

TAXATION: Erroneous publication invalidates sale  
PUBLICATION: of land for delinquent taxes.

November 30, 1939

12-2



Hon. G. L. Chambers  
Presiding Judge  
County Court of Maries County  
Vienna, Missouri

Dear Sir:

This will acknowledge receipt of your letter of November 7th, requesting an official opinion from this Department, which reads as follows:

"On yesterday, our County Collector sold several tracts of land for delinquent taxes, but the advertisement in the newspaper was in error, in this, it stated 'on Monday, November 6, 1938, at 10 o'clock and continuing from day to day as indicated by the following publication, by the undersigned according to the provisions of Senate Bill No. 94 of the 1933 Session Acts.'

"What we want to know is this: First, Would sales under this notice be good or should the whole matter be considered invalid and no certificates of purchase be issued or deeds made.

"Second. Does the County have to pay the printer for the publication under such a notice.

"Please advise in the premises as soon as possible and oblige, the undersigned."

We will take your questions in the order as they appear in your request.

Your first inquiry is would a sale of land for delinquent taxes be valid when the publication stated the sale would be made on November 6, 1938, when, in fact, said publication should have read November 6, 1939.

It is fundamental that in construing a statutory provision relating to the sale of land for delinquent taxes, it must be strictly construed in favor of the owner of said land. Section 1519, p. 1117 of 61 C. J. reads as follows:

"Sales of land for delinquent taxes being in derogation of private rights of property, the power has been said to be strictis-simi juris and statutes authorizing such sales must be strictly construed in favor of the owner of such land, or in so far as they are intended for the benefit, or the protection, of the citizen, and the scope of such statutes is never enlarged beyond their actual terms."

It is also stated in 61 C. J. Section 1603, p. 1190, that after a publication of notice the sale must be held on the very day shown in the notice. The pertinent part of this provision reads as follows:

"\* \* \* \* Where the law is such that the sale is to take place after a prescribed publication of notice, it must be held on the very day appointed in the notice or advertisement."

In Meriwether v. Overly, 228 Mo. 218, 1. c. 240, 241, a notice of publication was required before any sale of property for delinquent taxes could be made. The provision requiring notice to be given requires said publication to be given in numerical order. The court held that since said property for sale was not placed in consecutive numerical order, the notice amounted to no notice at all. In so holding, the court said:

"Nor is the notice or advertisement any the less invalid. The property in suit appears therein after lot 122. Lot 67 is not, therefore, described 'consecutively' 'in numerical order' in either the land tax book or advertisement notice. The assessment was in radical disregard of the positive requirements of the charter and was void; and, as the notice, which is an essential prerequisite to a valid sale, was nugatory, both it and the sale were void.

"It is proper to remember in this connection that the city treasurer did not sell this property for taxes pursuant to a judgment of court. The charter of Kansas City authorizes him to sell real estate against which taxes are due and delinquent without bringing suit and without any personal notice to the owner. The only notice he is required to give is by a publication 'once in the daily edition of some

newspaper of general circulation published in Kansas City,' and then the newspaper 'for a period of ten days immediately following such publication' shall cause a notice in large type to be inserted on its local page, 'stating the day and date on which said publication was made.' No other notice is required. The charter provisions requiring lots to be listed in the tax book and in the notice of publication 'consecutively,' 'in numerical order,' at once become of the highest value to the property-owner, for if the notice is misleading, as any notice would be that lists lot 67 after lot 122, then his property is taken from him without notice, which every here means without due process of law. The notice in this case amounted to no notice. The charter method for selling real estate for delinquent taxes is a harsh one, and the courts should not permit an owner's property to be taken from him in pursuance thereof unless the requirement as to notice is strictly complied with."

Also in *Schlafly v. Baumann*, 108 S. W. (2d) 363, 1. c. 366, the court held that because a sale was not commenced on the first Monday in November as provided by law, and also as shown in the publication, the power to sell becomes *functus officio*. We quote from this decision the following:

"The general rule and its limitations, likewise recognized in the cited cases, are stated in 59 C. J. 1078, Sec. 634: 'A statute specifying a time within which a public

officer is to perform an official act regarding the rights and duties of others, and made with a view to the proper, orderly, and prompt conduct of business, is usually directory, unless the phraseology of the statute, or the nature of the act to be performed and the consequences of doing or failing to do it at such time, is such that the designation of time must be considered a limitation on the power of the officer.'

"Exercise of the official action here involved is in derogation of private rights of property, disturbs vested rights therein, and deprives persons of their ownership of property; and this, under the Jones-Munger Act, by ex parte proceedings of a rather drastic and summary nature, based upon constructive notice. The provision for sale on the 'first Monday in November' is for the benefit, protection, and security of landowners, and not for the convenience of officials or the dispatch of their official duties. Due diligence on such date should avail landowners of information concerning any proceedings against their real estate for the collection of delinquent taxes. Statutory provisions prescribing the time and place of tax sales have been strictly construed in favor of the taxpayer and strict compliance therewith rigorously exacted. The maxim, 'Expressio unius est exclusio alterius,' is especially apropos. *Keane v. Strodman*, 323 Mo. 161, 167 (II), 18 S.W. (2d) 896, 898 (2). In the instant case we need only rule that the notice and proposed sale are null and void because not in substantial com-

pliance with the Jones-Munger Act - a ruling well within the foregoing observations and the cases relied upon by respondents: Meriwether v. Overly, 228 Mo. 218, 239, 129 S.W. 1, 8; Lagroue v. Rains, 48 Mo. 536, 538; Large v. Fisher, 49 Mo. 307, 308, 309. See, also, Sullivan v. Donnell, 90 Mo. 278, 283, 2 S.W. 264, 266 (stating, considering certain Kansas City charter provisions: 'While the sale may be continued from day to day, he must at least begin on that day, the day for which the notice of sale is given; and, if not begun then, the power to sell becomes functus officio'); 61 C. J. p. 1190, Section 1603; p. 1117, Section 1519."

In *Spurlock v. Dougherty*, 81 Mo. 171, 1. c. 181 and 182, the court held that the notice of publication was made to the August Adjourned Term instead of notice to the special term or to some subsequent regular term, and therefore, was not in compliance with the law, and concluded by holding that the Circuit Court did not err in excluding the deed. The court in so holding, said:

"The notice given by the collector for judgment and for sale, was notice of an application to the August adjourned term. This was not a compliance with the statute which required notice of application to the special term, as provided by section 182, supra, or to some subsequent regular term. There was no authority of law for an application to an adjourned term of court, and the notice was

worthless for the purposes intended. The notice is the indispensable prerequisite, and without it the court had no jurisdiction. In *Large v. Fisher*, 49 Mo. 307, Judge Adams says: 'A regular notice published as the law requires, is the very foundation of the collector's authority to sell. In selling lands for taxes, he is executing a mere naked statutory power, and the rights of the citizen to his property cannot be divested by this kind of sale, unless it appears affirmatively from the form of the collector's deed that all the prerequisites of the statute have been strictly pursued. This is the settled law of this State.' *Spurlock v. Allen*, 49 Mo. 178; *Lagroue v. Rains*, 48 Mo. 536; *State ex rel. v. Mantz*, 62 Mo. 258."

\* \* \* \* \*

"But the notice of application for judgment, in this case, ran to neither of these times, but to the 'August adjourned term.' 76 Mo. 129. This is not such compliance with the requirements of the statute as the authorities above quoted hold to be necessary. We think, therefore, that the circuit court did not err in excluding the deed. This proceeding is for a purpose. The notice is given so that the owners of the land may have their day in court. It stands in the place of summons in the circuit court."

Also in *State v. Magedanz*, 250 N.W. 337, 1. c. 338, the court had to deal with a statutory provision requiring that a notice of sale for delinquent taxes be published. The statute provided that the sale shall be held on the second Tuesday in December of each year. This provision is very similar to our

statutory provision on notice.

In 1932, the second Tuesday come on the 13th day of December. The notice stated the sale would be held on Tuesday, the 8th day of December, 1932, instead of the 13th day of December. The court, in holding that no legal notice was given, said:

"A sale of real estate for the nonpayment of taxes can only be held after proper and legal notice, as required by the statute, and since there was no notice for a tax sale to be held on the 13th day of December no legal sale could be made on that date.

"The judgment of the district court, holding that the tax sale notice was a legal notice, was erroneous and is reversed."

Also, in *Numitor Gold Mining Co. v. Katzer*, 256 Pa. 464, l. c. 465 and 466, we have a situation including facts very similar to the instant case. The above case was appealed from a judgment quieting plaintiff's title to real property and declaring defendant's tax deed void on account of a defective notice of sale. The following publication appeared in the newspaper:

**"Addenda Notice.**

**"Property to be Sold at Public Auction on June 27, 1923, for Delinquent Taxes of 1918.**

**"Public notice is hereby given that the five-year period allowed by law for the redemption of property sold**

to the state for delinquent taxes will have expired on the 25th day of June, 1923, on all of the property sold to the state for delinquent taxes in the year 1918, as herein listed (unless redeemed or canceled on or before the date of sale), and that pursuant to the provisions of section 3771a of the Political Code, I, Wm. T. Garland, as county tax collector of the county of Nevada, will be on the 27th day of June, 1922, at 10 o'clock a. m. of said day, and continuing each day thereafter, if additional time is required to complete the sale, in the tax collector's office in the courthouse in the county of Nevada, state of California, the undersigned tax collector will sell at public auction to the highest bidder, for cash in lawful money of the United States, the several parcels and lots of property hereinafter described. \* \* \*

On June 27, 1923, said land was sold to the defendants. The court, in holding that this notice was fatally defective and that the tax deed was void by reason of inserting the year 1922 in the notice instead of the year 1923, said:

"The caption to the addenda which reads 'Property to be sold at public auction on June 27, 1923, for delinquent taxes of 1918,' is not a definite statement that the property would, in fact, be sold on that date. Moreover, if it can be said to be an affirmative statement that the property would be sold on June 27, 1923, it is in direct conflict with the following language employed in the body of the notice:

'I, Wm. T. Garland, as county tax collector of the county of Nevada, will be on the 27th day of June, 1922, at 10 o'clock a. m. of said day, and continuing each day thereafter, if additional time is required to complete the sale, in the tax collector's office. \* \* \*'

"Evidently a clerical error occurred in inserting in this notice the year 1922 instead of 1923. Of course, the figures 1922 indicated an impossible date of sale, since at the time of the publication that date had already elapsed. Nor can it be held that reference to the caption of a notice can be resorted to to correct and actually change an erroneous date contained in the body of the instrument. The notice of the time of sale is statutory and jurisdictional, and the court may not speculate as to the actual date intended to have been inserted. Lewis v. Tulare Rec. Dist., 56 Cal. App. 52, 204 P. 421; Simmons v. McCarthy, 118 Cal. 622, 50 P. 761. In Black on Tax Titles, Section 207, it is said:

'It (the notice) must designate the time and place of the sale with such certainty that there can be no reasonable misconception in regard to it.' 3 Cooley on Taxation (4th Ed.) p. 2804, Sec. 1415; Knowlton v. Moore, 136 Mass. 32.

"A strict construction of the language employed in this notice impels the conclusion that there was an omission to

state that the property would actually be sold, even upon that inaccurate date of 1922, for the language is:

'I, Wm. T. Garland, as county tax collector \* \* will be \* \* in the tax collector's office,' on 'June 27, 1922, \* \* \* and continuing each day thereafter,' etc., and 'will sell at public auction \* \* \* the several parcels and lots of property hereinafter described. \* \* \*'

"This language, construed strictly according to the rule invoked, means that Wm. T. Garland, county tax collector, gave notice that he would be in his office June 27, 1922, and continuing thereafter, and would sell the property in question, without stating when or where he would dispose of it."

Therefore, in view of the foregoing authorities, it is the opinion of this Department that any sale made under the notice attached to your letter would not constitute a valid sale. We are assuming that the sale was made, but that no certificates were issued. In such case the purchase money and interest thereon should be refunded out of the county treasury as provided in Section 9958a, p. 441, Laws of Missouri, 1933, which reads as follows:

"Whenever the county collector shall discover, prior to the conveyance of any lands sold for taxes, that the sale was for any cause whatever, invalid, he shall not convey such lands; but the purchase money and the interest thereon shall be refunded out of the county treasury to the purchaser, his

representatives or assigns, on the order of the county court. Such invalid sale shall suspend for the period intervening between the date of the sale and the discovery of its invalidity the running of the statute of limitations. In such cases the county collector shall make an entry opposite to such tracts or lots in the record of certificates of purchase issued or redemption record that the same was erroneously sold, and the cause of invalidity, and such entry shall be prima facie evidence of fact therein stated. He shall notify the county clerk of such action, whose duty it shall be to make a like entry upon his sale record."

Your second inquiry - Does the County have to pay for the publication of such a notice. In view of the limited facts as to who is responsible for the error in the publication, it is hard to answer your request. However, we will say that depends to a great extent upon who is responsible for the error in the first instance.

Respectfully submitted,

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Assistant Attorney General

APPROVED:

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W. J. BURKE  
(Acting) Attorney General

ARH:RV