

## No. 319

**TAXATION—TAX DEED LANDS, use of proceeds from  
sale of—COUNTIES—FENCES**

- Held: 1. The proceeds from sale of tax deed lands by counties, or any part of such proceeds, may not be used to pay a person for having repaired or built part of the fence thereon.
2. Subsection (a) of Section 6 of Chapter 171, Laws of 1941, is not unconstitutional.

December 12, 1941.

Mr. Fred W. Schmitz  
County Attorney  
Broadwater County  
Townsend, Montana

Dear Mr. Schmitz:

You have submitted the following statement of facts:

Broadwater County took a tax deed to land for delinquent taxes and subsequently agreed with some person residing near the land that if such person would repair and build part of the fence on the land he might have the use of the same for one year, or, if the land was sold, it was agreed he would be paid the value of the improvement. The land, within a year, was sold for \$450.00. The county paid for the improvement made. The question is: May the \$75.00 paid for fence repair and building be taken out of the proceeds of the sale of the land before distributing the same among the county funds and purposes?

You have also asked whether subsection (a) of Section 6, Chapter 171, Laws of 1941, is constitutional.

When tax deed property is sold by a county, the proceeds from such sale must be distributed by the County Treasurer in the manner set out in the statutes of the State of Montana. A county treasurer is a ministerial officer and has no authority other than that conferred by statute, either expressly or impliedly. (*Rosebud County v. Smith, et al.*, 92 Mont. 75, 81, 9 Pac. (2nd) 1071.) When the proceeds of a sale of tax deed land are received by the county treasurer, therefore, it cannot be disposed of except in accordance with the statute. There is no statute relating to distribution of such proceeds which authorizes the use of such proceeds for constructing or repairing fences on the land sold.

No reason is given why the constitutionality of subsection (a) of Section 6 of Chapter 171, Laws of 1941, might be questioned. No constitutional defect or question is readily apparent on reading the subsection referred to in connection with the rest of the act, including the title. As you know, a statute is presumed to be constitutional, and it will not be declared unconstitutional unless clearly so, or beyond a reasonable doubt. (*State ex rel. Peyton v. Cunningham*, 39 Mont. 197, 200, 103 Pac. 497; *State ex rel. City of Missoula v. Holmes*, 100 Mont. 256, 273, 47 Pac. (2nd) 624.)

It is my opinion the proceeds from sale of tax deed lands by counties, or any part thereof, may not be used to pay a person for having repaired or built part of the fence thereon and that subsection (a) of Section 6 of Chapter 171, Laws of 1941, is not unconstitutional.

Sincerely yours,

JOHN W. BONNER  
Attorney General