

ment of Indian lands by patent deed April 4, 1923. Taxes were levied against the land for the years 1922 and 1923, by Glacier County and were paid December 29, 1939. A properly executed claim was filed for a refund of these taxes.

Prior to the allotment of the land in question the title to the land was in the United States. In 27 Am. Jur. 555, the text states:

"It has been settled by repeated adjudications that the fee of the lands in this country in the original occupation of the Indian tribes has, from the time of the formation of this government, been vested in the United States."

The Constitution of Montana, Section 2, Article XII, provides that property of the United States shall be exempt from taxation by the State of Montana.

An Indian allottee would not receive title to the land until a patent was issued. The rule as set out in 27 Am. Jur. 559 is as follows:

"Generally, when an allotment statute or treaty requires the issuance of a patent to the allottee, no legal title to the land vests in him until he receives patent nor does any title ordinarily vest in an allottee until the allotment has been definitely selected, located, and set apart."

It is apparent from the foregoing that the taxes levied against the land for the years 1922 and 1923 were unauthorized as they were levied prior to the issuance of patent.

Section 2222, Revised Codes of Montana, 1935, as amended by Chapter 201, Laws of 1939, provides in part:

"Any taxes, per centum and costs, heretofore or hereafter, paid more than once or erroneously or illegally collected, may, by order of the board of county commissioners, be refunded by the county treasurer."

In considering Section 2222, Revised Codes of Montana, 1935, before amendment our Court in *First National Bank v. Sanders County*, 85 Mont. 450, 279 Pac. 247, said:

"It is unreasonable to believe that it was ever in the thought of the

Opinion No. 166.

Taxation—Recovery of Taxes Unlawfully Levied.

Held: Recovery of taxes paid on an unlawful levy can be recovered under the provisions of Section 2269, Revised Codes of Montana, 1935, which is an exclusive remedy.

January 18, 1944.

Mr. Wilbur P. Werner
County Attorney
Glacier County
Cut Bank, Montana

Dear Mr. Werner:

You have requested my opinion concerning the following facts:

An Indian ward of the United States government received an allot-

legislature that Section 2222, had reference to unlawful levies or moneys collected upon unlawful levies . . .

"Clearly, this case is one wherein is involved an 'unlawful levy and collection of public revenue.' The remedy provided by section 2269 is applicable and section 2222 is not."

The amendment of Section 2222, by Chapter 201, Laws of 1939, did not change the effect of the section. A method of settlement of accounts between the county treasurer and state treasurer was added to avoid the defect in that regard which was pointed out in *First National Bank v. Sanders County*, supra. Also a limitation to two years was added for the presentation of claims. Section 2 of Chapter 201 reads as follows:

"All acts and parts of acts in conflict herewith are hereby repealed, but none of the provisions of this act shall be deemed or construed to be in conflict with the provisions of Sections 2268 and 2272, inclusive, of this code, but this act and the provisions of such sections shall provide and afford concurrent remedies."

In other words, Section 2222 and Section 2269 are effective in different situations. Section 2222 would not be applicable where the original levy was unlawful. This was recognized in the case of *Christofferson v. Chouteau County*, 105 Mont. 577, 74 Pac. (2nd) 427, where a recovery was allowed for taxes erroneously paid. In allowing the recovery, the court said:

"Thus it appears that at the time these taxes were levied and assessed they were, so far as this record discloses, levied in accordance with the laws of the state. After their imposition, and long after they became delinquent, the state land commissioner cancelled the certificate of purchase in accordance with the statute."

Section 2269, Revised Codes of Montana, 1935, provides in part:

"In all cases of levy of taxes . . . which are deemed unlawful by the party whose property is thus taxed . . . such party may, before such tax or license becomes delinquent, pay under written protest . . . and thereupon the party so paying . . . may bring an action . . . to recover such

tax . . . provided, that any action instituted to recover any license or tax paid under protest shall be commenced within sixty days after the date of payment of the same."

To recover under the provisions of Section 2269, it is necessary that certain conditions be fulfilled. First, the tax must be paid before it is delinquent; second, a written protest must be made at time of payment, and third, an action to recover must be brought within sixty days after the date of payment.

In *Christofferson v. Chouteau County*, supra, the Supreme Court again considered the case of *First National Bank v. Sanders County*, supra, and said of the latter case:

"The court held the action to be one wherein an unlawful levy and collection of public revenue were involved. It decided that Sections 2268, 2269 and 2272 provided exclusive remedies as to all cases falling within their purview, and that, as to all such cases falling within the purview of these sections, Section 2222 had been repealed."

It might be urged that the amendment of Section 2222 enlarged its field of effectiveness. However, Chapter 201 provided that it should not be construed to be in conflict with Section 2269. Section 2269 applies where the "levy of taxes . . . are deemed unlawful and Section 2222 where taxes are" paid more than once or erroneously or illegally collected.

Previous opinions of this office are in accord with my views. See Report and Official Opinions of Attorney General, Vol. 16, Opinion No. 101, and Vol. 18, Opinion No. 188.

Applying the foregoing to the facts you submitted, the original levy was without authority and unlawful as the land in question was owned by the United States during the time of the levy. Therefore, the provisions of Section 2269 would apply, and any recovery must be had under that section. However, there may be no recovery as the taxes were not paid before they became delinquent, a written protest was not made and an action was not filed within sixty days after payment of the taxes.

Sincerely yours,
R. V. BOTTOMLY
Attorney General