

No. 230

**REDEMPTION OF REAL ESTATE FROM TAX SALE—
DUTY OF COUNTY TREASURER—INTEREST—
TAXATION**

Held: It is the duty of the county treasurer to allow any owner or any person, firm, co-partnership, corporation or association having any interest in any real estate sold for taxes to redeem such real estate or any interest therein by paying the proportionate part of such tax, as provided in Chapter 17, Laws of 1941.

Mr. D. Gordon Rognlien
County Attorney
Flathead County
Kalispell, Montana

September 3, 1941.

Attention: Mr. Marshall Murray
Deputy County Attorney

Dear Mr. Rognlien:

You have submitted the following question:

“Can the owner, as a tenant in common of an interest in real property, redeem such interest from a tax sale by paying the taxes, interest and penalty proportionate to such interest, where such interest was assessed and sold at tax sale as a part of the whole estate?”

The question you have submitted is a vexatious one and of great import. From my search I can find no decision by our Supreme Court squarely on this proposition.

Starting with our state constitution, we find that Section 6 of Article XII declares, “no county, city, town or other municipal corporation, the

inhabitants thereof nor the property therein, shall be released or discharged from their or its proportionate share of state taxes."

Section 11 of Article XII declares, "Taxes shall be levied and collected by general laws and for public purposes only. They shall be **uniform upon the same class of subjects** within the territorial limits of the authority levying the tax." (Emphasis mine.)

Section 16 of Article XII declares:

"All property shall be assessed in the manner prescribed by law except as is otherwise provided in this constitution. The franchise, roadway, roadbed, rails and rolling stock of all railroads operated in more than one county in this state shall be assessed by the state board of equalization and the same shall be apportioned to the counties, cities, towns, townships and school districts in which such railroads are located, in proportion to the number of miles of railway laid in such counties, cities, towns, townships and school districts."

Section 17 of Article XII declares:

"The word property as used in this article is hereby declared to include moneys, credits, bonds, stocks, franchises and all matters and things (real, personal and mixed) capable of private ownership, but this shall not be construed so as to authorize the taxation of the stocks of any company or corporation when the property of such company or corporation represented by such stocks is within the state and has been taxed."

Section 6663, Revised Codes of Montana, 1935, provides:

"The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others. In this code, the thing of which there may be ownership is called property."

Section 6667, Revised Codes of Montana, 1935, provides:

"Real or immovable property consists of:

1. Land;
2. That which is affixed to land;
3. That which is incidental or appurtenant to land;
4. That which is immovable by law."

Section 6673, Revised Codes of Montana, 1935, provides:

"All property has an owner, whether that owner is the state, and the property public; or the owner an individual, and the property private. The state may also hold property as a private proprietor."

Section 6675, Revised Codes of Montana, 1935, provides:

"The ownership of property is either:

1. Absolute; or,
2. Qualified."

Section 6676, Revised Codes of Montana, 1935, provides:

"The ownership of property is absolute when a single person has the absolute dominion over it, and may use it or dispose of it according to his pleasure, subject only to general laws."

Section 6677, Revised Codes of Montana, 1935, provides:

"The ownership of property is qualified:

1. When it is shared with one or more persons;
2. When the time of enjoyment is deferred or limited;
3. When the use is restricted."

Section 6682, Revised Codes of Montana, 1935, provides:

"An interest in common is one owned by several persons, not in joint ownership or partnership."

Section 6683, Revised Codes of Montana, 1935, provides:

"Every interest created in favor of several persons in their own right, including husband and wife, is an interest in common, unless acquired by them in partnership, for partnership purposes, or unless declared in its creation to be a joint interest, as provided in Section 6680."

In *Town of Cascade v. County of Cascade*, 75 Mont. 304, 310, 243 Pac. 806, it is stated:

"The article of our constitution above referred to defines 'property' as the term is used therein, to include 'moneys, credits, bonds, stocks, franchises and all matters and things (real, personal and mixed) capable of private ownership.' Section 17, Article 12. 'Ownership of a thing' is defined in our statute as 'the right of one or more persons to possess and use it to the exclusion of others.' Section 6663, Revised Codes of 1921. The constitutional provision is sufficiently broad to cover all manner of property as defined above, which may be possessed and used under the above definition of 'ownership.'"

Our Supreme Court has declared that an oil lease is an interest in the land, and therefore real property.

Willard v. Federal Surety Co., 91 Mont. 465, 8 Pac. (2nd) 633.

Now to the examination of Section 2211, Revised Codes of Montana, 1935, as amended by Chapter 17 of the Laws of 1941, which is as follows:

"Whenever any person, firm, co-partnership, corporation or association shall desire to redeem from a tax sale and pay all subsequent taxes upon any lots, piece or parcel of real estate, which said person, firm, co-partnership, corporation or association shall own or hold a mortgage or other lien against or when such person, firm, co-partnership, corporation or association shall be the owner of or have some interest in such property, it shall be the duty of the county treasurer of the county in which such real estate is situated to permit such redemption and payment; and in case the said real estate shall have been assessed and sold, together with other real estate, or in case the tax assessed against any other property shall be a lien thereon, then it shall be the duty of said county treasurer to compute and apportion the tax that should have properly been assessed against the said real estate sought to be redeemed, and upon which the taxes are sought to be redeemed, and upon which the taxes are sought to be paid, the same as if said property had been separately assessed. Any personal property tax which is a lien upon said real estate shall be likewise computed and apportioned on the same percentage basis as the tax assessed against the real estate is apportioned."

It will be noted the title recites, "Relating to the Piecemeal Redemption of Real Property Sold for Taxes." It will be further noted the statute now provides whenever any person, firm, co-partnership, corporation or association shall desire to redeem from a tax sale and pay all subsequent taxes upon any lots, piece or parcel of real estate which said person, firm, co-partnership, corporation or association shall own or hold a mortgage or other lien against, or when such person, firm, co-partnership, corporation or association shall be the owner of or have some interest in (any lots, piece or parcel of real estate) such property, it shall be the duty of the county treasurer to permit such redemption and payment; and if said real estate (or an interest in such real estate) shall have been assessed and sold, with other real estate, or if the tax assessed against any other property shall be a lien thereon, then the county treasurer shall compute and apportion the tax that should have properly been assessed against the said real estate (or interest in said real estate) sought to be redeemed, and upon which the taxes are sought to be paid, the same as if said property had been separately assessed.

There is no question but that an undivided interest in real estate, as where real estate is held in common, is property, in the same sense and meaning as though it was owned by one individual, under the constitution.

"In some jurisdictions, the statute is construed as giving the owner of an undivided interest in real estate a right to redeem his interest on payment of a proportionate share of the entire amount due. . . ." (61 C. J. 1249.)

In the only case that I have found decided by the Supreme Court of the United States, it was held:

"The court below also instructed the jury 'that the corporation, or its collectors of taxes acting under its authority, was not competent to advertise and sell any part of lot No. 4, for the taxes assessed on the same. By the law, not less than a lot, when the property upon which the tax has accrued is not less than that quantity, may be sold for the taxes due thereon.

"No doubt can exist that a part of a lot may be sold for taxes where they have accrued on such part; it appears therefore, that the circuit court has also erred on this point.

"But the sale, to be valid, need not extend to the interest of both claimants. One having paid his share of the tax, the interest of the other may well be sold for the balance. The court therefore erred in their instructions on this point also.'" (Emphasis mine.)

Mary Ronkendo v. James N. Taylor, 4 Pet. U. S. 349, 7 L. Ed. 882.

The Supreme Court of Michigan had under consideration this question and held:

"An undivided interest (in real property) is just as much a separate estate as a divided one, and the law of equity so regards it. No tenant in common can restrain his co-tenant from disposing of his interest to absentees or irresponsible persons. . . . And for my part I am not prepared to admit the law can validly make any such distinction. No property can be subjected to more than its share of general taxes, without infringing on principals of great moment; and I am not willing to apply to any statute a meaning which will render it obnoxious to such consequences. . . .

"In providing for the sale of 'real estate' (for taxes) we must hold that the term applies, not to whole lots, but to such interests as are not paid upon, or else we must hold that the city may lawfully receive and demand a portion from each part owner, and yet sell the whole estate for the defaulted one, although the rest have paid, and without allowing the amount of such payments to be deducted. This would be a monstrous doctrine."

People v. Treasurer of Detroit, 8 Mich. 14, 77 Am. D. 433.

It is to be remembered:

"All taxes are levied against the person, not against property. It is the owner who is taxed because of his ownership, and his property but serves as the basis for computing the measure of his liability and as security for the discharge of the lien which the tax imposes. (State v. Camp Sing, 18 Mont. 128, 56 Am. St. Rep. 551, 32 L. R. A. 635, 44 Pac. 516.) The term 'subject of taxation' is given a broad or restricted meaning, according to the circumstances of the particular case. In its comprehensive sense it denotes the particular thing which measures the amount of the tax, and as such includes every kind of property, real, personal and mixed, not exempt, as well as every other item upon which a rate of taxation may be lawfully imposed. That the framers of our Constitution did not employ the term in its technical sense is perfectly apparent. Neither did they employ it in its broadest sense. The right to take property by inheritance is a subject of taxation according to all authorities, and if

the term 'subjects' was used in section 11 in its comprehensive sense, then an inheritance tax would have to conform to the uniformity clause; but this court has held that it does not. (Touhy's Estate, 35 Mont. 431, 90 Pac. 170.)"

Hilger v. Moore, 56 Mont. 147, 182 Pac. 477.

"The constitutional guaranty that no person shall be deprived of his property without due process of law may be violated without the physical taking of property for public or private use. Property may be destroyed, or its value may be annihilated; it is owned and kept for some useful purpose and it has no value unless it can be used. Its capability for enjoyment and adaptability to some use are essential characteristics and attributes without which property can not be conceived; and hence any law which destroys it or its value, or takes away any of its essential attributes, deprives the owner of his property.' (Matter of Application of Jacobs, 98 N. Y. 98, 50 Am. Rep. 636.)"

Betty v. City of Sidney, 79 Mont. 314, 257 Pac. 1007.

"Taxes are levied against the person, not against property; property serving only as a basis for computing each person's measure of liability and as security for the discharge of the lien which the tax imposes (Hilger v. Moore, 56 Mont. 146, 182 Pac. 477), . . .

State ex rel. Tillman v. District Court, 101 Mont. 176, 182, 53 Pac. (2nd) 107.

In a case entitled "In the District Court of the Eighth Judicial District of the State of Montana in and for the County of Cascade, The Frank M. Wallace Agency, Inc. v. Cascade County, a public corporation, and its Board of County Commissioners," in which the Honorable H. H. Ewing presided, the learned Judge held that the redemption of an undivided interest in real estate should have been allowed, the decision being dated December 20, 1940.

I am not unmindful of the opinions of the Attorney General at page 148 of Volume 16 and page 266 of Volume 18, but as those opinions were written prior to the amendments of Section 2211, Revised Codes of Montana, 1935, by Chapter 17, Laws of 1941, they are not now controlling.

I am of the opinion that, by Chapter 17, Laws of 1941, the legislature intended to correct and extend the right of redemption of real estate and any interest in common therein from tax sales; the title of the act provides for piecemeal redemption. Our constitution above quoted provides this right.

It is therefore my opinion any person, firm, co-partnership, corporation or association owning or having an interest in common, as a tenant in common, in any real estate sold at tax sale, may redeem such interest from such tax sale and pay all subsequent taxes therein, and that it is the duty of the county treasurer to allow such redemption as provided in Chapter 17 of the Laws of 1941.

Sincerely yours,

JOHN W. BONNER
Attorney General