, it does not necessarily follow that it may not be done afterwards. In other words, as the cases universally hold, a statute specifying a time within

which a public officer is to perform an official act regarding the rights and duties of others is directory, unless the nature of the act to be performed, or the phraseology of the statute, is such that the designation of time must be considered as a limitation of the power of the officer. (2 Lewis' Sutherland on Statutory Construction Sec. 612, p. 1117.) As a rule a statute prescribing the time within which public officers are required to perform an official act is merely directory, unless it denies the exercise of the power after such time or the nature of the act or the statutory remedy shows that the time was intended as a limitation. (46 C. J. 1037.)

The performance of a duty resulting from an office and specially enjoined by law may be compelled by mandamus, even though the time within which it should have been performed has elapsed. A public official by delaying action until the time designated by law for action has expired may not thus defeat the will of the people as expressed by the legislature. He will not be heard to say that it is too late to do that which he ought to have done at the proper time. (State v. Board of County Com'rs, 44 Mont. 51.) But if the discharge of the duty may be enforced by legal process, assuredly the duty may be discharged without the compulsion of such process and, although not done at the time prescribed, may be voluntarily done or peremptorily enforced at any time thereafter before it is too late for the doing to accomplish the results intended to be accomplished by such act. (Standrod v. Case, 133 Pac. 651.)

When it is considered that the purpose of the legislature in passing Chapter 65 was to replenish the county treasuries and restore to the tax rolls numerous tracts of real property within the state, there cannot be any doubt, in view of the position of the highest courts of the land and of able textwriters, that the provisions of Section 1 thereof as to time of performance, are directory and not mandatory and that a substantial compliance therewith in other respects, after the lapse of the 90-day period, is sufficient. (59 C. J. 1074; Evers v. Hud-

son, 36 Mont. 135.) The proceedings of the Board, therefore, were and are valid.

In arriving at this conclusion we have assumed, of course, that the Board decided that the term "lands" included only grazing, farming and irrigated lands, as the statute apparently contemplated, and acted accordingly. It is more than a coincidence that the restricted meaning so given to the term "lands" corresponds somewhat closely to the first three classifications made by Section 2026, Revised Codes 1921. (State v. Duncan, 68 Mont. 420; State v. Stewart, 89 Mont. 257.) Lands other than those mentioned, including city and town lots (Sec. 1999, R. C. M. 1921), and personal property to which the county has acquired title on account of delinquent taxes, if of a value in each instance in excess of one hundred dollars, must be disposed of according to the provisions of Chapter 162, Laws of 1929, as amended by Chapter 33, Laws of Extraordinary Session 1933; but if of a value of less than one hundred dollars then according to the provisions of subdivision 10 of Section 4465, Revised Codes 1921, as amended by Chapter 100, Laws of 1931. Chapter 65, Chapter 33 and Chapter 100, relating as they do to the same subject matter, must be harmonized and all given effect, if possible. (Wilkinson v. LaCombe, 59 Mont. 518; State v. Mills, 81 Mont. 86; Box v. Duncan, 98 Mont. 216.)